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COMMENTARIES

ON THE

# LAWS OF ENGLAND

BY

SIR WILLIAM BLACKSTONE, KT.,

EDITED BY

**WILLIAM CAREY JONES**

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UNIVERSITY OF CALIFORNIA

VOLUME I

CONTAINING BOOKS I AND II

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This we claim for the true and accomplished lawyer, that is, for you if you will truly follow the quest. As a painter rests on the deep and luminous air of Turner, or the perfect detail of a drawing of Lionardo; as ears attuned to music are rapt with the full pulse and motion of the orchestra that a Richter or a Lamoureux commands, or charmed with the modulation of the solitary instrument in the hands of a Joachim; as a swordsman watches the flashing sweep of the sabre, or the nimbler and subtler play of opposing foils; such joy may you find in the lucid exposition of broad legal principles, or in the conduct of a finely reasoned argument on their application to a disputed point. And so shall you enter into the fellowship of the masters and sages of our craft, and be free of that ideal world which our greatest living painter has conceived and realized in his master-work. I speak not of things invisible or in the fashion of a dream; for Mr. Watts, in his fresco that looks down on the Hall of Lincoln's Inn, has both seen them and made them visible to others. In that world Moses and Manu sit enthroned side by side, guiding the dawning sense of judgment and righteousness in the two master races of the earth; Solon and Scaevola and Ulpian walk as familiar friends with Blackstone and Kent, with Holt and Marshall; and the bigotry of a Justinian and the crimes of a Bonaparte are forgotten, because at their bidding the rough places of the ways of justice were made plain. There you shall see in very truth how the spark fostered in our own land by Glanvill and Bracton waxed into a clear flame under the care of Brian and Choke, Littleton and Fortescue, was tended by Coke and Hale, and was made a light to shine round the world by Holt, and Mansfield, and the Scotts, and others whom living men remember. You shall understand how great a heritage is the law of England, whereof we and our brethren across the ocean are partakers, and you shall deem treaties and covenants a feeble bond in comparison of it; and you shall know with certain assurance that, however arduous has been your pilgrimage, the achievement is a full answer. So venerable, so majestic, is this living temple of justice, this immemorial and yet freshly growing fabric of the Common Law, that the least of us is happy who hereafter may point to so much as one stone thereof and say, The work of my hands is there.—

SIR FREDERICK POLLOCK, Oxford Lectures, 110.

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## PREFACE TO THE PRESENT EDITION.

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The perennial interest in Blackstone's Commentaries affords ample reason for the periodic publication of new editions. In 1890 Messrs. Bancroft-Whitney Company, of San Francisco, published an edition prepared by William G. Hammond, then Dean of the St. Louis Law School, a recognized scholar, an influential teacher of law, and a learned lawyer, now deceased. The Hammond edition won high praise for its careful editing and for its valuable monographic notes. Aside from the fact that the work is now out of print, owing to the destruction of the plates in the San Francisco fire of 1906, the lapse of twenty-five years since its publication seems to call for a new edition.

The present editor has availed himself of Professor Hammond's painstaking and scholarly labors. In the first place, he has accepted the text as prepared by Professor Hammond from the eighth edition of the Commentaries, which was published by the Clarendon Press, Oxford, in 1788, and was the last issued during the author's lifetime. Professor Hammond made an exhaustive collation of texts of all editions from the first to the ninth, and indicated the variations by footnotes. It has seemed unnecessary to repeat all the minute variations assembled by Professor Hammond, and consequently the present edition contains only those that seemed to be the more significant. The Hammond edition will remain an invaluable addition to the library of the special student and the collector of Blackstone literature. Furthermore, Professor Hammond indicated by footnotes all the cases decided by the courts in all the American jurisdictions, in which Blackstone's Commentaries had been cited, quoted, or commented on. Hammond found, up to 1890, 6477 such references. The search of the American state and federal reports has been continued to 1915, with the result that 2412 additional references have been discovered. All these citations have been examined, and a considerable number have been embodied in footnotes to the present edition. But the information seems in general to be more interesting than important. That is to say, while it is a noteworthy fact that Blackstone's Commentaries have been cited, and usually

approved and followed, some nine thousand times by the American courts, it may still not serve any useful purpose to annotate the Commentaries with all these citations. The present editor, while grateful to the labors of Professor Hammond, believes that his edition will be more serviceable without such annotations.

In the next place, it has been a question to what extent to retain Professor Hammond's monographic notes. It seems to the present editor, for reasons that are more fully set forth in his introduction, "Concerning the Commentaries," that the Commentaries have long since so thoroughly vindicated themselves and now rest so solidly upon their own merits, that it is useless to perpetuate in notes the controversies aroused by the attacks of Bentham, Austin, and others of the utilitarian school. Some of the criticisms are unquestionably just, and the more important are pointed out, but an elaborate discussion of them or defense of Blackstone is not the purpose of this edition. Notes by Hammond of this character, have, therefore, been discarded, and are left to the perusal of the special student in the Hammond edition.

In place of the omitted Hammond notes, and in addition to those retained, there are, first, notes prepared by the present editor or by other persons for him, intended to show important modern modifications of or innovations on the common law, and, secondly, notes in the form of extracts from the writings of acknowledged authorities on the history and theory, as well as the practice, of the law. In respect to the first style of notes, the editor renders grateful recognition to the able assistance of his colleagues in the School of Jurisprudence of the University of California, namely, Professors Orrin Kip McMurray, Alexander Marsden Kidd, Matthew Christopher Lynch, and Dr. Maurice E. Harrison. Professor Lynch has prepared the notes to Chapter 18 of Book I, on the subject of Corporations. Professor McMurray has written the notes in Book II on the Rule against Perpetuities, Restraints on Alienation, Recording Acts and Registration of Title, and Community Property. Professor McMurray has likewise written the notes to Chapter 27 of Book III, on the subject of Equity, and is the author of the added chapter on Conflict of Laws at the end of Book III. Dr. Harrison has written several notes in Book III bearing on the subject of code procedure. Professor Kidd has written the note in Book IV on the Theories of Crime and of Punishment, as well

as several other notes. Credit for their services is given to the respective authors in connection with the notes themselves.

The second class of notes, extracts from published works of authorities in various fields of legal study, constitutes a feature of this edition. These notes will be found, it is thought, to speak for themselves. The source from which the various extracts are derived is always stated. It remains to make here appreciative acknowledgment of the courtesy accorded by the publishers or authors, as the case may be, of the several works so utilized.

First in the obligation owed by the publishers and editor of this edition of Blackstone are Messrs. Butterworth & Co., for the permission they have granted for the very free use made of the sixteenth edition of Serjeant Stephen's *New Commentaries on the Laws of England* (four volumes, 1914). That edition was prepared by Edward Jenks, Esq., as general editor, with the co-operation of fourteen assistant editors. The work is one of a highly authoritative character. It has supplied the means of checking the statements of Blackstone with the later developments of the law.

Sincere recognition for similar courtesy is likewise gratefully extended to the publishers named below for permission to make extracts from the works mentioned in connection with their names.

In some cases the copyright is owned by the authors or others, who, however, have added their cordial permission for the use of passages from their books.

The Macmillan Company: Holland, *Jurisprudence* (11th ed.), 1910; Pollock, *Essays on Jurisprudence and Ethics*, 1882, *First Book of Jurisprudence*, 1896, *Land Laws*, 1887; Hannis Taylor, *Science of Jurisprudence*, 1908; Stephen, *History of the Criminal Law of England*, 3 vols., 1883, *General View of the Criminal Law of England*, 1890; Dicey, *Law and Public Opinion in England* (2d ed.), 1914.

Cambridge University Press, C. F. Clay, Manager: Maitland, *Collected Papers*, 3 vols., 1911; Pollock & Maitland, *History of English Law* (2d ed.), 2 vols., 1898.

Clarendon Press, Henry Frowde: Digby, *History of the Law of Real Property* (5th ed.), 1897; Jenks, *Modern Land Law*, 1899; Pollock & Wright, *Possession in the Common Law*, 1888.

Stevens & Haynes: Salmond, *Jurisprudence*, 1902.

Sweet & Maxwell: Williams, *Real Property* (21st ed.), 1910.

Methuen & Co.: Holdsworth, History of English Law, 3 vols., 1903.

Little, Brown & Co.: Minor, Conflict of Laws, 1901; Reeves, Real Property, 2 vols., 1909; Woerner, American Law of Administration (2d ed.), 2 vols., 1899; Dillon, Laws and Jurisprudence of England and America, 1894; Thayer, Preliminary Treatise on Evidence, 1898; Wigmore, A Treatise on the System of Evidence in Trials at Common Law, 4 vols., 1904; Perry, Common Law Pleading, 1897; Bigelow, Centralization and the Law, 1906.

Edward Thompson Co.: Street, Foundations of Legal Liability, 3 vols., 1906.

Boston Book Co.: Thayer, Legal Essays, 1908.

Henry Holt & Co.: Vinogradoff, Common Sense in the Law, 1914; Geldart, Elements of English Law, 1911.

Harper & Bros.: Vinogradoff, Roman Law in Mediæval Europe, 1909.

Harvard University Press: Ames, Lectures on Legal History, 1913.

Harvard Law Review Assn.: Harvard Law Review; Langdell's Brief Survey of Equity Jurisdiction, 1904.

Baker, Voorhis & Co.: Williston, Sales, 1909.

Banks & Co.: Burdick, Torts (3d ed.), 1913.

West Publishing Co.: Bouvier's Law Dictionary (Rawle's 3d Rev.), 1914.

Grateful acknowledgment is likewise made to Professor Roscoe Pound for permission to use certain material of his own in his volume entitled, Readings on the History and System of the Common Law, 1913.

In the case of other works from which brief extracts have been made, credit has been given for their source or authorship.

The editor desires to suggest to the student of Blackstone that he make acquaintance with a few auxiliary works. On the general principles of the law he recommends, Markby, Elements of Law (4th ed.), 1889; Pollock, First Book in Jurisprudence, 1896; Holland, Elements of Jurisprudence (11th ed.), 1910; Salmond, Jurisprudence, 1902; Holmes, Common Law, 1881; Geldart, Elements of English Law, 1911; Vinogradoff, Common Sense in the Law, 1914. Professor Pound's Readings on the History and System of the Common Law, 1913, will be found useful. Dillon, Laws and

Jurisprudence of England and America, 1894, is a suggestive series of lectures. Leaming, *A Philadelphia Lawyer in the London Courts* (2d ed.), 1912, gives one a vivid picture of the English courts and bar of to-day.

On the history of the English law, attention is called to Pollock & Maitland, *History of English Law* (2d ed.), 2 vols., 1898; Holdsworth, *History of the English Law*, 3 vols., 1903; Jenks, *A Short History of the English Law*, 1912; Dicey, *Law and Public Opinion in England During the Nineteenth Century*, 2d ed., with an introduction on the relation between Law and Public Opinion in England in the first thirteen years of the twentieth century, 1914; Digby, *History of the Law of Real Property* (5th ed.), 1897; Stephen, *History of the Criminal Law of England*, 3 vols., 1883; *Select Essays in Anglo-American Legal History*, 3 vols., 1907-09.

On the constitutional history of England, books suggested are, Maitland, *Constitutional History of England*, 1913; Taswell-Langmead, *Constitutional History of England*, 1911; Stubbs, *Constitutional History of England* (5th ed.), 3 vols., 1906.

For a relatively brief, reliable, and readable exposition of Roman law, Sohm's *Institutes of Roman Law*, translated by Ledlie (3d ed.), 1907, is recommended. For a brilliant generalization of leading principles of Roman law and their application to modern history, Sir Henry Sumner Maine's famous work entitled *Ancient Law*, should be read. Sir Frederick Pollock has contributed valuable notes to an edition published in 1906. Vinogradoff's *Roman Law in Mediæval Europe*, 1909, from which a long extract has been printed as a note on p. \*19, is a highly interesting little volume by a leading member of the contemporary school of English jurists.

Attention is also called to three important series of books now in course of publication, namely, The Continental Legal History Series, The Modern Legal Philosophy Series, and the Criminal Science Series. The volumes already published, or announced for publication, in these series are as follows:

Continental Legal History Series: *A General Survey of Events, Sources, Persons, and Movements in Continental Legal History*; *Great Jurists of the World, from Papinian to Von Ihering*; *History of French Private Law*; *History of Continental Criminal Procedure*; *History of Continental Law*; *History of Continental Civil*



Procedure; History of Italian Law; History of French Public Law; History of Continental Commercial Law; the Evolution of Law in Europe.

Modern Legal Philosophy Series: The Science of Law; The World's Legal Philosophies; Comparative Legal Philosophy; General Theory of Law; Law as a Means to an End; The Positive Philosophy of Law; Modern French Legal Philosophy; Theory of Justice; Select Essays in Modern Legal Philosophy; The Formal Basis of Law; the Scientific Basis of Legal Justice; The Philosophy of Law; Philosophy in the Development of Law.

Criminal Science Series: Modern Theories of Criminality; Criminal Psychology; Crime, Its Causes and Remedies; The Individualization of Punishment; Criminal Sociology; Penal Philosophy; Criminality and Economic Conditions; Criminology; Crime and Its Repression.

The editor has divided the text of the Commentaries into sections, usually following Blackstone's paragraphing, numbering the sections consecutively throughout each book. He has given careful attention to the section heads, printed in black-face type. It is hoped that this arrangement of the matter may be of real service to the reader and in no wise interfere with the easy following of the text. The editor has also prepared an outline, which may serve as a full table of contents of both text and notes, and as a basis for review by the student. Blackstone's own analysis, or syllabus, of his lectures, which he printed for the use of his own students, is also included for the benefit of the student preparing for examination.

Another feature of this edition is the insertion in parentheses of the dates of all statutes mentioned in the text and notes. As a rule, the title of statutes is also given. All Latin maxims and foreign terms and phrases have been translated. The index has been thoroughly revised, and made complete for the present edition.

WILLIAM CAREY JONES.

Berkeley, California, June 25, 1915.

## CONCERNING THE COMMENTARIES.

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The announcement of the course of lectures which gave to the world the Commentaries on the Laws of England was posted at the University of Oxford in the following form:

"Oxford, 23 June, 1753.

In Michaelmas Term next will begin

a

Course of Lectures

on the

Laws of England

By Dr. Blackstone, of All-Souls College.

This Course is calculated not only for the Use of such Gentlemen of the University, as are more immediately designed for the Profession of the Common Law; but of such others also, as are desirous to be in some Degree acquainted with the Constitution and Polity of their own Country.

To this end it is proposed to lay down a general and comprehensive Plan of the Laws of England; to deduce their History; to enforce and illustrate their leading Rules and fundamental Principles; and to compare them with the Laws of Nature and of other Nations; without entering into practical Niceties, or the minute Distinctions of particular Cases.

The Course will be completed in one Year; and, for greater Convenience, will be divided into four Parts; of which the first will begin to be read on Tuesday the 6th of November, and be continued Three times a Week throughout the Remainder of the Term; And the following Parts will be read in Order, one in each of the three succeeding Terms.

Such Gentlemen as propose to attend this Course (the Expense of which will be six Guineas) are desired to give in their Names to the Reader some Time in the Month of October."

William Blackstone was born July 10, 1723, in Cheapside. His father, Charles Blackstone, a silkman and bowyer of London, died some months before William's birth. His mother died when he was about the age of twelve. He and his two brothers then fell under the kind and wise charge of their maternal uncle, Dr. Thomas Bigg, who was an eminent surgeon residing in London. In 1730, at the age of seven, William was put to school at the Charterhouse, and in 1735, by the nomination of Sir Robert Walpole, he was admitted upon the foundation of that institution. This meant that he was taken in as a poor boy to be maintained and educated at this famous school, which had already numbered among its scholars such names as those of Addison, Steele, and John Wesley. Blackstone achieved a distinct success in the classics and manifested

at least a poetic instinct in some Latin stanzas which he composed on Milton. At the age of fifteen, being qualified for the University, he was matriculated at Pembroke College, Oxford.

Besides pursuing the traditional curriculum with zeal, he displayed varied interest in other subjects, particularly poetry and architecture. His verse has no merit that can hold the attention of a later day, but it exhibits an imagination and a taste for form and expression which found better scope in other kinds of writing and served to give to the Commentaries their imperishable character. His study of architecture resulted in his writing a treatise on that subject, which, though never published, had for its author great value in training his mind in exact statement. He showed, too, his practical ability in architecture by work in restoring some of the buildings in Oxford, as well as the old Gothic church in his home town of Wallingford.

In 1741 Blackstone was entered as a student of law in the Inns of Court at the Middle Temple. He was at this period dividing his time between the University and the Inns of Court. In 1743 he was elected into the Society of All Souls College, and the next year admitted actual fellow in that college, and took chambers in the Temple, in order to attend the courts at Westminster. In 1745 he received his degree of Bachelor of Civil Law, and in 1746 he was called to the bar.

The Inns of Court were originally real inns, or hostels, for housing students, or apprentices, of the law. The earliest mention of an inn for this purpose occurs in 1344, when a demise was made from Lady Clifford of a house in Fleet street, called Clifford's Inn, to the *apprenticiis de banco*, that is, to the lawyers belonging to the Court of Common Pleas. Other hostels were leased to voluntary associations, or guilds, of teachers and learners, who gradually developed their own regulations, customs, and traditions. The Inns that came to have a permanent interest were the Middle Temple, the Inner Temple, Lincoln's Inn, and Gray's Inn.

These historic inns did not—or rather do not—occupy single houses or buildings, but extensive districts. They were established just outside the old wall of the city of London, on the west, where they might have at once the charm of the open field, and access to, and protection from, the city, and yet be within convenient distance of the law courts at Westminster. The group of buildings, halls, courts, and gardens that make up the Middle Temple and the Inner Temple stretch from south of the Strand and Fleet street to the Thames. Lincoln's Inn occupies a wide district beginning a little south of Holborn thoroughfare along Chancery Lane to Carey street. The Royal Courts of Justice now occupy the great square of land lying between Carey street and the Strand, that is to say, between Lincoln's Inn and the group constituting the Middle Temple and Inner Temple. Gray's Inn lies a little north of Holborn, along the west side of Gray's Inn Road.

Before the seventeenth century there were "readings" and "mootings" in the Inns of Court, or, in other words, more or less of instruction and discipline. This system fell into disuse during the seventeenth century, and was not revived until the middle of the nineteenth. But the decline in professional training was made up by a gain in other directions, for the Inns housed

during two centuries or more not only lawyers but writers and statesmen. They were the resort and home of the culture of the day, the great men of letters,—Addison, Steele, Dr. Johnson, Goldsmith, Charles Lamb, Thackeray, Dickens,—bringing to the men of the law an atmosphere of sweetness and light.

Thackeray, in "Pendennis," gives us a picture of the literary traditions of the Middle Temple, which is true in general in its application to the other inns.

"Nevertheless, those venerable Inns which have the 'Lamb and Flag' and the 'Winged Horse' for their ensigns have attractions for persons who inhabit them, and a share of rough comforts and freedom, which men always remember with pleasure. I don't know whether the student of law permits himself the refreshment of enthusiasm, or indulges in poetical reminiscences as he passes by historical chambers, and says, 'Yonder Eldon lived; upon this site Coke mused upon Lyttelton; here Chitty toiled; here Barnwell and Alderson joined in their famous labors; here Byles composed his great work upon bills, and Smith compiled his immortal leading cases; here Gustavus still toils with Solomon to aid him.' But the man of letters can't but love the place which has been inhabited by so many of his brethren or peopled by their creations, as real to us at this day as the authors whose children they were; and Sir Roger de Coverley walking in the Temple Gardens, and discoursing with Mr. Spectator about the beauties in hoops and patches who are sauntering over the grass, is just as lively a figure to me as old Samuel Johnson rolling through the fog with the Scotch Gentleman at his heels, on their way to Dr. Goldsmith's chambers in Brick Court, or Harry Fielding, with inked ruffles and a wet towel round his head, dashing off articles at midnight for the Covent Garden Journal, while the printer's boy is asleep in the passage."

Nathaniel Hawthorne, speaking of Gray's Inn, says: "Nothing else in London is so like the effect of a spell as to pass under one of these archways and find yourself transported from the jumble, rush, tumult, uproar, as of an age of weekdays condensed into the present hour, into what seems an eternal Sabbath. It is very strange to find so much of ancient quietude right in the monster city's very jaws—which yet the monster shall not eat up—right in its very belly indeed, which yet in all these ages it shall not digest and convert into the same substance as the rest of its bustling streets."

The savor of romance that hangs about the Inns may be caught by many a touch in Lamb and Dickens. We may, for instance, see the delicate figure of Ruth Pinch amid the shrubbery about Fountain Court, of the Temple Inns. For it was there she had her secret meetings with Tom, who was always to come out of the Temple past the Fountain and look for her "down the steps leading into Garden Court," to be greeted "with the best little laugh upon her face that ever played in opposition to the Fountain, and beat it all to nothing. The Temple Fountain might have leaped twenty feet to greet the spring of hopeful maidenhood that in her person stole on, sparkling, through the dry and dusty channels of the Law; the chirping sparrows, bred in Temple chinks and crannies, might have held their peace to listen to imaginary skylarks, as so fresh a little creature passed; the dingy boughs, unused to droop, otherwise than in their puny growth, might have bent down in a kindred gracefulness, to shed their benedictions on her graceful head; old love letters, shut up in iron

boxes in the neighboring offices, and made of no account among the heaps of family papers into which they had strayed, and of which, in their degeneracy, they formed a part, might have stirred and fluttered with a moment's recollection of their ancient tenderness, as she went lightly by."\*

The Halls of the Inns were formerly the scenes of masques and revels, in which the benchers, barristers and students took part. "The last occasion of a revel taking place in the Halls of the Inns of Court was upon the elevation of Mr. Talbot to the woolsack (1734). Then, after dinner, the Benchers all assembled in the Great Hall of the Inner Temple, and a large ring having been formed round the fireplace, the Master of the Revels took the Lord Chancellor by the hand, who with his left took Mr. Justice Page, and the other serjeants and benchers being joined together, all danced about the fireplace three times, while the ancient song, 'Round about our Coal Fire,' accompanied by music, was sung by the Comedian, Tony Aston, dressed as a barrister."†

In the beautiful Hall of the Middle Temple, where Blackstone "ate dinners" and was called to the bar, Shakespeare's "Twelfth Night" was first presented.

The Inns of Court possess by immemorial custom the exclusive privilege of calling candidates to the bar, of disciplining, and even of disbarring barristers. The governing body is composed of the benchers, who are either judges or king's counsel and prominent junior barristers. The members of the Inn are the barristers and students. The executive officer is the treasurer, who is selected annually.

Every young man desiring to become a barrister must identify himself with one of the Inns of Court. The chief gain which, in Blackstone's day, the law student drew therefrom was in traditions and associations, and in the stimulus to generous culture and high ambition, although he might also acquire the professional knowledge necessary to success at the bar. Formally, he had only to attend the function of "eating dinner," once each term. When he had "eaten twelve dinners" in his Inn, he was entitled to be called to the bar. Nowadays, he is subjected to rigid examinations. "Having passed the necessary examinations, the young barrister is finally 'called to the Bar,' a ceremony which takes place in the Hall of his Inn, at the close of dinner on 'Grand Day,' which is the day appointed for a banquet, to which a score or more of distinguished guests are invited by the 'Treasurer and the Masters of the Bench.' The Students, wearing gowns over evening dress, are grouped together, below the dais on which the benchers' table stands. The Steward of the Inn calls out the names in order of seniority. Each Student, as his name is called, advances to the high table and halts there, facing the Treasurer, who, standing up, says to him: 'Mr. —, by the authority and on behalf of the Masters of the Bench, I publish you a barrister of this Honorable Society.' Then the Treasurer shakes hands with the new barrister and the latter walks away to join his comrades."‡

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\* Dickens, "Martin Chuzzlewit."

† Home & Headlam, *The Inns of Court*, 98n.

‡ Leaming, *A Philadelphia Lawyer in the London Courts*, 2d ed., 26.



In closing his account of the history of the Inns of Court, Mr. Cecil Headlam says: "Such is the story of the Inns of Court, which have gone on from strength to strength, and of the Inns of Chancery and the Serjeants' Inns, which have almost vanished, together with the Societies which made them famous, from off the changing face of London. . . . It brings before us, not only the vision of the great Justiciars who transacted the business of the King's Courts, of the great Lawyers who built up the mighty fabric of English Law, and the great Judges who defended the rights and liberties and progress of the people, but also many of the greatest names in literature and architecture. The precincts of the Temple remind us of the Order of the Red-Cross Knights, and near at hand are the vacated Inns of that other Order which has been likewise dissolved. For we see no more, save in the light of imagination, either the mail-clad figures of the Templars in their white cloaks stamped with the red cross, or the Serjeants in their white lawn coifs and parti-colored gowns, wending their way from the Temple Hall to the shrine of St. Thomas.

"The silver tongue of Harcourt is mute as the impassioned eloquence of Burke and Sheridan, yet these buildings seem to echo with their voices, with the sonorous declamation of Dr. Johnson, or the witty stammer of Charles Lamb. There, in Gray's Inn, we still seem to see the figure of Francis Bacon, pacing the walks with Raleigh, talking of trees and politics and high adventure; from the Gateway of Lincoln's Inn, and past the red bricks laid by Ben Jonson, when Wolsey was Cardinal, the form of Sir Thomas More emerges; and across the way the thin, alert figure of Sir Edward Coke steps briskly from his tiny garden into old Serjeants' Inn.

"Here Dickens talks with Thackeray, and Blackstone scowls at Goldsmith; there, in the Middle Temple Hall, Queen Elizabeth leads the dance with Sir Christopher Hatton, and the rafters ring with the music of Shakespeare's voice and Shakespeare's poetry. And the buildings themselves are the works of a noble army of English architects, admirable creations and memorials of the genius of Sir Christopher Wren, Inigo Jones, Adam, Hardwick, Street, and of the unknown builders of Norman, Gothic, and Elizabethan things. These facts once known, not all the dirt and fog of London air, not all the noise and distraction of city business and legal affairs, can ever again wholly obscure the charm, the romance, the historical and literary associations, which haunt these homes of so many great English lawyers, writers, and administrators."\*

During the seven years Blackstone attended the courts at Westminster, after his call to the bar, the profits accruing from his practice were unsatisfactory and disappointing. His disposition was doubtless rather academical than contentious. He had acted as bursar of Oxford soon after he took his bachelor's degree, and did efficient service in straightening out confused accounts. His habit of mind is shown in the fact that he prepared a treatise on the subject of keeping college accounts for the benefit of other bursars. In 1750 he published *An Essay on Collateral Consanguinity*. This was called out by the question arising as to the persons who were entitled to election into the society of All Souls College because of kinship to the founder. The claims had in the course of

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\* Inns of Court, painted by Gordon Home, described by Cecil Headlam.



centuries become so numerous that the college complained that it was thereby hampered in the selection of the most desirable candidates. The aim of this treatise was to prove that all the kindred of the founder were by this time collateral, and that the length of time since the founder's death must, according to the rules of both the civil and canon law, have extinguished consanguinity; or, in other words, that the whole race of mankind were equally his kinsmen.

In 1750 Blackstone received the degree of Doctor of Civil Law, and in 1753 he determined to give up his disappointing metropolitan practice, and to retire to an academical life, continuing the practice of his profession as a provincial counsel. In so deciding he was undoubtedly following out the course of his own best self-development. In the early part of his professional life, a vacancy had occurred in the Professorship of Civil Law at Oxford. Mr. Murray, afterward Lord Mansfield, took occasion to expostulate with the Duke of Newcastle on the appointment of an incumbent to the vacant professorship, expressing his regret that the civil law was not receiving the attention at Oxford which it was receiving at Cambridge. Later, upon a request for recommendation of a candidate, Murray introduced Blackstone to the Duke of Newcastle. The latter in order to ascertain the political bias of the candidate said to him: "Sir, I can rely upon the judgment of your friend, Mr. Murray, as to your giving law lectures in a style most beneficial to the students; and I dare say, I may safely rely on you, whenever anything in the political hemisphere is agitated in the University, that you will exert yourself in *our* behalf." The answer was, "Your grace may be assured that I will discharge my duty in giving law lectures to the best of my poor ability." "Ay, ay," replied the Duke, "and your duty in the other branch too?" Declining to commit himself on this point, the appointment went to another person.

Before returning to Oxford, he had already planned his lectures on the laws of England, and was ready to announce their public delivery. These lectures were repeated year after year to large and interested classes of students. In 1758 the Vinerian Professorship of Law became effective through the bequest of the author of Viner's *Abridgment*, and Blackstone was elected as its first occupant. On October 25th of that year he read his introductory lecture, later prefixed to the first book of the Commentaries. As regards Blackstone's great achievement in the delivery of his lectures, we may listen to his twentieth century successors. The present Vinerian Professor, W. M. Geldart, in his inaugural lecture at All Souls College, on November 5, 1910, says:

"He would be a bold man who, for the first time publicly addressing this University from a chair of which the first and last traditions are so splendid, should not feel some trepidation lest he should show himself too ignominiously unworthy of them; and he would show himself doubly unworthy if he passed to the subject of his discourse without saying something of the predecessors who established those traditions. . . . Blackstone was happy in his opportunity and great in his use of it. Our law, coherent in its principles, elaborated by nearly five centuries of judicial interpretation, modified by some few great statutes which it had been able to assimilate and incorporate in its structure, had successfully survived royal tyranny and two revolutions, and looked like a stable and final system to those who knew it. But that system could only

be known to those whom love of recondite study or the hope of professional success could induce to search for its elements in statutes and reports and abridgments and crabbed commentaries. Then Blackstone gathered together these scattered elements, displayed the system as a whole, expounded it in diction dignified, luminous and copious; made English law, in a way in which it had never been before, a part of English literature and English thought. In an age when the teaching of law had sunk to its lowest ebb, Blackstone raised law to the level of a subject of academic study."

The immediately preceding incumbent of the Vinerian Professorship, A. V. Dicey, in an address at the time he surrendered his chair, on June 12, 1909, said:

"Literary power then of the rarest quality enabled Blackstone to grasp with masterly ability the happy opportunity for achieving the task which he had set before himself of reviving professorial instruction and of exhibiting the whole law of England in an adequate literary form. He assuredly wrote under a happy star. The success of his work was favored by several circumstances which no longer exist. The intellectual apathy or somnolence of Oxford during the eighteenth century has been the subject of exaggeration. Still the amount of good teaching provided by the University in 1753, when he began to deliver public lectures, was admittedly small. The sudden appearance of a capable teacher who gave attractive lectures was a startling phenomenon. Blackstone had the advantage of drawing to his classes all the youthful intelligence of Oxford. The pupils who gathered round him probably included every man who had any taste or desire whatever for study. The law of England, further, was in 1765, when the first volume of the Commentaries was published, complete and symmetrical. The foundations of the common law and of Equity were firmly established. Our legal system, looked at from a practical point of view, was far indeed from being the voice of absolute reason, but it was coherent. Fifty years at least were to elapse between the publication of the Commentaries and the beginning of that constant improvement or alteration of the law by parliamentary legislation which began about 1830, and has continued to the present day. Blackstone, therefore, could contemplate the law which he described as a possibly strange, but assuredly coherent and immutable body of doctrine. Utilitarian reform, carried out through the instrumentality of parliament, may have promoted human happiness; it has without doubt delayed the growth of legal literature. The law has year by year increased in bulk and has lost its symmetry. No man of letters, however skillful—not even the great commentator himself—could, from a literary point of view, make anything of a modern statute. An act of parliament produced by the skill or cunning of parliamentary draftsmanship, and modified to meet the exigencies of party warfare, is, to put the truth plainly, a document written in the very worst English known to the civilized world. Even in his own time, Blackstone had perceived the wisdom of avoiding acts of parliament; he glides with deftness over the statute of frauds. Blackstone, in the last place, lived at a time when the learned world was still a reality, when there was an established standard of style and when men of letters could address themselves, even when writing on such a subject as law, neither to experts, nor to practitioners, nor to that un-

satisfactory class now known as general readers. The audience of whom Johnson, Goldsmith, Hume, Adam Smith, Gibbon, Burke and Blackstone courted and received the approbation, was made up of the educated gentlemen of England. It is no accident that these authors and others belonging to the same period, greatly as they differed from one another, were all of them masters of style. It was, in short, the commentator's happy fortune to have lived at a date when the learned world supplied him with the right method of expression, and when—the two things are only different sides of one phenomenon—he could address the definite class of educated English gentlemen in the language accepted by all men of liberal education. Of this advantage he availed himself to the utmost."

The success of his lectures brought Blackstone into renown, and he was not only hailed as the Great Commentator, but the way was opened to him for success in the practice of his profession. For a while he gave up his residence at Oxford, although going there each year to read his lectures, and bought chambers in the Temple. He resigned the office of assessor of the vice-chancellor's court, which he had held for six years, and soon afterwards the stewardship of All Souls College. In 1763, the Queen, upon the establishment of her household, made him her Solicitor-General. About the same time he was chosen a bencher of the Middle Temple. In 1770 he was tendered the office of Solicitor-General to the King, which he declined from distaste for public life. He had already been in parliament, and had held his seat through two elections. Parliament in practice was a disillusionment to him. He did not have the qualities that make for success in public debate and controversy.

He was thereafter, in the same year, 1770, appointed to the office of Justice of the Court of Common Pleas. Mr. Justice Yates, then one of the judges of the King's Bench, after Blackstone had received the announcement of the appointment, but before his patent had passed, expressed to Blackstone a great desire, because of physical infirmity, to have a seat in the Common Pleas. Blackstone yielded the position in the Common Pleas to Yates, himself taking the seat on the King's Bench. At the same time Blackstone received the honor of knighthood. Formerly he had declined the order of the Coif; but in 1761 he was made King's Counsel, and in 1770, Serjeant at Law.

Within a few months after his appointment to the Common Pleas, Mr. Justice Yates died, and Blackstone was given the position which he had desired. The circumstance of these changes is set forth in the following letter from Blackstone to Lord Chief Justice Wilmot:

"Wallingford, 8 June, 1770.

MY LORD:

I have received by today's post the melancholy News of the Death of my Brother Yates, which happened Yesterday afternoon, after an Illness of four Days. Probably Your Lordship's Letters may have brought you the same Account: But I thought it proper to acquaint You with it as early as possible; because the Loss which we have all sustained is more peculiarly interesting to your Lordship, as the Head of the Court in which he sate. I have also a farther Reason for communicating to You this Intelligence immediately, because Your Lordship well remembers that in February Last when I relinquished His

Majesty's Nomination of myself to the Common-Pleas, in favor of my poor Brother Yates (in which I was principally determined by Your Lordship's Advice) I did it with a Reservation of my Claim to a Seat upon that Bench at the next Vacancy; which, God knows, I little expected would have happened in so sudden and disastrous a Manner. I hope, however, that Your Lordship will have no objection to the Renewal of my Claim to a Seat in Your Court, which was my original Option when I accepted the King's Nomination & from which I receded only on account of poor Yates Representation of his infirm State of Health; which this Event has, alas, too fully confirmed. I have the Honor to be, My Lord,

Your most obliged

humble Servt.,

W. BLACKSTONE."\*

In addition to the *Essay on Collateral Consanguinity*, Blackstone published, in 1758, *Considerations on Copyholders*; in 1759, an edition of the *Great Charter*, and the *Charter of the Forest*; in 1762, *A Treatise on the Law of Descents in Fee Simple*, and in the same year, two volumes octavo, entitled "*Law Tracts*," in which several of his essays were collected and published. After his death, in 1780, his brother-in-law, James Clitherow, published the two volumes known as "*W. Blackstone's Reports*," being reports of cases decided in the courts of Westminster Hall from 1746 to 1779, as taken and compiled by Blackstone.

No great distinction over and above many another attaches to Blackstone from his professional and judicial positions, from his law tracts, or from his reports of cases. They were all worthy and honorable, and served to round out his career, and may perhaps have contributed their share, so far as they preceded, or accompanied, the preparation of his lectures, to the successful writing of the *Commentaries*. It was unquestionably as a professorial lawyer that Blackstone performed his signal services, and his fame rests on the celebrated *Commentaries*.

In 1765 Blackstone published the first volume of the *Commentaries*; in 1769 the fourth volume issued from the press. During his lifetime seven editions followed. After his death such able editors as Burn, Christian, Coleridge, and Chitty, annotated and brought forth new editions. Down to 1840, edition after edition followed one another in England. Since 1841, however, no reprint of Blackstone's text has been made in England. The work of Serjeant Stephen's *New Commentaries*, based on Blackstone, and incorporating large portions of Blackstone's own treatise, has taken the place of the original work for the law student. This has been deplored by later English lawyers. Sir Frederick Pollock, for example, has said:

"Our young men bear systematic lectures on jurisprudence and legal method in general, and have meanwhile to pick up their first notions of the law of their

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\* Permission to use this letter is accorded by its present owner, Charles Stetson Wheeler, Esq., of the San Francisco bar. It was read in an address on Blackstone which Mr. Wheeler delivered before the Law Association of the University of California, November 30, 1909, and is contained in "*Select Addresses of Charles S. Wheeler*," privately printed in 1911.

own country from mauled and tinkered editions or imitations of Blackstone put together in defiance of all rational arrangement. Blackstone's work was an excellent one in his time and according to his lights; we might honour him better at this day than by a blundering lip-service which, as a rule, effectually excludes the knowledge of what Blackstone really wrote. The modern editions utterly spoil Blackstone as literature, without producing a good account of the modern law. One consequence of this is that the historical value of Blackstone in his genuine form is apt to be sadly underrated."

Professor Dicey (who confesses never to have read Blackstone thoroughly and completely until he occupied the Vinerian Professorship as Blackstone's successor), says: "To any critic of Blackstone, as to any student of English law, I unhesitatingly give this advice: Begin your study by reading Blackstone's Commentaries. Keep in mind that the book describes English law as it stood toward the end of the eighteenth century, and then read the Commentaries without the use of note or comment."

Amid the admiration and eulogy which greeted the delivery of Blackstone's lectures and the publication of his Commentaries, there was sounded a note of hostility and criticism, which gathered strength and volume during many succeeding years. Among Blackstone's auditors was a boy of some fourteen or fifteen years old, Jeremy Bentham. He detected a fallacy in the lecturer's exposition of natural rights, and he began a systematic course of disparagement and ridicule. But to Bentham, Blackstone's chief offense did not lie here, although this and like characteristics of the Commentaries were especially taken up and criticised by some of Bentham's successors. Bentham, man of genius, was first of all a reformer. Blackstone was an optimistic upholder of the old order. In his generation general criticism of the existing state of things had not been aroused. He was "a typical Old Whig." He died in 1780, and not even the first rumors of the French revolution, with its excitements, its enthusiasms, its stirring of new impulses had reached him. Such ferment, however, was in the very-soul of the younger Bentham. Whether Blackstone would have moved with the progressive current had he been born later or had he lived longer, it is useless to speculate. His temperament, his studies, his position as a professor of law, and the atmosphere of the times, made of him a satisfied conservative. But to Bentham, Blackstone's Commentaries constituted a mighty fortress which had been erected to protect the existing order against the inroads of advancing reform. It was, consequently, to break down the opposing bulwarks that, at the age of twenty-five, he wrote his Fragment on Government. "It is the most trenchant critique ever penned by a youthful pupil on the doctrines of a celebrated teacher whose dogmas were accepted by the learned world as profound truths. The Fragment, which was merely a small part of an intended Comment on the Commentaries, is open to criticism, but it was an attack which achieved complete success. It proved once and for all that Blackstone had met with a controversialist of immense dialectical power, and that the Commentator, though a distinguished lawyer and a great man of letters, was a lax thinker. The Fragment, published anonymously, startled the learned world."\*

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\* Dicey, *The National Review*, Dec., 1909, p. 653.



The real animus of the Fragment against the Commentaries was that the Commentaries seemed invented for the very purpose of resisting attempts to improve the law. Bentham says:

"If to this endeavor [to improve the law] we should fancy any author, especially any author of great name, to be, and as far as could in such case be expected, to avow himself, a determined and persevering enemy, what should we say of him? We should say that the interests of reformation, and through them the welfare of mankind, were inseparably connected with the downfall of his works: of a great part, at least, of the esteem and influence, which these works might under whatever title have acquired.

"Such an enemy it has been my misfortune (and not mine only) to see, or fancy at least I saw, in the author of the celebrated Commentaries on the Laws of England; an author whose works have had, beyond comparison, a more extensive circulation, have obtained a greater share of esteem, of applause, and consequently of influence (and that by a title on many grounds so indisputable), than any other writer who on that subject has ever yet appeared."

Now, to us in calm retrospect, no sinister motives can be imputed to Blackstone. No man more than he ever thought to serve his country well.

Love of English freedom, detestation of foreign despotism were his basic motives. He had with him Montesquieu, Voltaire, Chatham, Burke. His was the most kindly, charitable disposition. He studied and strove for, in his own way, the amelioration of the laws. He was a philanthropist. In the contemporary review of Blackstone and his Commentaries, in the Annual Register, it is said that "his unbounded philanthropy, and the eloquence and tenderness with which he pleads the cause of humanity, must always procure him the most favorable reception." We remember how he refused to surrender his political independence to the Duke of Newcastle. "He was neither a Tory nor a bigot. He believed in civil and religious freedom as understood in England and as interpreted by Locke."\*

We can, however, readily understand how, if not Blackstone himself, at least the Commentaries, might appear to Bentham as the "enemy." Complacent reliance upon what they taught had to be beaten down before the great reforms contemplated by Bentham could make much headway. It was an inevitable struggle. We can pardon, too, Bentham's increasing tone of asperity and virulence. But when the attack is taken up by the new English analytical jurists, in the person mainly of John Austin, and by the utilitarian school of economic thinkers, the ground of attack is lost and criticism descends into mere abuse and vituperation. The result, nevertheless, was that Blackstone's treatise suffered for many years an undeserved neglect and disparagement. The later school of historical jurists that has arisen in England has within recent years been viewing the Commentaries with a juster vision. It is to such Englishmen as Sir Kenelm Digby, Mr. Justice Stephen, Professor Maitland, Professor Dicey, and Professor Geldart, that we should look for a just appreciation of the value of the Commentaries. Throughout Digby's History of the Law of Real Property, the Commentaries are referred to "as at once the most available and the

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\* Dicey, The National Review, Dec., 1909, p. 653.

most trustworthy authority on the law of the eighteenth century." Sir James Stephen, in his *History of the Criminal Law of England*, says: "Blackstone first rescued the law of England from chaos. He did, and did exceedingly well, for the end of the eighteenth century, what Coke tried to do, and did exceedingly ill, about 150 years before; that is to say, he gave an account of the law as a whole, capable of being studied, not only without disgust, but with interest and profit. If we except the Commentaries of Chancellor Kent, which were suggested by Blackstone, I should doubt whether any work intended to describe the whole of the law of any country possessed anything like the same merits. His arrangement of the subject is, I think, defective, for reasons which have often been given, but a better work of the kind has not yet been written, and, with all its defects, the literary skill with which a problem of extraordinary difficulty has been dealt is astonishing. The dryness of the subject is continually relieved by appropriate digressions. The book is full of knowledge of many kinds, though no special attempt is made to exhibit it. It is also full of judicious if somewhat timid criticism, and, so far as I am qualified to judge, I should say, that though Blackstone did not encumber himself with useless learning, he knew nearly everything relating to the subject on which he wrote which was at all worth knowing."

The late Professor Maitland (of whom Professor Dickey, expressing the consensus of opinion of many learned persons, says, "No Englishman has arisen capable of repeating the feat performed both by Bracton and by Blackstone unless it be Maitland himself"), has said: "Bracton was rivaled by no English juridical writer till Blackstone arose five centuries afterwards. Twice in the history of England has an Englishman had the motive, the courage, the power to write a great readable, reasonable book about English law as a whole."

"It required, perhaps," says Coleridge, in the preface to his edition of the Commentaries, "the study necessarily imposed upon an editor to understand fully the whole extent of praise to which the author is entitled; his materials should be seen in their crude and scattered state; the controversies examined, of which the sum only is shortly given; what he has rejected, what he has forborne to say should be known; before his learning, judgment, taste, and, above all, his total want of self-display can be justly appreciated." The writer in the *Dictionary of National Biography*, in remarking upon this passage, says: "To this just eulogy one need only add that Blackstone had formed the true conception of an institutional work, which not merely should state the principles of existing law, but by means of 'the learning out of use' should explain their growth. And so well did he carry out his plan that in the Commentaries there is still to be found the best general history of English law, needing comparatively little correction, and told with admirable clearness and spirit."

These are judicious statements of discriminating lawyers and historical scholars. The words of the one-sided panegyrist are not appealed to. Lawyers in the United States have not been, as a rule, either so discriminatingly just, or so severely harsh, as the critics in England. Blackstone has been, on the one hand, too slavishly followed, or, on the other, neglected and disparaged with too much prejudice. Of course the more eminent judges and the more learned scholars have assessed his values at their true worth. Professor Ham-

mond, in his edition of the Commentaries, does Blackstone full justice on all occasions; he may even seem to have expended too much space in defending him from the attacks and aspersions of Bentham and Austin. His notes, however, constitute a valuable contribution to the Blackstone literature. Judge Dillon reminds us of Maine's judgment of certain of Hammond's discussions of the subject, where he tells us:

"Professor Hammond's learned exposition, in his introduction to Sandars' Justinian, of the classical distribution of the law and of Blackstone's classification and arrangement based thereon attracted the attention and called forth the commendation of Sir Henry Maine, who declared it to be 'the best defense he had seen.' 'Early Law and Custom,' chap. xi, p. 365 (American reprint). Hammond's Sandars' Justinian, Introduction, p. xlii, *et seq.* See, also, the notes of the same learned scholar to his edition of Blackstone, vol. 1, p. 316, note 1; *Ib.*, p. 330, note 2."

Judge Dillon, likewise, in his *Laws and Jurisprudence of England and America*, has discussed fully Blackstone's work and services, from which we quote:

"By Blackstone's time the English law was sufficiently matured (as his Commentaries show) to admit of being put into methodical form; and the need for it arising from the mass of statutes and adjudged cases, and the insufficiency of existing text-books and treatises, pressed with increasing urgency. This great work could not have fallen into the hands of anyone better able than Blackstone to perform it. He was by no means unfamiliar with the practical work of the profession. He gave many studious years to the task of preparation. He was, moreover, a consummate literary artist. In this respect he has never been excelled,—and I must say that in my judgment he has never, among legal elementary authors, been quite equaled. Even Bentham was forced to admit that Blackstone was the 'first of all institutional writers who taught jurisprudence to speak the language of the scholar and the gentleman.' His generalizations are clear and concise; his historical researches minute and in general remarkably accurate, and his book is not, like so many modern works, a mere digest and arrangement of cases, but a systematic treatise. He had, therefore, all the qualifications—learning, general and legal, professional experience, literary gifts, and an exquisite artistic sense—necessary for the work on which he entered when he took his seat in 1758 as Vinerian Professor of Law at Oxford.

"In judging of his Commentaries, we must not fall into the mistake that some of Blackstone's critics make, and look at them from a wrong point of view. He was a teacher whose purpose was to set forth the English law as it then existed, and not a reformer whose purpose was to point out its defects with a view to its improvement. The two functions are, of course, not incompatible. But it is obviously not necessary in an institutional work whose design is to state the law as it is, that the author should expose and dwell upon the defects and imperfections of the system which he is expounding."

The examination of nearly ten thousand citations of Blackstone's Commentaries in the reports of American courts from 1789 to 1915 leads inevitably to the conclusion that Blackstone is accepted in the United States as an authori-

tative expositor of the common law. Many courts do go further in their explorations of the sources of the common law, but they nearly always end in conceding that Blackstone had correctly interpreted it. In England there have been judicial protests against his being taken as an "authority," without necessarily questioning the general correctness of his statements, but, nevertheless, it is said in the *Dictionary of National Biography*: "The Commentaries have had a yet higher legal fame, having almost, but not quite, reached the distinction accorded to those treatises which as Blackstone himself says, 'are cited as authority . . . and do not entirely depend on the strength of their quotations from older authors.' His name is constantly heard in our courts, and to this day judges fortify their decisions by quoting his statement of the law." And even of his exposition of the English constitution, it is said in the *Encyclopædia Britannica* (11th ed.): "It is certain that a vast amount of constitutional sentiment of the country has been inspired by its pages. To this day Blackstone's criticism of the English constitution would probably express the most profound political convictions of the majority of the English people. Long after it has ceased to be of much practical value as an authority in the courts, it remains an arbiter of all public discussions on the law or the constitution. On such occasions the Commentaries are apt to be construed as strictly as if they were a code."

The completest and most satisfactory discussion of the merits and influence of the Commentaries is contained in an article by Professor A. V. Dicey, in *The National Review* for December, 1909, p. 653. The substance of the article, which is entitled "Blackstone's Commentaries," was delivered on June 12, 1909, at All Souls College, Oxford. Professor Dicey says that the permanent merits of the work may be summed up in a few words. "The book is the work of an eminent lawyer who was also a consummate man of letters; by virtue both of his knowledge of law and of his literary genius he produced the one treatise on the laws of England which must for all time remain a part of English literature. The Commentaries live by their style." He then explains that "the command of style implies the possession by an author of at least three rare qualities: power of expression, clearness of aim, literary judgment or tact."

Even Bentham admitted Blackstone's mastery of expression, saying that Blackstone "first of all institutional writers, has taught jurisprudence to speak the language of the scholar and gentleman," and that his style is "correct, elegant, unembarrassed, ornamented." In respect to his clearness of aim, he intended to treat English law as a whole, and indubitably succeeded in his purpose, he and Bracton alone, according to the testimony of Maitland, the greatest of English legal historical scholars, achieving such a result. In respect to his literary judgment or tact, Professor Dicey says: "Of his supreme skill in the use of literary judgment no better example can be given than his unrivaled success in blending the history with the exposition of English law. How to achieve this combination is the problem which drives to despair any teacher who undertakes to explain adequately and intelligibly the existing law of England." "As illustrations of his skill," says Professor Dicey further on, "let me refer to his account of the rise, the progress, and the gradual improvement of the laws of England; to his sketch of the feudal system; to his tale of the doctrine of the benefit of clergy; to his explanation of the action of

ejection, where the solemn description of a portentous series of legal fictions excites, and was intended to excite, not only interest, but amusement; to his explanation of the growth and nature of equity, which, at any rate till quite recently, remained the best, as it was certainly the most readable, exposition of a matter as to which the ideas even of trained lawyers exhibit no small perplexity.\*

Blackstone had hoped when he accepted the Vinerian Professorship to found a school of law at Oxford. He was disappointed in this. Compensation has come, however, even in England. For there grew up, whether by repulsion or otherwise, the analytical jurists of which Austin was the leader and Holland a later builder; and then the historical jurists, of which Maine was the leader, and Maitland the master. The schools of jurisprudence at the English universities, too, while not what Blackstone dreamed of, are perhaps, coupled with the work of the revised system of the Inns of Court, doing a higher and more needed work for legal scholarship. And again, Blackstone is the spirit, at least, to which the American law schools owe their life. "We transplanted," says the late Professor James Bradley Thayer, "an English root, and nurtured and developed it, while at home it was suffered to languish and die down. It was the great experiment in the university teaching of our law at Oxford, in the third quarter of the eighteenth century, and the publication, a little before the American Revolution, of the results of that experiment, which furnished the stimulus and the exemplar for our own early attempts at systematic legal education."\*

"To the example of the Vinerian Professorship," says Professor Dicey, "is distinctly due the foundation in Massachusetts of the professorial Chair where Story expounded every portion of the law of England and continued his professorial labors even when raised to the bench of the Supreme Court of the United States. Kent, Story, and Marshall are merely a few among the many distinguished American lawyers who in spirit were the disciples of Blackstone. The famous American law schools, such as those of Harvard, Yale, Columbia, California, and Michigan, are in a real sense the fruit of his work and of his ideas. It is idle to apply in any serious sense the term failure to the career of a teacher the force of whose genius is felt and acknowledged in the universities where the most eminent professors of English law teach the principles of the law of England to the citizens of that Republican Commonwealth, which is as much the work of the English people as is the constitutional monarchy of England."

In the words of this same distinguished Vinerian Professor, who recently retired from his chair, and who cheerfully acknowledges the full debt that he, and all the scholars and lawyers of the English-speaking world, owe to the author of the Commentaries, Blackstone "will remain forever the eminent lawyer, the perfect professor, the consummate man of letters, whose genius claimed and vindicated for English law its high and rightful place in the noble literature of England."

WILLIAM CAREY JONES.

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\* The Teaching of English Law at Universities, Legal Essays, by James Bradley Thayer.





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To give an accurate account of the editions prior to the fifth, it is necessary to distinguish the volumes.

Vol. I was first published in 1765 in a large broad-margined quarto, bearing the title and imprint: Commentaries on the Laws of England. By William Blackstone, Esq., Vinerian Professor of Law and Solicitor-General to her Majesty. Oxford, printed at the Clarendon Press, MDCCLXV, pp. (xi) 473. In this edition the preface is not dated, but in the second edition it bears the date November 2, 1765, with a postscript dated November 2, 1766. The Second Edition of this volume, pp. (vii) 485, bears date, MDCCLXVI. The Third, pp. (x) 485, MDCCLXVIII. The Fourth, pp. (x) 485, MDCCLXX.

Vol. II. First Edition, pp. (viii) 520, App. xix, MDCCLXVI. (See note *a.*) Second Edition, pp. (viii) 520, App. xix, MDCCLXVII. Third Edition, pp. (viii) 520, App. xix, MDCCLXVIII. Fourth Edition, pp. (viii) 520, App. xix, MDCCLXX.

Vol. III. First Edition, pp. (8) 455, App. xxvii, MDCCLXVIII. Fourth Edition, pp. (viii) 455, App. xxvii, MDCCLXX.

Vol. IV. First Edition, pp. (viii) 436, App. vii, Index 39, MDCCLXIX.

All the foregoing are in quarto. I suppose, from all the copies I have been able to see, that when the first two volumes had reached the fourth edition, the same numbering was given to the third and

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(*a*) Volume II has the same number of pages in all the early quarto editions, and it may be worth while to give a few of the distinguishing marks by which each edition may be known. The first and second have a list of the *errata* facing page 1, the first contains 12 lines, the second 7, while the third and fourth have none.

Page 13, line 6, first edition reads *never can be heir*: second and following, *never can be their immediate heir*. Page 21, line 4, first reads, collateral to and issuing: second and following, collateral to or issuing. Page 52, line 8, first and second read *broke*: third and fourth, *broken*. First, second, and third begin this page *a high hand* and end *of our*; the fourth begins *as the basis*, ends *arms*. This is the best distinction between the third and fourth editions.

Volume III, 1768, with second edition of I and II, has pages vi, xxvii, 455. Appendix in front. 1770, marked fourth edition. 1769 with fourth edition but not marked.



fourth volumes, though they had not passed through any editions between the first and fourth.

The first edition I have found in octavo is a Dublin reprint, printed for John Exshaw, Henry Saunders, Boulter Grierson, and James Williams (their names vary in the different volumes), MDCCLXXI. It is curious that in this edition the author is termed "Sir William Blackstone, one of his Majesty's Justices of the Honorable Court of Common Pleas," though in the English editions this is not done until after his death. (See ninth edition, *post.*) This edition is called on the title page the fourth. So far as I have collated it, it is based on the text of the third English edition.

The title "Vinerian Professor of Law" appears in the first, second, and third editions of volume I, but not in the first, second, or third editions of volume II, or in any edition of volumes III and IV. With the fourth edition it disappears entirely. The title of Solicitor-General to the Queen remains in all title pages to the *eighth* inclusive, though Blackstone had resigned the office and been succeeded by Mr. Ambler, when he took his seat on the K. B., *vice* Mr. Justice Yates in 1770. (See 5 Burr. 2585; 3 Wils. 50.)

*The Fifth Edition*, Oxford, at the Clarendon Press, MDCCLXXIII, printed for William Strahan, Thomas Cadell, and Daniel Prince. 8vo., 4 vols. The pages of volumes I, II, and III same with those of the first four editions; vol. IV, pages (viii) 443, vii, Index 51. This was the first (Eng.) octavo edition. (Hist. of Bl. p. 46, n.)

*The Sixth Edition*, London, printed for W. Strahan, T. Cadell in the Strand, and D. Prince at Oxford, MDCCLXXIV, quarto edition, title page otherwise same as above (5th). The pages of volumes I, II, and III same with those of first five editions; volume IV, pages (viii) 443, vii, Index 40.

*The Seventh Edition*, Oxford, at the Clarendon Press, MDCCLXXV, printed for William Strahan, Thomas Cadell, and Daniel Prince, octavo, 4 volumes, substantially same with the fifth edition.

*The Eighth Edition*, title page same as above (5th and 7th eds.), MDCCLXXVIII; 8vo., 4 vols. By W. B., Esq., Solicitor-General.

*The Ninth Edition*, title page same except that the author's name now appears as "Sir W. B. Knt., one of the Justices of his

Majesty's Court of Common Pleas." "The Ninth Edition, with the Last Corrections of the Author and continued to the Present Time. By Ri. Burn, LL.D., London, printed for W. Strahan, T. Cadell in the Strand, and D. Prince, Oxford, MDCCLXXXIII." 4 vols., 8vo. The Editor's Advertisement is dated July 20, 1783.

*The Tenth Edition* was published in 1787 by John Williams, Esq. (with slight additions, see Clarke's *Bibl. Legum*, p. 103; *Bridgman's Legal Bibl.* p. 19), London, 4 vols., 6vo.

*The Eleventh Edition*, London, 1791, also by Williams. Advertisement bears date January 12, 1791.

*The Twelfth Edition* (with portraits of the judges), with the last corrections of the author and with notes and additions by Edward Christian, Esq., Barrister at Law and Professor of the Laws of England in the University of Cambridge, London, 1793-1795. 4 vols., 8vo.

This edition is said to have been originally published in numbers, each number containing the portrait of a judge. This was done by the publishers and disclaimed by the editor in his preface. The portraits in Book III, the only volume of this edition I have had a chance to examine, are these: William Earl of Mansfield, opposite title page; Lord Ch. Baron Gilbert, opposite page 167; Sir John Comyns, Kt., opposite page 325; Philip Earl of Hardwicke, opposite page 426.

*The Thirteenth Edition*, by Christian, London, 1800. 4 vols., 8vo. (That of Dublin, 1796, 4 vols., 12mo., though called the thirteenth edition and having Christian's notes, is doubtless fraudulent. In the Dublin reprint, and the American, the notes are in an appendix to each book; but mentioned on the title page thus: "and continued to the present time by Edward Christian, Esq., Barrister at Law and Professor of the Laws of England in the University of Cambridge.")

*The Fourteenth Edition*, in 1803, with notes and additions, was published by Edward Christian, Esq. *Bridgman's L. B.*, p. 20. (Dr. Hoffman in his course of Legal Study, p. 159, mentions this as Christian's first edition, but this is evidently a mistake.)

*The Fifteenth Edition*, with notes by E. Christian, London, 1809.

*The Sixteenth Edition*, with notes by J. F. Archbold (added to Christian's), London, 1811. 4 vols., royal 8vo. (See *Camus*, No.

2081; Hoffman, p. 159.) I have never been able to find a copy of the three last mentioned.

*The Seventeenth Edition*, with notes by J. T. Coleridge, London, 1825.

*The Eighteenth Edition*, with notes by J. Chitty, London, 1826 (often reprinted in America).

*The Nineteenth Edition*, by Hovenden and Ryland, London, 1836, is described in a Philadelphia reprint as "with a life of the author and notes by Christian, Chitty, Lee, Hovenden, and Ryland," adding references to the American cases by a member of the New York Bar.

*The Twentieth Edition* (with additions to the text) was by James Stewart, London, 1841-1844.

*The Twenty-first Edition*, London, 1844, 4 vols., was edited by four members of the English Bar, viz.: Vol. I by J. F. Hargrave, Vol. II by G. Sweet, Vol. III by R. Couch, Vol. IV by W. N. Welsby.

The text of this edition was reprinted from the *ninth* edition, published by Dr. Burn after Blackstone's death, and is therefore more correct than that of the later editions generally.

This edition was reprinted in New York, 4 vols., 8vo., with notes by Wendell.

It seems to have been the last English edition of the original work which received any careful editorial supervision. Serjeant Stephen's *New Commentaries* founded on Blackstone, 4 vols., 8vo., appeared in 1841. "The Commentaries on the Laws of England," by H. Broom and E. A. Hadley, 4 vols., 8vo., were first published in 1869. In the preface to this work the writers say that the *twenty-first* edition of the Commentaries of Blackstone, containing many valuable notes, had been placed at their entire disposal.

#### EARLY AMERICAN EDITIONS OF BLACKSTONE'S COMMENTARIES.

There was an American edition in four volumes octavo published 1771-72, an account of which will be found in the preface. It was by Robert Bell of Philadelphia, who in 1773 issued proposals for "reprinting a second American edition in four volumes quarto, at three dollars each volume. Those gentlemen who were subscribers to the first edition in octavo, and now choose to possess the

quarto edition, shall have their octavo (if not abused) exchanged for the quarto on paying the difference between the prices."

I have never seen a copy of this quarto edition, and doubt whether it was published, especially as the edition of 1799 (see below) was called the *second* American edition. Of the great number of copies printed of the *first*, the only one I have ever seen is in the Library of the Supreme Court of Washington. It was "reprinted from the British copy, page for page with the last edition," viz., the fourth, as may be seen by comparing page 109 of volume I, containing the stat. 7 Geo. III, c. 59, not in the third edition or the so-called fourth Dublin edition. The following curious note is appended to the Table of Contents of the first volume:—

If any reader of this Edition meets with *some* words uncommonly *spelled*, he is requested not hastily to blame the *American* editor because Report saith that the last *British* edition was corrected under the *immediate* inspection of the *learned* author, and it has of late been the practice of several great men to spell many words in their own peculiar manner. Therefore the *American* editor, to make this *American* edition a *perfect transcript* of the last *British* edition, hath adhered to it as *literally as possible*.

This first edition was followed by the same publisher with an interesting appendix to Sir William Blackstone's Commentaries on the Laws of England, containing: I. Priestley's Remarks relating to the Dissenters. II. Blackstone's Reply. III. Priestley's Answer. IV. The case of the late election of Middlesex [by Blackstone]. V. Furneaux's Letters to Blackstone concerning Toleration and Religious Liberty. VI. Argument of Mr. J. Foster and speech of Lord Mansfield in the cause between the City of London and the Dissenters. America. Printed for the subscribers by Robert Bell, at the late Union Library in Third Street, Philadelphia, MDCCLXXIII. Parts I to IV contain pages iv, 119. Parts V and VI contain pages xii, 155. This volume is occasionally quoted in the earlier American reports as *App. Bl.*

The Boston edition of 1799 has the following title page, which from the notes prefixed appears to have been taken from the eleventh English edition of 1791: Commentaries on the Laws of England. In Four Books. By Sir William Blackstone, Knt. One of the Late Justices of His Majesty's Court of Common Pleas. In Four Volumes. Second American Edition, carefully reprinted

from the last London Edition. Containing the Last Corrections of the Author, the Additions by Richard Burn, LL.D., and Continued to the Present Time, by John Williams, Esq. Vol. I. Book I. Printed at Boston, by I. Thomas and E. T. Andrews. Sold by them at Faust's Statue, No. 45, Newbury Street; by I. Thomas, Worcester; by Thomas, Andrews, and Penniman, Albany; by Thomas, Andrews, and Butler, Baltimore; and by E. S. Thomas, Charleston, S. C. 1799.

Bound up with each volume but separately paged are Mr. Christian's notes. The title page of those in Book I is this: Notes to Blackstone's Commentaries which are calculated to Answer all the Editions. By Edward Christian, Esq., Barrister at Law and Professor of the Laws of England in the University of Cambridge. Vol. V. Printed at Boston by I. Thomas and E. T. Andrews. Sold by them at their Bookstore, Faust's Statue, No. 45, Newbury Street; by said Thomas at Worcester; by Thomas, Andrews, and Penniman at Albany; and by Thomas, Andrews, and Butler at Baltimore. Jan., 1801. (The Dublin edition in 12mo. of 1796 has them printed in the same form, but paged continuously with the text. It also mentions them in the title page, and in a note by the printer dated Dec., 1796.)

Judge Wilson, whose lectures were prepared and delivered in 1790-91, though not published until 1804, evidently used a text of Blackstone identical with that of the fourth English edition, as may be seen by comparing his extract on pages 83, 84, and 180 of volume I. of his works with the text and notes of this edition, Book I., pages 43, 49, etc.

Tucker's edition, first published in 1803, of course follows the latest text of the author's own work (9th ed. 1783), though I have noticed in some few places unimportant departure from it and return to the text of the earlier editions.

[WILLIAM G. HAMMOND.]



## THE AUTHOR'S PREFACE.

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THE following sheets contain the substance of a course of lectures on the laws of England, which were read by the author in the university of Oxford. His original plan took its rise in the year 1753: and, notwithstanding the novelty of such an attempt in this age and country, and the prejudices usually conceived against any innovations in the established mode of education, he had the satisfaction to find (and he acknowledges it with a mixture of pride and gratitude) that his endeavors were encouraged and patronized by those, both in the university and out of it, whose good opinion and esteem he was principally desirous to obtain.

The death of Mr. Viner in 1756, and his ample benefaction to the university for promoting the study of the law, produced about two years afterwards a regular and public establishment of what the author had privately undertaken. The knowledge of our laws and constitution was adopted as a liberal science by general academical authority; competent endowments were decreed for the support of a lecturer, and the perpetual encouragement of students; and the compiler of the ensuing commentaries had the honor to be elected the first Vinerian professor.

In this situation he was led, both by duty and inclination, to investigate the elements of the law, and the grounds of our civil polity, with greater assiduity and attention than many have thought it necessary to do. And yet all, who of late years have attended the public administration of justice, must be sensible that a masterly acquaintance with the general spirit of laws and the principles of universal jurisprudence, combined with an accurate knowledge of our own municipal constitutions, their original, reason, and history, hath given a beauty and energy to many modern judicial decisions, with which our ancestors were wholly unacquainted. If, in the pursuit of these inquiries, the author hath been able to rectify any errors which either himself or others may have heretofore imbibed, his pains will be sufficiently answered: and, if in some points he is still mistaken, the candid and judicious reader will



make due allowances for the difficulties of a search so new, so extensive, and so laborious.

The labor indeed of these researches, and of a regular attention to his duty, for a series of so many years, he hath found inconsistent with his health, as well as his other avocations: and hath therefore desired the university's permission to retire from his office, after the conclusion of the annual course in which he is at present engaged. But the hints, which he had collected for the use of his pupils, having been thought by some of his more experienced friends not wholly unworthy of the public eye, it is therefore with the less reluctance that he now commits them to the press: though probably the little degree of reputation, which their author may have acquired by the candor of an audience (a test widely different from that of a deliberate perusal) would have been better consulted by a total suppression of his lectures;—had that been a matter entirely within his power.

For the truth is, that the present publication is as much the effect of necessity, as it is of choice. The notes which were taken by his hearers, have by some of them (too partial in his favor) been thought worth revising and transcribing; and these transcripts have been frequently lent to others. Hence copies have been multiplied, in their nature imperfect, if not erroneous; some of which have fallen into mercenary hands, and become the object of clandestine sale. Having therefore so much reason to apprehend a surreptitious impression, he chose rather to submit his own errors to the world, than to seem answerable for those of other men. And, with this apology, he commits himself to the indulgence of the public.

2 Nov. 1765.

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#### POSTSCRIPT BY THE AUTHOR.

Notwithstanding the diffidence expressed in the foregoing Preface, no sooner was the work completed, but many of its positions were vehemently attacked by zealots of all, even opposite, denominations, religious as well as civil; by some with a greater, by others with a less degree of acrimony. To such of these animadvertisers as have fallen within the author's notice, for he doubts not but some have escaped it, he owes at least this obligation, that they have occasioned him from time to time to revise his work, in respect

to the particulars objected to; to retract or expunge from it what appeared to be really erroneous; to amend or supply it when inaccurate or defective; to illustrate and explain it when obscure. But where he thought the objections ill-founded, he hath left, and shall leave, the book to defend itself; being fully of opinion, that if his principles be false and his doctrines unwarrantable, no apology from himself can make them right; if founded in truth and rectitude, no censure from others can make them wrong.

[2 Nov. 1766.]



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# BLACKSTONE'S ANALYSIS OF THE COMMENTARIES.\*

## INTRODUCTION. OF THE STUDY, NATURE, AND EXTENT OF THE LAWS OF ENGLAND.

### SECTION I.

#### OF THE STUDY OF THE LAW.

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1. The general utility of the study of the English common law will principally appear from considering the peculiar situations of, 1. Gentlemen of fortune. 2. The nobility. 3. Persons in liberal professions..6-16
2. The causes of its neglect were, chiefly, the revival of the study of the Roman laws in the twelfth century, their adoption by the clergy and universities, and the illiberal jealousy that subsisted between the patrons and students of each.....16-22
3. The establishment of the court of common pleas at Westminster preserved the common law, and promoted its study in that neighborhood, exclusive of the two universities.....22-26
4. But the universities are now the most eligible places for laying the foundations of this, as of every other liberal accomplishment; by tracing out the principles and grounds of the law, even to their original elements .....26-37

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2. Natural law is the rule of human action, prescribed by the Creator, and discoverable by the light of reason.....39-41
3. The divine or revealed law (considered as a rule of action) is also the law of nature, imparted by God himself.....41-43
4. The law of nations is that which regulates the conduct and mutual intercourse of independent states with each other, by reason and natural justice ..... 43
5. Municipal or civil law is the rule of civil conduct prescribed by the supreme power in a state, commanding what is right, and prohibiting what is wrong .....44-47

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\* This Analysis was printed by Blackstone for the use of his students as a syllabus of his lectures.

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6. Society is formed for the protection of individuals; and states or government for the preservation of society..... 47
7. In all states there is an absolute supreme power, to which the right of legislation belongs; and which, by the singular constitution of these kingdoms, is vested in the king, lords, and commons.....48-53
8. The parts of a law are, 1. The declaratory, which defines what is right and wrong. 2. The directory, which consists in commanding the observation of right, or prohibiting the commission of wrong. 3. The remedial, or method of recovering private rights and redressing private wrongs. 4. The vindicatory sanction of punishments for public wrongs; wherein consists the most forcible obligation of human laws .....53-59
9. To interpret a law, we must inquire after the will of the maker, which may be collected either from the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. .59-61
10. From the latter method of interpretation arises equity, or the correction of that wherein the law (by reason of its universality) is deficient. .61-62

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#### OF THE LAWS OF ENGLAND.

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2. The unwritten law includes, 1. General customs. 2. Particular customs. 3. Particular laws.....64-67
3. General customs, or the common law properly so called, are founded upon immemorial universal usage, whereof judicial decisions are the evidence; which decisions are preserved in the public records, explained in the year-books and reports, and digested by writers of approved authority .....68-74
4. Particular customs are those which are only in use within some peculiar districts; as gavelkind, the customs of London, etc.....74-76
5. These; 1. Must be proved to exist; 2. Must appear to be legal; that is, immemorial, continued, peaceable, reasonable, certain, compulsory, and consistent; 3. Must, when allowed, receive a strict construction. .76-79
6. Particular laws are such as, by special custom, are adopted and used only in certain peculiar courts, under the superintendence and control of the common and statute law; namely, the Roman, civil, and canon laws .....79-84
7. The written or statute laws are the acts which are made by the king, lords, and commons in parliament, to supply the defects, or amend what is amiss, of the unwritten law.....85-91
8. In order to give a more specific relief than can sometimes be had, through the generality of both the unwritten and written law, in matters of private right, it is the office of equity to interpose.....91-92

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5. The Isle of Man, the Norman Isles (as Guernsey, etc.) and our plantations abroad, are governed by their own laws, but are bound by acts of the British parliament, if specially named therein.....104-111
6. The territory of England is divided, ecclesiastically, into provinces, dioceses, archdeaconries, rural deaneries, and parishes.....111-114
7. The civil division is, first, into counties, of which some are palatine; then, sometimes, into rapes, lathes, or tithings; next into hundreds, or wapentakes; and, lastly, into towns, vills, or tithings.....114-120

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CHAPTER I.

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2. Rights are, the rights of persons, or the rights of things..... 122
3. The rights of persons are such as concern, and are annexed to, the persons of men, and, when the person to whom they are due is regarded, they are called (simply) rights; but, when we consider the person from whom they are due, they are then denominated duties... 123
4. Persons are either natural, that is, such as they are formed by nature; or artificial, that is, created by human policy, as bodies politic or corporations ..... 123
5. The rights of natural persons are, 1. Absolute, or such as belong to individuals. 2. Relative, or such as regard members of society.... 123
6. The absolute rights of individuals, regarded by the municipal laws (which pay no attention to duties of the absolute kind), compose what is called political or civil liberty..... 123
7. Political or civil liberty is the natural liberty of mankind, so far restrained by human laws as is necessary for the good of society..... 125

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8. The absolute rights, or civil liberties, of Englishmen, as frequently declared in parliament, are principally three: the right of personal security, of personal liberty, and of private property.....125-129
9. The right of personal security consists in the legal enjoyment of life, limb, body, health, and reputation.....129-134
10. The right of personal liberty consists in the free power of locomotion, without illegal restraint or banishment.....134-138
11. The right of private property consists in every man's free use and disposal of his own lawful acquisitions, without injury or illegal diminution.....138-140
12. Besides these three primary rights, there are others which are secondary and subordinate; viz. (to preserve the former from unlawful attacks),
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## OF THE PARLIAMENT.

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2. Parliaments, in some shape, are of as high antiquity as the Saxon government in this island; and have subsisted, in their present form, at least five hundred years.....147-150
3. The parliament is assembled by the king's writs, and its sitting must not be intermitted above three years.....150-153
4. Its constituent parts are the king's majesty, the lords spiritual and temporal, and the commons represented by their members: each of which parts has a negative, or necessary, voice in making laws..153-160
5. With regard to the general law of parliament, its power is absolute; each house is the judge of its own privileges; and all the members of either house are entitled to the privilege of speech, of person, of their domestics, and of their lands and goods.....160-167
6. The peculiar privileges of the lords (besides their judicial capacity) are to hunt in the king's forests; to be attended by the sages of the law; to make proxies; to enter protests; and to regulate the election of the sixteen peers of North Britain.....167-169
7. The peculiar privileges of the commons are to frame taxes for the subject, and to determine the merits of their own elections, with regard to the qualifications of the electors and elected, and the proceedings at elections themselves.....169-181

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8. Bills are usually twice read in each house, committed, engrossed, and then read a third time; and when they have obtained the concurrence of both houses, and received the royal assent, they become acts of parliament .....181-186
9. The houses may adjourn themselves; but the king only can prorogue the parliament .....186-187
10. Parliaments are dissolved, 1. At the king's will. 2. By the demise of the crown; that is, within six months after. 3. By length of time, or having sat for the space of seven years.....188-189

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5. This course of descent is subject to limitation by parliament....195-196
6. Notwithstanding such limitations, the crown retains its descendible quality, and becomes hereditary in the prince to whom it is limited .....196-197
7. King Egbert, King Canute, and King William I, have been successively constituted the common stocks, or ancestors, of this descent....197-210
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# TABLE OF ENGLISH REGNAL YEARS.

Sovereigns.	Commencement of Reign.	Length of Reign.
William I.....	October 14, 1066.....	21
William II.....	September 26, 1087.....	13
Henry I.....	August 5, 1100.....	36
Stephen.....	December 26, 1135.....	19
Henry II.....	December 19, 1154.....	35
Richard I.....	September 3, 1189.....	10
John.....	May 27, 1199.....	18
Henry III.....	October 28, 1216.....	57
Edward I.....	November 20, 1272.....	35
Edward II.....	July 8, 1307.....	20
Edward III.....	January 25, 1327.....	51
Richard II.....	June 22, 1377.....	23
Henry IV.....	September 30, 1399.....	14
Henry V.....	March 21, 1413.....	10
Henry VI*.....	September 1, 1422.....	39
Edward IV.....	March 4, 1461.....	23
Edward V.....	April 9, 1483.....	—
Richard III.....	June 26, 1483.....	3
Henry VII.....	August 22, 1485.....	24
Henry VIII.....	April 22, 1509.....	38
Edward VI.....	January 28, 1547.....	7
Mary.....	July 6, 1553.....	2
Philip and Mary.....	July 25, 1554.....	5
Elizabeth.....	November 17, 1558.....	45
James I.....	March 24, 1603.....	23
Charles I.....	March 27, 1625.....	24
The Commonwealth.....	January 30, 1649.....	12
Charles II†.....	May 29, 1660.....	37
James II.....	February 6, 1685.....	4
William and Mary.....	February 13, 1689.....	8 } 14
William III‡.....	December 28, 1694.....	6 }
Anne.....	March 8, 1702.....	13
George I.....	August 1, 1714.....	13
George II.....	June 11, 1727.....	34
George III.....	October 25, 1760.....	60
George IV.....	January 29, 1820.....	11
William IV.....	June 26, 1830.....	7
Victoria.....	June 20, 1837.....	64
Edward VII.....	January 23, 1901.....	9
George V.....	May 6, 1910.....	—

\* On March 4, 1461, Henry was deposed by Edward IV, but in October, 1470, he recovered possession of the throne, resumed the regal title, and reigned six months, this period being called the 49th year of his reign.

† Charles II did not ascend the throne until May 29, 1660, but his regnal years are computed from the death of Charles I, January 30, 1649, so that the year of his restoration is styled the twelfth of his reign.

‡ The reign of William and Mary and the reign of William are considered as one continuous reign, so that 6 & 7 Wm. & Mary is designated as 7 & 8 Wm. III, instead of 1 Wm. III.

The names of James and Charles have their Latin form of Jacobus and Carolus and are abbreviated into Jac. and Car. Hence, for example, the celebrated Statute of Frauds of 1677 is cited as "29 Car. 2, c. 3."



## INTRODUCTION.

THE STUDY, NATURE, AND EXTENT OF THE LAW.

## BOOK I.

OF THE RIGHTS OF PERSONS.

(cxxiii)



# INTRODUCTION.

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[3]

## SECTION THE FIRST.

### ON THE STUDY OF THE LAW.\*

*Mr. Vice-Chancellor, and Gentlemen of the University.*

§ 1. **Introductory.**—The general<sup>1</sup> expectation of so numerous and respectable an audience, the novelty, and (I may add) the importance of the duty required from this chair, must unavoidably be productive of great diffidence and apprehensions in him who has the honor to be placed in it. He must be sensible how much will depend upon his conduct in the infancy of a study, which is now first adopted by public academical authority; which has generally been reputed (however unjustly) of a dry and unfruitful nature; and of which the theoretical, elementary parts have hitherto received a very moderate share of cultivation. He cannot but reflect that, if either his plan of instruction be crude

\*Read in Oxford at the opening of the Vinerian lectures, 25 Oct. 1758. (The attention of the twentieth century student of law is directed to a lecture by Brooks Adams, entitled "Nature of Law: Methods and Aim of Legal Education," to be found in a volume called "Centralization and the Law: Scientific Legal Education," with an introduction by Melville M. Bigelow, Boston, 1906. This lecture is in two parts. The first part, dealing with the nature of law, traces briefly but clearly the process by which the principles of Modern English law have been evolved. The second part of the lecture discusses, with a sure hand, the problem, and the method of its solution, of the professional preparation of the modern lawyer.)

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<sup>1</sup> In *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 432, Green, J., quotes Blackstone, vol. 1, p. 1, but the citation is an error. The passage quoted is on page 44. This is noted here for the purpose of explaining that where references to the Commentaries found in American Reports are not given at the page referred to, the reader may understand that the reference is erroneous. Such mistakes of volume and page are numerous, and it would be a useless expenditure of space to note them. They have been silently corrected wherever the true reference could be identified.—HAMMOND.



and injudicious, or the execution of it lame and superficial, it will cast a damp upon the further progress of this most useful and most rational branch of learning; and may defeat for a time the <sup>[4]</sup> public-spirited design of our wise and munificent benefactor. And this he must more especially dread, when he feels by experience how unequal his abilities are (unassisted by preceding examples) to complete, in the manner he could wish, so extensive and arduous a task; since he freely confesses, that his former more private attempts have fallen very short of his own ideas of perfection. And yet the candor he has already experienced, and this last transcendent mark of regard, his present nomination by the free and unanimous suffrage of a great and learned university (an honor to be ever remembered with the deepest and most affectionate gratitude), these testimonies of your public judgment must entirely supersede his own, and forbid him to believe himself totally insufficient for the labor at least of this employment. One thing he will venture to hope for, and it certainly shall be his constant aim, by diligence and attention to atone for his other defects; esteeming, that the best return, which he can possibly make for your favorable opinion of his capacity, will be his unwearied endeavors in some little degree to deserve it.

§ 2. Study of law on the Continent and in Scotland.—The science thus committed to his charge, to be cultivated, methodized, and explained in a course of academical lectures, is that of the laws and constitution of our own country; a species of knowledge, in which the gentlemen of England have been more remarkably deficient than those of all Europe besides. In most of the nations on the continent, where the civil or imperial law under different modifications is closely interwoven with the municipal laws of the land, no gentleman, or at least no scholar, thinks his education is completed, till he has attended a course or two of lectures, both upon the institutes of Justinian and the local constitutions of his native soil, under the very eminent professors that abound in their several universities. And in the northern parts of our own island, where also the municipal laws are frequently connected with the civil, it is difficult to meet with a person of liberal education, who is destitute of a competent

knowledge in that science, which is to be the guardian of his natural rights and the rule of his civil conduct.

§ 3. Study of law abroad by Englishmen.—<sup>[5]</sup> Nor have the imperial laws been totally neglected even in the English nation. A general acquaintance with their decisions has ever been deservedly considered as no small accomplishment of a gentleman; and a fashion has prevailed, especially of late, to transport the growing hopes of this island to foreign universities, in Switzerland, Germany, and Holland; which, though infinitely inferior to our own in every other consideration, have been looked upon as better nurseries of the civil, or (which is nearly the same) of their own municipal law. In the meantime it has been the peculiar lot of our admirable system of laws, to be neglected, and even unknown, by all but one practical profession; though built upon the soundest foundations, and approved by the experience of ages.

§ 4. The common law as an element of culture.—Far be it from me to derogate from the study of the civil law, considered (apart from any binding authority) as a collection of written reason. No man is more thoroughly persuaded of the general excellence of its rules, and the usual equity of its decisions, nor is better convinced of its use as well as ornament to the scholar, the divine, the statesman, and even the common lawyer. But we must not carry our veneration so far as to sacrifice our Alfred and Edward to the manes<sup>2</sup> of Theodosius and Justinian; we must not prefer the edict of the prætor, or the rescript of the Roman emperor, to our own immemorial customs, or the sanctions of an English parliament; unless we can also prefer the despotic monarchy of Rome and Byzantium, for whose meridians the

<sup>2</sup> Manes. This word was misprinted "names" in the Dublin duodecimo edition of 1796, and the mistake was copied in the Second American Edition printed at Boston, 1799, in the same form; from which it has probably been perpetuated in most of our American editions, even down to the last [fourth] edition of Judge Cooley. From some other examples of the same kind to be noted in their place, I am inclined to think that the text of most of our American editions may be traced, with all its errors and false readings, to this pirated Dublin edition. It was apparently from this also that Professor Christian's notes were first printed in this country, as an appendix to each volume of the Commentaries.—HAMMOND.

former were calculated, to the free constitution of Britain, which the latter are adapted to perpetuate.

Without detracting, therefore, from the real merit which abounds in the imperial law, I hope I may have leave to assert, that if an Englishman must be ignorant of either the one or the other, he had better be a stranger to the Roman than the English institutions. For I think it an undeniable position, that a competent knowledge of the laws of that society, <sup>[6]</sup> in which we live, is the proper accomplishment of every gentleman and scholar; an highly useful, I had almost said essential, part of liberal and polite education. And in this I am warranted by the example of ancient Rome; where, as Cicero informs us,<sup>a</sup> the very boys were obliged to learn the twelve tables by heart, as a *carmen necessarium* or indispensable lesson, to imprint on their tender minds an early knowledge of the laws and constitution of their country.

§ 5. **Aim of this lecture.**—But as the long and universal neglect of this study, with us in England, seems in some degree to call in question the truth of this evident position, it shall therefore be the business of this introductory discourse, in the first place to demonstrate the utility of some general acquaintance with the municipal law of the land, by pointing out its particular uses in all considerable situations of life. Some conjectures will then be offered with regard to the causes of neglecting this useful study; to which will be subjoined a few reflections on the peculiar propriety of reviving it in our own universities.

§ 6. **Importance of the study of law.**—And, first, to demonstrate the utility of some acquaintance with the laws of the land, let us only reflect a moment on the singular frame and polity of that land, which is governed by this system of laws—a land, perhaps the only one in the universe, in which political or civil liberty is the very end and scope of the constitution.<sup>b3</sup> This liberty rightly understood, consists in the power of doing whatever

<sup>a</sup> De Legg. 2. 23.

<sup>b</sup> Montesq. Esp. L. l. 11. c. 5.

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<sup>3</sup> **Definition of liberty.**—Blackstone refers here to Montesquieu's famous eulogy upon the English constitution, which begins: "There is one nation in the world which makes political liberty the direct object of its constitution.

the laws permit;<sup>c</sup> which is only to be effected by a general conformity of all orders and degrees to those equitable rules of action, by which the meanest individual is protected from the insults and oppression of the greatest. As, therefore, every subject is interested in the preservation of the laws, it is incumbent upon every man to be acquainted with those at least, with which he is immediately concerned; lest he incur the censure, as well as inconvenience, of living in society without knowing the obligations which it lays him under. And thus much may suffice for persons of inferior condition, who have neither time nor capacity to enlarge their views beyond that contracted sphere in which they are appointed to move. But those on whom nature and fortune have bestowed more abilities and greater leisure cannot be so easily excused. These advantages are given them, not for the benefit of themselves only, but also of the public; and yet they cannot, in any scene of life, discharge properly their duty either to the public or themselves, without some degree of knowledge in the laws.<sup>4</sup> To evince this the more clearly, it may not be amiss to descend to a few particulars.

<sup>c</sup> *Facultas ejus, quod cuique facere libet, nisi quid vi, aut jure prohibetur.* (Its essence is the power of doing whatsoever we please, except what authority or law forbids.) Inst. 1. 3. 1.

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We are about to examine the principles on which it is founded. If these are correct, liberty will be seen there as in a mirror."

But the definition of liberty which immediately follows in our text, though taken from the Institutes of Justinian, is hardly of such liberty as Montesquieu had in mind. Even Bracton, six centuries ago, could see its defects. He says that by this definition even slaves are free, since they have the power of doing whatever the laws permit; and he intimates that the true meaning of the definition can be understood only by disregarding all human laws, and confining our attention to the law of nature. (Lib. 2, c. 6, par. 2, fol. 4 b.) That is, if I understand him correctly, that liberty consists in being limited only by that supreme law which is the expression of abstract right.

As to Blackstone's definition of civil liberty, see *post*, Chapter 1, note 14.—HAMMOND.

<sup>4</sup> **General interest in the study of law.**—When Blackstone began his Oxford lectures on English law (1753), he felt himself under the obligation of justifying a new academic venture. "Advantages and leisure," he said, "are given to gentlemen not for the benefit of themselves only, but also of the public, and yet they cannot, in any scene of life, discharge properly their

§ 7. 1. **To landed proprietors.**—Let us therefore begin with our gentlemen of independent estates and fortune, the most useful as well as considerable body of men in the nation; whom even to suppose ignorant in this branch of learning is treated by Mr. Locke<sup>d</sup> as a strange absurdity. It is their landed property, with its long and voluminous train of descents and conveyances, settlements, entails, and encumbrances, that forms the most intricate and most extensive object of legal knowledge. The thorough comprehension of these, in all their minute distinctions, is perhaps too laborious a task for any but a lawyer by profession; yet still the understanding of a few leading principles, relating to estates and conveyancing, may form some check and guard upon a gentleman's inferior agents, and preserve him at least from very gross and notorious imposition.

§ 8. 2. **To testators.**—Again, the policy of all laws has made some forms necessary in the wording of last wills and testaments, and more with regard to their attestation. An ignorance in these must always be of dangerous consequence, to such as by choice or necessity compile their own testaments without any technical assistance. Those who have attended the courts of justice are the best witnesses of the confusion and distresses that are hereby occasioned in families; and of the difficulties that arise in dis-

<sup>d</sup> Education, § 187.

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duty either to the public or to themselves, without some degree of knowledge in the laws."

Things have moved fast since Blackstone's day, and significant changes have certainly occurred in the educational aspects of law. To begin with, the circle of "gentlemen" who ought to give some thought to laws has been greatly widened: it comprises now all educated persons called upon to exercise the privileges and to perform the duties of citizenship. One need not be a barrister or a solicitor, a member of parliament, a justice of the peace, or even an elector, to take an interest in and feel responsibilities towards laws: all those who pay taxes and own property of any kind, who hire and supply labor, who stand on their rights and encounter the rights of others, are directly concerned with laws, whether they realize it or not. Sometimes a knowledge of law may help directly in the matter of claiming and defending what belongs to one; on other occasions it may enlighten a juror or an elector in the exercise of his important functions; in any case, every member of the community takes his share in the formation of public opinion, which is one of the most potent factors in producing and modifying law.—VINOGRADOFF, *Common-Sense in Law*, 7.



cerning the true meaning of the testator, or sometimes in discovering any meaning at all; so that in the end his estate <sup>[8]</sup> may often be vested quite contrary to these his enigmatical intentions, because perhaps he has omitted one or two formal words, which are necessary to ascertain the sense with indisputable legal precision, or has executed his will in the presence of fewer witnesses than the law requires.

§ 9. 3. To jurors.—But to proceed from private concerns to those of a more public consideration. All gentlemen of fortune are, in consequence of their property, liable to be called upon to establish the rights, to estimate the injuries, to weigh the accusations, and sometimes to dispose of the lives of their fellow-subjects, by serving upon juries. In this situation they have frequently a right to decide, and that upon their oaths, questions of nice importance, in the solution of which some legal skill is requisite; especially where the law and the fact, as it often happens, are intimately blended together. And the general incapacity, even of our best juries, to do this with any tolerable propriety, has greatly debased their authority, and has unavoidably thrown more power into the hands of the judges, to direct, control, and even reverse their verdicts, than perhaps the constitution intended.

§ 10. 4. To magistrates.—But it is not as a juror only that the English gentleman is called upon to determine questions of right, and distribute justice to his fellow-subjects: it is principally with this order of men that the commission of the peace is filled. And here a very ample field is opened for a gentleman to exert his talents, by maintaining good order in his neighborhood; by punishing the dissolute and idle; by protecting the peaceable and industrious; and, above all, by healing petty differences and preventing vexatious prosecutions. But, in order to attain these desirable ends, it is necessary that the magistrate should understand his business; and have not only the will, but the power also (under which must be included the knowledge), of administering legal and effectual justice. Else, when he has mistaken his authority, through passion, through ignorance, or absurdity, he will be the object of <sup>[9]</sup> contempt from his inferiors,

and of censure from those to whom he is accountable for his conduct.

§ 11. 5. To legislators.—Yet further; most gentlemen of considerable property, at some period or other in their lives, are ambitious of representing their country in parliament: and those, who are ambitious of receiving so high a trust, would also do well to remember its nature and importance. They are not thus honorably distinguished from the rest of their fellow-subjects, merely that they may privilege their persons, their estates, or their domestics; that they may list under party banners; may grant or withhold supplies; may vote with or vote against a popular or unpopular administration; but upon considerations far more interesting and important. They are the guardians of the English constitution; the makers, repealers, and interpreters of the English laws; delegated to watch, to check, and to avert every dangerous innovation, to propose, to adopt, and to cherish any solid and well-weighed improvement; bound by every tie of nature, of honor, and of religion, to transmit that constitution and those laws to their posterity, amended if possible, at least without any derogation. And how unbecoming must it appear in a member of the legislature to vote for a new law, who is utterly ignorant of the old! What kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments!

Indeed, it is perfectly amazing that there should be no other state of life, no other occupation, art, or science, in which some method of instruction is not looked upon as requisite, except only the science of legislation, the noblest and most difficult of any. Apprenticeships are held necessary to almost every art, commercial or mechanical: a long course of reading and study must form the divine, the physician, and the practical professor of the laws: but every man of superior fortune thinks himself *born* a legislator. Yet Tully was of a different opinion; “it is ne- [10] cessary,” says he,\* “for a senator to be thoroughly acquainted with the constitution; and this, he declares, is a knowledge of the most extensive nature; a matter of science, of

\* De Legg. 3. 18. *Est senatori necessarium, nosse rempublicam; idque late patet:—genus hoc omne scientiæ, diligentæ, memoriæ est; sine quo paratus esse senator nullo pacto potest.*



diligence, of reflection; without which no senator can possibly be fit for his office."

The mischiefs that have arisen to the public from inconsiderate alterations in our laws, are too obvious to be called in question; and how far they have been owing to the defective education of our senators, is a point well worthy the public attention. The common law of England has fared like other venerable edifices of antiquity; which rash and unexperienced workmen have ventured to new-dress and refine, with all the rage of modern improvement. Hence frequently its symmetry has been destroyed, its proportions distorted, and its majestic simplicity exchanged for specious embellishments and fantastic novelties. For, to say the truth, almost all the perplexed questions, almost all the niceties, intricacies, and delays (which have sometimes disgraced the English, as well as other courts of justice) owe their original not to the common law itself, but to innovations that have been made in it by acts of parliament; "overladen (as Sir Edward Coke expresses it<sup>1</sup>) with provisos and additions, and many times on a sudden penned or corrected by men of none or very little judgment in law." This great and well-experienced judge declares, that in all his time he never knew two questions made upon rights merely depending upon the common law; and warmly laments the confusion introduced by ill-judging and unlearned legislators. "But if," he subjoins, "acts of parliament were after the old fashion penned, by such only as perfectly knew what the common law was before the making of any act of parliament concerning that matter, as also how far forth former statutes had provided remedy for former mischiefs, and defects discovered by experience; then should very few questions in law arise, [11] and the learned should not so often and so much perplex their heads to make atonement and peace, by construction of law, between insensible and disagreeing words, sentences, and provisos, as they now do." And if this inconvenience was so heavily felt in the reign of Queen Elizabeth, you may judge how the evil is increased in later times, when the statute book is swelled to ten times a larger bulk; unless it should be found that the penners of our modern statutes have proportionably better informed themselves in the knowledge of the common law.

<sup>1</sup> 2 Rep. pref.

§ 12. 6. **To the nobility.**—What is said of our gentlemen in general, and the propriety of their application to the study of the laws of their country, will hold equally strong or still stronger with regard to the nobility of this realm, except only in the article of serving upon juries. But, instead of this, they have several peculiar provinces of far greater consequence and concern; being not only by birth hereditary counselors of the crown, and judges upon their honor of the lives of their brother-peers, but also arbiters of the property of all their fellow-subjects, and that in the last resort. In this their judicial capacity they are bound to decide the nicest and most critical points of the law: to examine and correct such errors as have escaped the most experienced sages of the profession, the lord keeper and the judges of the courts at Westminster. Their sentence is final, decisive, irrevocable; no appeal, no correction, not even a review can be had:<sup>5</sup> and to their determination, whatever it be, the inferior courts of justice must conform; otherwise the rule of property would no longer be uniform and steady.

§ 13. a. **As judges.**—Should a judge in the most subordinate jurisdiction be deficient in the knowledge of the law, it would reflect infinite contempt upon himself, and disgrace upon those who employ him. And yet the consequence of his ignorance is comparatively very trifling and small; his judgment may be examined, and his errors rectified, by other courts. But how much more serious and affecting is the case of a superior judge [<sup>12</sup>] if without any skill in the laws he will boldly venture to decide a question, upon which the welfare and subsistence of whole families may depend! Where the chance of his judging right, or wrong, is barely equal; and where, if he chances to judge wrong, he does an injury of the most alarming nature, an injury without possibility of redress!

<sup>5</sup> Upon this rule, still recognized, by which the decisions of the house of lords in their judicial capacity become irrevocable, and cannot be overruled by themselves, but only by a statute of parliament changing the law, see an article by Emory Washburn, *Limitations of Judicial Power* (proposing the same rule as applicable to the decisions of the supreme court of the United States, at least upon constitutional question), published in 1 *Southern Law Review*, N. S., 354, and also in 8 *Journal of Social Science*, 140.—HAMMOND.

Yet, vast as this trust is, it can nowhere be so properly reposed as in the noble hands where our excellent constitution has placed it: and therefore placed it, because, from the independence of their fortune and the dignity of their station, they are presumed to employ that leisure which is the consequence of both, in attaining a more extensive knowledge of the laws than persons of inferior rank: and because the founders of our polity relied upon that delicacy of sentiment, so peculiar to noble birth; which, as on the one hand it will prevent either interest or affection from interfering in questions of right, so on the other it will bind a peer in honor, an obligation which the law esteems equal to another's oath, to be master of those points upon which it is his birthright to decide.

§ 14. (1) **An instance from Roman history.**—The Roman pandects will furnish us with a piece of history not unapplicable to our present purpose. Servius Sulpicius, a gentleman of the patrician order, and a celebrated orator, had occasion to take the opinion of Quintus Mutius Scaevola, the then oracle of the Roman law; but, for want of some knowledge in that science, could not so much as understand even the technical terms, which his friend was obliged to make use of. Upon which Mutius Scaevola could not forbear to upbraid him with this memorable reproof,<sup>g</sup> “that it was a shame for a patrician, a nobleman, and an orator of causes, to be ignorant of that law in which he was so peculiarly concerned.” This reproach made so deep an impression on Sulpicius, that he immediately applied himself to the study of the law; wherein he arrived to that <sup>[13]</sup> proficiency, that he left behind him about an hundred and fourscore volumes of his own compiling upon the subject; and became, in the opinion of Cicero,<sup>h</sup> a much more complete lawyer than even Mutius Scaevola himself.

I would not be thought to recommend to our English nobility and gentry, to become as great lawyers as Sulpicius; though he, together with this character, sustained likewise that of an excellent orator, a firm patriot, and a wise, indefatigable senator; but

<sup>g</sup> Ff. 1. 2. § 43. *Turpe esse patricio, et nobili, et causas oranti, jus in quo versaretur ignorare.*

<sup>h</sup> Brut. 41.

the inference which arises from the story is this, that ignorance of the laws of the land hath ever been esteemed dishonorable in those who are entrusted by their country to maintain, to administer, and to amend them.

But surely there is little occasion to enforce this argument any further to persons of rank and distinction, if we of this place may be allowed to form a general judgment from those who are under our inspection; happy, that while we lay down the rule, we can also produce the example. You will therefore permit your professor to indulge both a public and private satisfaction, by bearing this open testimony; that, in the infancy of these studies among us, they were favored with the most diligent attendance, and pursued with the most unwearied application, by those of the noblest birth and most ample patrimony: some of whom are still the ornaments of this seat of learning; and others at a greater distance continue doing honor to its institutions, by comparing our polity and laws with those of other kingdoms abroad, or exerting their senatorial abilities in the councils of the nation at home.

§ 15. 7. **To the clergy.**—Nor will some degree of legal knowledge be found in the least superfluous to persons of inferior rank; especially those of the learned professions. The clergy in particular, besides the common obligations they are under in proportion to their rank and fortune, have also abundant reason, considered <sup>[14]</sup> merely as clergymen, to be acquainted with many branches of the law, which are almost peculiar and appropriated to themselves alone. Such are the laws relating to advowsons, institutions, and inductions; to simony, and simoniacal contracts; to uniformity, residence, and pluralities; to tithes and other ecclesiastical dues; to marriages (more especially of late) and to a variety of other subjects, which are consigned to the care of their order by the provisions of particular statutes. To understand these aright, to discern what is warranted or enjoined, and what is forbidden by law, demands a sort of legal apprehension; which is no otherwise to be acquired, than by use and a familiar acquaintance with legal writers.

§ 16. 8. **To physicians.**—For the gentlemen of the faculty of physic, I must frankly own that I see no special reason, why they

in particular should apply themselves to the study of the law; unless in common with other gentlemen, and to complete the character of general and extensive knowledge; a character which their profession, beyond others, has remarkably deserved. They will give me leave, however, to suggest, and that not ludicrously, that it might frequently be of use to families upon sudden emergencies, if the physician were acquainted with the doctrine of last wills and testaments, at least so far as relates to the formal part of their execution.

§ 17. Study of the civil and canon law.—But those gentlemen who intend to profess the civil and ecclesiastical laws, in the spiritual and maritime courts of this kingdom, are of all men (next to common lawyers) the most indispensably obliged to apply themselves seriously to the study of our municipal laws. For the civil and canon laws, considered with respect to any intrinsic obligation, have no force or authority in this kingdom; they are no more binding in England than our laws are binding at Rome. But as far as these foreign laws, on account of some peculiar propriety, have in some particular cases, and in some particular courts, been introduced and allowed by our laws, so far they oblige, and no further; their authority being wholly founded upon that permission and adoption. In which we are not singular in our <sup>[15]</sup> notions; for even in Holland, where the imperial law is much cultivated and its decisions pretty generally followed, we are informed by Van Leeuwen,<sup>1</sup> that it receives its force from custom and the consent of the people, either tacitly or expressly given: “for otherwise,” he adds, “we should no more be bound by this law, than by that of the Almain, the Franks, the Saxons, the Goths, the Vandals, and other of the ancient nations.” Wherefore, in all points in which the different systems depart from each other, the law of the land takes place of the law of Rome, whether ancient or modern, imperial or pontifical. And in those of our English courts wherein a reception has been allowed to the civil and canon laws, if either they exceed the bounds of that reception, by extending themselves to other matters, than are permitted to them; or if such courts proceed according to the decisions of those laws, in cases wherein it is controlled

<sup>1</sup> *Dedicatio corporis juris civilis*. Edit. 1663.



by the law of the land, the common law in either instance both may, and frequently does, prohibit and annul their proceedings;<sup>k</sup> and it will not be a sufficient excuse for them to tell the king's courts at Westminster, that their practice is warranted by the laws of Justinian or Gregory, or is conformable to the decrees of the Rota or imperial chamber. For which reason it becomes highly necessary for every civilian and canonist, that would act with safety as a judge, or with prudence and reputation as an advocate, to know in what cases and how far the English laws have given sanction to the Roman; in what points the latter are rejected; and where they are both so intermixed and blended together as to form certain supplemental parts of the common law of England, distinguished by the titles of the king's maritime, the king's military, and the king's ecclesiastical law. The propriety of which inquiry the University of Oxford has for more than a century so thoroughly seen, that in her statutes<sup>l</sup> she appoints, that one of the three questions to be annually discussed at the act by the jurist-inceptors shall relate to the common law; subjoining this reason, "*quia juris civilis studiosos decet haud imperitos esse* [<sup>16</sup>] *juris municipalis, et differentias exteri patrique juris notas habere*" (for students of civil law should not be ignorant of the municipal law nor of the remarkable differences between their own laws and those of foreign nations). And the statutes<sup>m</sup> of the University of Cambridge speak expressly to the same effect.

§ 18. Academic neglect of the common law.—From the general use and necessity of some acquaintance with the common law, the inference was extremely easy with regard to the propriety of the present institution, in a place to which gentlemen of all ranks and degrees resort, as the fountain of all useful knowledge. But how it has come to pass that a design of this sort has never before

<sup>k</sup> Hale Hist. C. L. c. 2. Selden in Fletam. 5 Rep. Caudrey's Case, 2 Inst. 599.

<sup>l</sup> Tit. VII. sect. 2, § 2.

<sup>m</sup> *Doctor legum mox a doctoratu dabit operam legibus Angliæ, ut non sit imperitus earum legum quas habet sua patria, et differentias exteri patrique juris noscat.* (A doctor of laws, having taken his degree, should study the laws of England, that he be not unskilled in those of his own country, nor be ignorant of the essential differences between them and foreign laws.) Stat. Eliz. B. c. 14. Cowell, Institut. in Præmio.

taken place in the university, and the reason why the study of our laws has in general fallen into disuse, I shall previously proceed to inquire.

§ 19. 1. Fortescue's explanation.—Sir John Fortescue, in his panegyric on the laws of England (which was written in the reign of Henry the Sixth), puts<sup>n</sup> a very obvious question in the mouth of the young prince, whom he is exhorting to apply himself to that branch of learning; "why the laws of England, being so good, so fruitful, and so commodious, are not taught in the universities, as the civil and canon laws are?" In answer to which he gives<sup>o</sup> what seems, with due deference be it spoken, a very jejune and unsatisfactory reason; being in short, that "as the proceedings at common law were in his time carried on in three different tongues, the English, the Latin, and the French, that science must be necessarily taught in those three several languages; but that in the universities all sciences were taught in the Latin tongue only"; and therefore he concludes, "that they could not be conveniently taught or studied in our universities." But without attempting to examine seriously the validity of this reason (the very shadow of which by the wisdom of your late constitutions is entirely taken away),<sup>6</sup> we perhaps may find out a better, or at least a more plausible account, why the study of the municipal laws has been banished from these seats of science, than what the learned chancellor thought it prudent to give to his royal pupil.

§ 20. 2. Mediæval teaching of common law.—[17] That ancient collection of unwritten maxims and customs, which is called the common law, however compounded or from whatever fountains derived, had subsisted immemorially in this kingdom; and, though

<sup>n</sup> C. 47.

<sup>o</sup> C. 48.

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<sup>6</sup> This refers, no doubt, to stat. 4 Geo. II, c. 26, A. D. 1730 (Proceedings in Courts of Justice), by which all proceedings in law were ordered to be recorded as well as carried on in English (see 3 Comm. 322); and likewise to the university statutes establishing the Vinerian professorship, which required a complete course of lectures on the laws of England and in the English language, consisting of sixty lectures at the least yearly.—HAMMOND.



somewhat altered and impaired by the violence of the times, had in great measure weathered the rude shock of the Norman Conquest. This had endeared it to the people in general, as well because its decisions were universally known, as because it was found to be excellently adapted to the genius of the English nation. In the knowledge of this law consisted great part of the learning of those dark ages; it was then taught, says Mr. Selden,<sup>p</sup> in the monasteries, in the universities and in the families of the principal nobility. The clergy in particular, as they then engrossed almost every other branch of learning, so (like their predecessors, the British Druids<sup>q</sup>) they were peculiarly remarkable for their proficiency in the study of the law. *Nullus clericus nisi causidicus* (no clergyman who is not a lawyer also, or, every clergyman a lawyer), is the character given of them soon after the conquest by William of Malmesbury.<sup>r</sup> The judges, therefore, were usually created out of the sacred order,<sup>s</sup> as was likewise the case among the Normans;<sup>t</sup> and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated *clerks* to this day.

§ 21. 3. *Vogue of the civil law.*—But the common law of England, being not committed to writing, but only handed down by tradition, use, and experience, was not so heartily relished by the foreign clergy; who came over hither in shoals during the reign of the Conqueror and his two sons, and were utter strangers to our constitution as well as our language. And an accident, which soon after happened, had nearly completed its ruin. A copy of Justinian's pandects, being newly<sup>u</sup> discovered at Amalfi, [18] soon brought the civil law into vogue all over the west of Europe, where

<sup>p</sup> In Fletam. 7. 7.

<sup>q</sup> Cæsar de Bello Gal. 6. 12.

<sup>r</sup> De gest. reg. l. 4.

<sup>s</sup> Dugdale Orig. Jurid. c. 8.

<sup>t</sup> *Les juges sont sages personnes et autentiques,—sicome les archevesques, evsques, les chanoines des eglises cathedraulx, et les autres personnes qui ont dignitez in sainte eglise; les abbez, les prieurs conventaulx, et les gouverneurs des eglises, etc.* Grand Coustumier, c. 9. (The judges are persons of wisdom and authority—such as archbishops, bishops, canons of cathedral churches, and other dignitaries of holy church, the abbots, priors of convents and church governors, etc.)

<sup>u</sup> Circ. A. D. 1130.

before it was quite laid aside<sup>w</sup> and in a manner forgotten; though some traces of its authority remained in Italy<sup>x</sup> and the eastern provinces of the empire.<sup>y</sup> This now became in a particular manner the favorite of the popish clergy, who borrowed the method and many of the maxims of their canon law from this original.

<sup>w</sup> LL. Wisigoth. 2. 1. 9.

<sup>x</sup> Capitular. Hludov. Pii. 4. 102.

<sup>y</sup> Selden in Fletam. 5. 5.

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7 Revival of study of Roman law.—The revival of the study of Roman law and the rise of the Bologna school were long erroneously attributed to the alleged discovery of a manuscript copy of the pandects at the sack of Amalfi by the Pisans in 1137. The study of Roman law, however, was pursued with ardent enthusiasm long before 1137, and the sack of Amalfi in that year by the Pisans is not an absolutely certain historical event. The manuscript in question was well known to the glossators of the middle ages and was referred to as the *Littera Pisana*. It was afterwards, in 1406, carried to Florence on the conquest of Pisa, and is now known as the *Pandectæ Florentinæ*. It is a very ancient and valuable copy of the entire Pandects, and the only one now extant that dates before the age of the glossators.—HUNTER, Roman Law, 101.

The scholarly and interesting little book by Professor Paul Vinogradoff, Corpus Professor of Jurisprudence in the University of Oxford, entitled "Roman Law in Mediæval Europe," will give the student, in brief compass, an illuminating account of this subject. On the rise of the school at Bologna, he says (p. 44): "The immediate occasion for the creation of the great Bolognese school was provided by the endeavors of the famous Marchioness Matilda. As a staunch supporter of Gregory VII, she wanted to counterbalance the influence of the Imperialistic school in Ravenna by establishing a center of studies in Roman law that would act on the papal side. The first exponent of laws in Bologna had been a certain Pepo, who taught in the last quarter of the eleventh century. He is mentioned as a doctor of laws in a notable judgment delivered in the court of Beatrice, Duchess of Tuscany, in 1076, in which the digest was referred to and utilized for the decision. But the man with whose literary activities the rise of the Bologna law school has been traditionally connected, is, of course, Irnerius or Guarnerius. Originally a teacher of arts, he went to Rome at the instigation of the Marchioness Matilda, and, after having studied there for some time, began to lecture on law in Bologna. This happened towards the end of the eleventh century, perhaps about 1088.

"I need not dwell on the brilliant success of this teaching, and on the external circumstances attending the development of the Bologna school. It is well known that it soon became the leading university of the middle ages

The study of it was introduced into several universities abroad, particularly that of Bologna; where exercises were performed, lectures read, and degrees conferred in this faculty, as in other branches of science: and many nations on the continent, just then beginning to recover from the convulsions consequent upon the overthrow of the Roman empire, and settling by degrees into peaceable forms of government, adopted the civil law (being the best written system then extant), as the basis of their several constitutions; blending and interweaving it among their own feudal customs, in some places with a more extensive, in others a more confined authority.\*

§ 22. 4. The civil law in England.—Nor was it long before the prevailing mode of the times reached England. For Theobald,

\* Domat's Treatise of Law. c. 13. § 9. Epistol. Innocent. IV. in M. Paris ad A. D. 1254.

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for the study of law, and that it attracted thousands of undergraduates from all countries of Europe.

"I should like to characterize briefly the spirit of this revival of legal studies. It presents at bottom an application to law of the method which was employed by the new scholarship of Western Europe for the treatment of all problems of theology and science—the so-called scholastic method. The dark centuries preceding the year 1000 A. D., when learning meant merely the salvage of fragments of ancient knowledge, were followed by a period when organization again appeared. The great instrument for the advancement of learning at that time was the dialectical process by which formal and universal logic analyzes conceptions and constructs syllogisms. The permeation of the insufficient, fragmentary, classical texts by overwhelming logic was, in a sense, a masterly achievement, and the lawyers had more than their fair share in this work. While their fellows in the school of Divinity operated on Scripture and Canonic tradition, and the masters of arts struggled, by the help of distorted versions of Aristotle, with the rudiments of metaphysics, politics, and natural science, the lawyers exercised their dialectical acumen on a material really worthy of the name, namely, on the contents of the *Corpus Juris*. And as legal reasoning largely consists of dialectical analysis and co-ordination, they were able to produce remarkable results even at this early stage."

Of this event in human history Professor Maitland (*English Law and the Renaissance*, 24) has said: "A history of civilization would be miserably imperfect if it took no account of the first new birth of Roman law in the Bologna of Irnerius. Indeed, there are who think that no later movement—not the Renaissance, not the Reformation—draws a stronger line across the annals of mankind than that which is drawn about the year 1100 when a human science won a place beside theology."

a Norman abbot, being elected to the See of Canterbury,<sup>a</sup> and extremely addicted to this new study, brought over with him in his retinue many learned proficients therein; and among the rest Roger, surnamed Vacarius,<sup>b</sup> whom he placed in the University of Oxford,<sup>c</sup> to teach it to the people of this country. But it did not meet with the same easy reception in England, where a mild and rational system of laws had been long established, as it did upon the Continent; and, though the monkish clergy (devoted to the will of a foreign primate) received it with eagerness and zeal, yet the laity who were more interested to preserve the old constitution, and had already severely felt the effect of many Norman innovations, continued wedded to the use of the common law. King Stephen immediately pub-<sup>[19]</sup>lished a proclamation,<sup>c</sup> forbidding the study of

<sup>a</sup> A. D. 1138.

<sup>b</sup> Gervas. Doroborn, Act. Pontif. Cantuar. col. 1665.

<sup>c</sup> Rog. Bacon. citat. per Selden in Fletam. 7. 6. in Fortesc. c. 33, and 8 Rep. Pref.

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8 Vacarius.—Vacarius has of late years received considerable attention from scholars. There are studies of his work by Liebermann, 11 English Historical Review, 305; 2 Rashdall, Universities of Europe, 335; 1 Pollock and Maitland, History of English Law, 97; Maitland, Law Quart. Rev., April, 1897, and 3 Collected Essays, 87; Holland, Vacarius, in the Dictionary of National Biography. Professor Vinogradoff (Roman Law in Mediæval Europe, 51) says: "The best way to obtain some insight into the intellectual work of the glossators is, I think, to examine the teaching of one of them in some concrete cases. I should like from this point of view to dwell somewhat on the doctrine of Vacarius, who, although by no means the most brilliant or influential representative of the school, deserves our special attention as a pioneer of the new learning in England. The external facts of his career are sufficiently known. He studied Lombard and canon as well as civil law, and has written on all three branches of contemporary jurisprudence, but he was principally concerned with the teaching of Roman law, and may be considered a fair representative of the earlier Bolognese jurists. He was attracted to England by Archbishop Theobald, taught in Canterbury and, according to Gervase's testimony, in Oxford. He was silenced for some time by Stephen, either because his teaching was considered dangerous to the authority of native legal custom, or because Stephen was jealous of the success obtained by a clerk of Archbishop Theobald, who maintained a hostile attitude towards him. Vacarius must have resumed his professional activity after an interruption of some years, and, in any case, his doctrinal influence left a deep trace in Oxford, where the students of law came to be styled *pauperista*, because their principal text-book was Vacarius' Book of Poor Scholars (*Liber pauperum*)."

the laws, then newly imported from Italy; which was treated by the monks<sup>d</sup> as a piece of impiety, and, though it might prevent the introduction of the civil law process into our courts of justice, yet did not hinder the clergy from reading and teaching it in their own schools and monasteries.<sup>9</sup>

<sup>d</sup> Joan. Sarisburiens. Polycrat. 8. 22.

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<sup>9</sup> **Roman law in England.**—1. Civil law did not become a constituent element of English common law acknowledged and enforced by the courts, but it exercised a potent influence on the formation of legal doctrines during the critical twelfth and thirteenth centuries, when the foundations of common law were laid. Indeed, the teaching of Roman law inaugurated by Vacarius seemed for some time to carry everything before it. No school was more popular in Oxford at the close of the twelfth century than the school of legists. The tide was stemmed to some extent by powerful agencies acting in other directions. The church realized that its predominance was threatened by the spread of secular learning in the field of law; canon law was more sharply differentiated from civil jurisprudence, and it began to oppose the latter in its striving towards juridical supremacy. A bull of Honorius III (*Super Speculam*, A. D. 1217), and another of Innocent IV (*Dolentes*, A. D. 1259) were directed against the teaching of Roman law in Paris and in "neighboring countries." On the other hand, there grew up a national opposition against cosmopolitan doctrines which finds a definite expression in many facts. In 1234 Henry III forbade the teaching of civil law in London, while in 1236 the great men of England, assembled at Merton, declared against any modification of English custom by foreign views in the treatment of bastardy (*Nolumus leges Angliæ mutari*).

Nevertheless, the teaching of Roman law was never discontinued at the principal seats of learning in England. The canonists themselves frequently referred to its sources, as is shown, for instance, by the Golden Text-book (*Summa aurea*) of the Oxford professor, William of Drogheda (thirteenth century). The study of Roman law in Cambridge can be traced from this very thirteenth century, which witnessed so many declarations of the powers that be against its introduction. It was used at both universities and in other minor centers of learning as a kind of "general jurisprudence," and, as such, it exerted considerable, though indirect, influence on the practice of common law.

Turning to the results of this study in England, we have to notice, firstly, its bearing on the principal juridical doctrine evolved during the twelfth century, namely, on the doctrine of seizin, and the means of protecting it. The age of Henry II has left a profound mark in this respect by formulating the point of view of possession, and providing adequate remedies for its protection in the king's courts. As we have seen, the French lawyers were much concerned with this aspect of jurisprudence in the thirteenth century, and so were the English in the twelfth. A point in which the influence of Roman law is clearly traceable concerns the action itself by which possession was



§ 23. 5. Conflict between the civil and common law.—From this time the nation seems to have been divided into two parties;

protected. The famous writ of Novel Disseisin—introduced by Henry II's lawyers—appears as a secular variation of the canonistic action of spoliation (*actio spolii*), and this again has evidently sprung from the Roman interdict "*unde vi*."

To what extent the English view of seizin was colored by Roman teaching on possession may also be gathered among other things from Glanvill's treatment of the gage of land. He admits of the transfer of land from the debtor to the creditor with the object of providing a security for debt and interest, but he fails to recognize any distinct "estate" of the creditor in land transferred in such a way. The possession of the debtor remains legally intact, and the relation of the creditor is considered as a mere matter of fact devoid of juridical essence; it may be interrupted by the legal tenant, should the latter not be afraid of exposing himself to reprisals in the shape of a personal action.

Probably at the same time with Glanvill's treatise, William Longchamp, a Norman peasant who was to become Bishop of Durham and Regent of England in the reign of Richard Cœur-de-Lion, composes his Practice of Laws and Decrees (*Practica legum et decretorum*). It is a short manual of procedure based on civil as well as on canon law, and intended for use primarily in the French possessions of the English crown. As the career of the writer demonstrates, however, there was no sharp cleavage between the English and the French parts of the Plantagenets' dominions. At the fair of Lagny in Bresse, which is casually mentioned in the tract, English merchants were so numerous that one of the streets got its name from them (*vicus Anglicus*).

The teaching of the *practica* may well have influenced contemporary English lawyers on one or two important occasions. There was, for instance, a great controversy among the jurists of the time about the framing of an action. An authoritative glossator, Placentinus, held that it was not necessary to formulate an action in accordance with strict terms; the plaintiff might be allowed to state his claim in general expressions. Other doctors, such as Johannes Bassianus and Azo, disputed this and required the presentation of claims according to technical forms. William Longchamp's "practice" urges the necessity of definite formulæ of actions, and it may be considered in this respect as introducing the theory of strict writs adhered to by common law.

2. The most important English contribution to Romanesque jurisprudence, however, is contained in Bracton's work on the Laws and Customs of England. Although this famous book was primarily written for the instruction of practical lawyers, and its most valuable chapters are based on the case law of Henry III's age, it opens with a comprehensive introduction chiefly drawn from Azo's manuals of the Institutes and of the Code, a general analysis of actions. The very fact that an English justice should have felt the necessity of such a general introduction is extremely noteworthy.

Nor is his work in this line by any means a contemptible one. I do not propose to determine by exact marks what the school value of such work may

the bishops and clergy, many of them foreigners, who applied them-

be nowadays. But what we can do is to notice that Bracton's aim was as different from that of his model, the Bolognese doctor, as the means at his disposal were peculiar. He lived in a country which could not be compared with Italy in its standard of general culture, and especially in the wealth of classical tradition and scholarship. The Bolognese glossator provided a remarkable exegesis of the Institutes and of Justinian's Code; he comments on his texts, illustrates and explains them, but does not remodel their doctrine—he speaks of *patria potestas*, of slavery, of the *Lex Aquilia*, of the interdicts, as if they were institutions which still obtained in the Italian practice of his time; in doing this he does not consider modern practice, and he stands very near our own expositors of Roman law: we might almost be induced to treat him as one of ourselves, as a citizen of our present republic of letters. Now such a standard would be entirely out of place in regard to Bracton. He does not want to state Justinian's teaching more or less exactly, but compiles Institutes for the English law of his time, and he attempts to build up these English Institutes with the help of Roman materials. There were no better materials at his disposal; there was no body of doctrine which could show better the general notions with which legal thought must deal, and when we think of the place still occupied by the teaching of Roman law in European schools, we shall not wonder at the course followed by Bracton. In fact, he attempted to do in a very systematic manner what his French contemporaries were doing in a much more casual fashion.

Some of the general principles expounded in the Institutes and in the commentaries to them might serve as an illuminating guide for English legal thought, while features entirely foreign to English life had to be removed. Thus the Introduction was undoubtedly intended to strengthen native legal doctrine by the infusion of legal conceptions of a high order drawn from the fountain-head of civilized and scientific law. But there might also be a second aim, namely, to influence the material development of English legal doctrine, to provide it with clues for the solution of difficult problems, and to improve on the existing practice of the courts. Bracton aimed chiefly at the first of these results, although in some cases we may notice that he had in view to influence substantive law itself.

Let us turn, however, to Bracton's own work and take as examples some of its initial speculations.

3. On the very threshold he encounters an inevitable difficulty of his undertaking, and striking contrasts between English law and Roman law cause him to reflect on the great question as to the modes by which a legal rule is sanctioned and stated. Civil law as collected by Justinian and expounded by Azo was a definite body of doctrine sanctioned by Imperial authority, and consigned to an authorized written version. Now, does English law afford a parallel in this respect? Where is the sanction of English law to be found? How is one to recognize its rules? Both Glanvill and Bracton have been reflecting on these questions. It is not absurd to give English unwritten rules the designation of law, because they proceed from a command of the sovereign,



selves wholly to the study of the civil and canon laws, which now

the king, are established by the consent of the great men, and imply a promise of obedience (*sponsio*) on the part of the commonwealth. Thus far Bracton, while Glanvill is not only shorter but one-sided—he deduces the authority of English law from the famous saying: *quod principi placuit legis habet vigorem*—a saying which was not in keeping with the political tendencies of Simon de Montfort's time, and therefore put aside by Bracton. In what sense can it be said, however, that the consent of great men is an element of English law? At first sight this may be true of Statutes and Assizes, but hardly of the decisions of judges on which the greater part of common law rests. But, as Statutes and Assizes are written law, they do not come within the scope of the argument at all. It seems that the body of magnates, of great men whose consent appears necessary for the making of the law in England, is assumed to be identical with the body of the *Curia Regis*, from which all jurisdiction proceeds. To its authority the sanction of English legal rules is thus ultimately referred, although it remains always expressed in vague Romanesque terms. We can see that a difficulty is felt as to the power of single judges to lay down the law, and it is settled in a way which reminds us of Beaumanoir. The common-law rules established by general custom ought to proceed from the whole court of the king, and their repeal and alteration is the affair of the whole court. In case of doubt recourse should be had to this court, which represents the *maiores*, the magnates of the kingdom. Undoubtedly some of the great men, the judges and justiciars, one might be inclined to say, do not act up to this general doctrine, but lay down decisions as if their opinions were sufficient to constitute law. This is altogether reprehensible. The single judge is in the position of interpreter of the law, however, and though he is precluded from altering it at his wish, he may not only follow it when it is clear, but also improve upon it, an improvement not being an alteration. This reasoning is partly suggested by Azo's teaching as to the interpretation of law, and as to legal fictions by which the meaning of rules is widened, but it goes further both in wording and spirit, and though strained from a purely logical point of view, it very aptly opens a work which has to combine and contrast civil law and English common law.

If the difficulty as to the authority and sanction of common law may be easily overcome, the second objection to the common form of English doctrine is recognized to be grounded on serious considerations. There is no authorized version of English legal rules. This is felt both by Glanvill and by Bracton. Very material drawbacks follow from the absence of such a version; law is perverted by the ignorance of beginners who ascend the bench before they have mastered the elements of legal lore; it is also perverted by the overbearing conceit of people in authority, who treat it according to their personal views and inclinations. It is to remedy these very drawbacks that both Glanvill and Bracton set out to perform their task, the first in a perfunctory and thoroughly practical manner, the other with a great store of authorities at his disposal. Bracton's work may be called a private treatise on the common

came to be inseparably interwoven with each other; and the nobility

law in its relation to general jurisprudence, and this literary departure remains significant for the further course of English legal studies.

4. There follow generalities about *justitia* and *jus*. The Bolognese doctor starts from the definition of justice as given in the Digest: "justice is a constant and permanent will to allow everyone his right" (*justitia est constans et perpetua voluntas jus suum cuique tribuendi*). According to scholastic method he takes up every word in the sentence and expands it by interpretation so as to define the different attributes and conditions of justice. In this way he draws attention to the fact that justice may be considered as a divine institution, deciding once for all what is right and what is wrong. Or else it may be considered from the point of view of humanity. In this case the stress would lie on the will of man to do right, and not on external facts. Immutability and permanency are necessary attributes of justice. Variations or changes would destroy its very essence. If a legal privilege is first conceded and afterwards denied, this is in no way a change of justice, but a consequence of a change of acts. Bracton's summary of this section cuts short many of the philological distinctions. He finds himself confronted with a peculiarity of English phraseology, namely, with the absence of an equivalent in English to the word *jus*. Though writing in Latin, he does not want to make his teaching dependent on a foreign use of terms, and therefore he introduces, though very shortly, the terms *lex* and *consuetudo*—law and custom—explaining that they correspond to *jus*, which in this case would be rendered by the English word "law." But, we may add, the proper rendering of *jus* would not always be "law," the objective order of things and duties, as one might say, but sometimes "right," the subjective sphere, what I claim as my own against my neighbors. If Bracton had been making a translation, he would have found himself obliged to observe this variation of meaning. As it is, he uses Latin, although a Latin addressed to English readers, and this gives rise to what seems at first sight a gross blunder. Azo, talking of *jus* as "law," ridicules the idea that there could be the law of Peter or John, of a lion or of a donkey. Bracton, evidently speaking of *jus* as "right," turns the same sentence to positive account, and admits the right (*jus*) of Peter and of Paul. "The right of a lion or of a donkey" would, however, sound quaint enough, and it would have been better if Bracton had not gone so far on the subjective track. His meaning seems to have been, that we have to consider varieties of right derived from claims of divers beings and of claims in respect of divers things.

He differs from Azo yet another time when the contrast between *proprietas* (ownership) and *bonorum possessio* (possession) makes it necessary for him to notice a material difference in the use of these fundamental conceptions in Rome and in England. While the Roman lawyer draws a sharp distinction between ownership as the genuine and complete right to a thing, and possession as the protected enjoyment of it, the English lawyer merges both ideas in the intermediate and relative conception of seizin. A man is seized of a thing, more frequently of land, and his seizin must be protected by the courts until

and laity, who adhered with equal pertinacity to the old common

a better ground of seizin has been found. B, the eldest son of A, may be his right heir, but if he did not obtain seizin on A's death, and C, the second son, has done so, C must be *prima facie* protected because he is already in seizin. He may be ousted only if B challenges his title and proves the truth of his contention. Bracton quite appropriately called attention to this fundamental difference of legal principle in a marginal note which eventually crept into the text itself, and destroyed the smooth course of Roman doctrine as set forth in Azo's manual.

There follows a section on the law of nature, the *jus civile* and the *jus gentium*. Azo, concerned with the interpretation of Roman texts as they stand, treats of the general philosophical problem of the law of nature as opposed to the positive law of states. But he also explains the purely Roman distinction between *jus civile*—the law of the Roman people—and the *jus gentium*—private law based on the legal customs of different nations. Bracton gives the substance of Azo's teaching on the law of nature, noticing the two possible meanings of the expression—as derived from the nature of live creatures, of animals as well as men, and as representing the rational concepts of man's nature. But he combines this second idea with that of the *jus gentium*, not taking much care to discover the historical differences between such reasonable rules and those imposed by the *jus civile*. In this respect he is undoubtedly inaccurate, but we can hardly reproach him, when we remember that even Roman jurists did not always distinguish clearly between the bidding of the *jus naturale* and the *ratio naturalis*, on which the rules of the *jus gentium* were supposed to be based. As for the *jus civile*, Bracton seeks to appropriate the expression in a way characteristic of mediæval usage. He has no interest in the original law of the Roman state, the *jus* of the Quirites, but there is one kind of law existing in England which might be designated by a reference to *jus civile*. This is the customary law of boroughs—*jus civitatum*.

5. The contrast between the professor expounding antiquarian doctrines, and the judge fitting English facts into a Roman frame, is especially striking in the treatment of the law of persons. Bracton follows Azo as to the principal and very important generalization, "all men are either free or slaves." But such a generalization had to be modified both in ancient Rome and in mediæval Italy or England. Azo proceeds to give the necessary commentary from the point of view of ancient Rome. He treats of *statu liberi* and of *adscripticii* to show that it is possible to arrange these subordinate groups under the chief headings of free and unfree. He does not deal with the Italian world in which he lives, nor is he troubled by the fact that neither the *statu liberi* nor the *adscripticii* are known to his Bolognese or Florentine contemporaries. The English lawyer proceeds on an entirely different course. The *statu liberi* and *adscripticii* are used by him to illustrate actual English conditions, although they lose much of their antiquarian genuineness, thanks to this process of adaptation. Of the free (*liberi*) it is needless to speak at length, for they appear in England under the same name. Villeins are equated with slaves—

law: both of them reciprocally jealous of what they were un-

a far-reaching assumption. As the *adscripticii* represent a kind of intermediate stage between free and serf, their counterpart would be the *villein socmen* of ancient demesne, and, to some extent, the freemen holding in villeinage. As for the *statu liberi*, Bracton employs this term to denote serfs enjoying a state of liberty, as for example, serfs dwelling as freemen on free soil. In this case they are *prima facie* protected by law, and any person claiming them as villeins must bring an action (*de nativo habendo*), and assume the burden of proof in court. This is, of course, no Roman doctrine; it is the adaptation of a Roman term to English distinctions.

At the end of the sections treating of the law of persons Bracton returns to the problem of slavery, and lays stress on the fact that slaves are not completely in the power of their lords. He finds support for this contention in the later Roman doctrine which, through the influence of Stoicism and Christianity, granted some protection to the slave against exceptional cruelty on the part of the master. From the time of the Antonines, a master treating his slave in an intolerable manner could be constrained by the magistrates to sell him. It was declared that the homicide of a slave by his master was a criminal offense. Azo took particular notice of these limitations of the power of masters over slaves, and adduced as a reason for the interference with the right of property in slaves, the importance for the commonwealth of preventing owners from misusing their property (*expedit reipublicæ ne quis re sua male utatur*). Bracton not only indorses the doctrine, but adds an important concrete feature which shows that in this case he did not merely copy foreign learning, but was pleading for a certain point of view before English jurists. He defines the "intolerable injury" as a destruction by the master of the serf's waynage, that is, of his plow team which, as we know, was safe from royal amercement. There are precedents for this view in Norman legal usage, forbidding the taking away of the rustic's waynage by the lord; and, of course, in the fact that in Anglo-Saxon times the predecessor of the villein, the ceorl, was not a slave at all, but had a standing against his lord in the courts of law. But at the time when Bracton wrote, the defense of waynage did not tally with the surrender of the old rights of free cultivators in other respects. Bracton himself, representing the general drift of the jurisprudence of his time, had maintained that there was no difference between a serf and a villein. The reservations, he wished to draw in regard to the right of waynage, are akin to the vacillations of his brother judges in cases where there was at stake the right of men holding in villeinage to appeal to the king's courts for remedies against their lords. After some contradictory decisions, the courts ended by applying strictly the rule that villeins have no civil claims against their lords, and that, in law, what is held by the villein, is owned by the lord. At the same time the reservation as to waynage disappears. Bracton's teaching on villeinage is thus very instructive, not merely from the point of view of the evolution of villein tenure, but also for estimating the practical influence of Romanesque learning on him and other English lawyers. Though the status of villeins was undoubt-

acquainted with, and neither of them perhaps allowing the oppo-

edly developed chiefly by the pressure of economic and political forces, it is clear that the study of Roman precedents played an important part in the shaping of its legal rules. To put it in another way, the historical growth of English villeinage did not necessarily involve its treatment on the basis of serfdom or slavery. But the infusion of Roman doctrine made the legal treatment of villeinage harder than might have been the case otherwise, while the partial reservations introduced by the emperors and admitted by Bracton did not carry much weight in practice.

Another case, where the study of Roman doctrine has left a distinct trace on English legal thought, is the well-known distinction between real and personal property. We may observe the actual origin of this famous distinction which still holds good at the present day. The root of it lies in the teaching of Roman lawyers on actions. There are real actions—*actiones in rem*—which aim at obtaining the property of a certain thing, and personal actions, urging certain claims against persons, requiring them to do something, to give something, or to forbear from something. The question of obtaining a specific object does not arise in the latter case. It is the value claimed that is of importance. So far, the teaching is common to both Roman and English lawyers. But Bracton and his fellow-judges, working on this basis, went a step beyond their Roman guides. They used the distinction between actions to differentiate between different kinds of property. Land and interests connected with it appeared to them to be naturally the object of real actions, because here the claim was directed to a definite thing and to nothing else. On the other hand, chattels were, as a rule, claimed in the same way as rights; for example, as the performance of some labor or office. The aim of the action was to obtain either the thing or service, or its equivalent from the person under obligation. The distinction became fundamental in the English legal system. Again, a striking example of the influence of Roman distinctions is afforded by the treatment of leases for terms of years. Bracton and thirteenth century judges consider the lessees not as tenants having an estate of freehold, but as mere *usufructuarii*. This is altered to a great extent by later doctrine, but the initial classification has left its traces on the law of the subject.

Bracton and his compeers had especially much to learn from the Romans, and the glossators who expounded their doctrines, on the subject of obligations generated by contracts and torts. The exceedingly active economic intercourse of the Roman state in its most prosperous days had been utilized by keen jurists to frame a doctrine conspicuous, even in the domain of classical law, for its subtlety and dialectical resourcefulness. Part of this vast material had to be left on one side by Bracton, while other parts were adopted more for the sake of possible eventualities than for the immediate requirements of practice. Bracton appropriates the fundamental idea that a nude pact, a convention bereft of particular form, does not constitute an obligation enforceable at law. He cites a couple of doggerel lines intended as an assistance



site system that real merit which is abundantly to be found in

to the beginner in remembering what could serve as vestments to pacts. "*Re, verbis, scripto, consensu, traditione, junctura vestes sumere pacta solent.*"

The first three species apply to real contracts—such as, e. g., deposit; to verbal contracts—the Roman solemn promise (*stipulatio*), or an equivalent of it in writing, the deed under seal, which came to be the principal mode of contracting in English law; the fourth relates to consensual contracts—sale and hire by mutual consent, although in this respect English law could not be made to fit exactly the Roman view. Besides these Azo mentions two modes of clothing a bargain which he describes in quaint language. Whereas in the first four cases the contract is born vested, there are two occasions when it is bare at the moment of birth; but once having seen the light, it begins to look about for suitable clothing, and, eventually, it may find furs which will protect it from frost and decay; this happens should delivery (*traditio*) supervene, or a condition which did not exist at the moment when the convention was made, but which, if it appears later on, renders it perfect and provides it with a vesture. All this is appropriated by Bracton in a slightly modified form, and this "reception" of the Roman doctrine provides a starting-point for subsequent development. First, the ecclesiastical courts and the chancery, later on common-law courts, took part in the development of a doctrine concerning obligations which took account of informal agreements, and laid down rules as to their validity and enforcement.

On the whole it is clear that it is impossible to estimate the influence of Roman law in England by references to paragraphs of the Digest or of the Codex. If we want to find definite traces of it we have to look out not for references but for maxims, some of which, besides, had passed through the medium of canon law. The only real test of its character and extent is afforded by the development of juridical ideas, and in this respect the initial influence of Roman teaching on English doctrines will be found to be considerable. On many subjects the judges and legal writers of England were, as it were, prompted by their Roman predecessors, and this intercourse of ideas is nowhere as conspicuous as in the frequent cases when English lawyers did not simply copy their Roman models, but borrowed suggestions from them in order to develop them in their own way.

*Authorities:* Pollock and Maitland, History of English Law, I, II; W. S. Holdsworth, History of English Law, II, III, 1909; Stubbs, Lectures on Mediæval and Modern History; Selden, Dissertatio ad Fletam; Maitland, Bracton's Notebook, 1888; Marcel Fournier, L'Eglise et le Droit Romain au XIII Siècle, in the Nouvelle Revue Historique de Droit Français et Etranger, 1890; E. Caillemer, Le Droit Civil dans les Provinces Anglo-Normandes au XII Siècle, 1883; Glanvill, De Legibus et Consuetudinibus Angliæ; Bracton, De Legibus Angliæ; Güterbogh, Henricus de Bracton und Sein Verhältniss zum Römischen Recht; F. W. Maitland, Bracton and Azo; Selden Society, VIII, 1894; P. Vinogradoff, Villeinage in England, 1892; James Williams, Latin Maxims in English Law, Law Magazine and Review, 1895, August.—VINOGRADOFF, Roman Law in Mediæval Europe, 84.



each.<sup>10</sup> This appears, on the one hand, from the spleen with which the monastic writers\* speak of our municipal laws upon all occasions; and, on the other, from the firm temper which the nobility showed at the famous parliament of Merton: when the prelates endeavored to procure an act, to declare all bastards legitimate in case the parents intermarried at any time afterwards; alleging this only reason, because holy church (that is, the canon law) declared such children legitimate: but "all the earls and barons (says the parliament roll<sup>†</sup>) with one voice answered, that they would not change the laws of England, which had hitherto been used and approved." And we find the same jealousy prevailing above a century afterwards,<sup>‡</sup> when the nobility declared with a kind of prophetic spirit, "that the realm of England hath never been unto this hour, neither by the consent of our lord the king and the lords of parliament shall it ever be, [<sup>20</sup>] ruled or governed by the civil law."<sup>§</sup> And of this temper between the clergy and laity many more instances might be given.

While things were in this situation, the clergy, finding it impossible to root out the municipal law,<sup>||</sup> began to withdraw themselves

\* *Idem, Ibid.* 5. 16. Polydor, Vergil, Hist. l. 9.

† Stat. Merton. 20 Hen. III. c. 9 (Bastardy, 1235). *Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ.*

‡ 11 Ric. II. (1388).

§ Selden. Jan. Anglor. l. 2. § 43, in Fortesc. c. 33.

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<sup>10</sup> **Role of the clergy in mediæval law.**—Blackstone's picture of a nation divided into two parties, "the bishops and clergy" on the one side contending for their foreign jurisprudence, "the nobility and the laity" on the other side adhering "with equal pertinacity to the old common law," is not true. It is by "popish clergymen" that our English common law is converted from a rude mass of customs into an articulate system, and when the "popish clergymen," yielding at length to the pope's commands, no longer sit as the principal justices of the king's court, the creative age of our mediæval law is over. Very characteristic of our thirteenth century is it that when there is talk of legitimation *per subsequens matrimonium*, the champion of the common law is a canon of St. Paul's. William Raleigh, who is going to be a bishop and somewhat of a martyr, whose name is to be joined with the names of Anselm and Becket. These royal clerks have two sides; they are clerks, but they are royal. POLLOCK & MAITLAND, 1 Hist. Eng. Law (2d ed.), 133.

<sup>11</sup> Blackstone uses the term "municipal law" in this place as equivalent to "common law," which is "the orthodox name for that uniform system of national customary law which was the result of the centralizing process of the twelfth and thirteenth centuries."—STEPHEN, 1 Comm. (16th ed.), 5 n.

by degrees from the temporal courts; and to that end, very early in the reign of King Henry the Third, episcopal constitutions were published,<sup>1</sup> forbidding all ecclesiastics to appear as advocates *in foro sæculari* (in the secular court); nor did they long continue to act as judges there, not caring to take the oath of office which was then found necessary to be administered, that they should in all things determine according to the law and custom of this realm;<sup>k</sup> though they still kept possession of the high office of chancellor, an office then of little juridical power; and afterwards, as its business increased by degrees, they modeled the process of the court at their own discretion.

But wherever they retired, and wherever their authority extended, they carried with them the same zeal to introduce the rules of the civil, in exclusion of the municipal law. This appears in a particular manner from the spiritual courts of all denominations, from the chancellor's courts in both our universities, and from the high court of chancery before mentioned; in all of which the proceedings are to this day in a course much conformed to the civil law: for which no tolerable reason can be assigned, unless that these courts were all under the immediate direction of the popish ecclesiastics, among whom it was a point of religion to exclude the municipal law; Pope Innocent the Fourth having forbidden<sup>l</sup> the very reading of it by the clergy, because its decisions were not founded on the imperial constitutions, but merely on the customs of the laity. And if it be considered, that our universities began about that period to receive their present form of scholastic discipline; that they were then, and continued to [<sup>21</sup>] be till the time of the Reformation, entirely under the influence of the popish clergy (Sir John Mason, the first Protestant, being also the first lay, chancellor of Oxford); this will lead us to perceive the reason why the study of the Roman laws was in those days of bigotry<sup>m</sup> pursued

<sup>1</sup> Spelman. Concil. A. D. 1217. Wilkins, vol. 1. p. 574. 599.

<sup>k</sup> Selden. in Fletam. 9. 3.

<sup>l</sup> M. Paris ad A. D. 1254.

<sup>m</sup> There cannot be a stronger instance of the absurd and superstitious veneration that was paid to these laws, than that the most learned writers of the times thought they could not form a perfect character, even of the blessed Virgin, without making her a civilian and a canonist. Which Albertus Magnus, the renowned dominican doctor of the thirteenth century, thus proves in his *Summa de laudibus christiferae virginis* (*divinum magis quam humanum opus*)

with such alacrity in these seats of learning; and why the common law was entirely despised, and esteemed little better than heretical.

§ 24. 6. Other causes of neglect.—And, since the Reformation, many causes have conspired to prevent its becoming a part of academical education. As, first, long usage and established custom; which, as in everything else, so especially in the forms of scholastic exercise, have justly great weight and authority. Secondly, the real intrinsic merit of the civil law, considered upon the footing of reason and not of obligation, which was well known to the instructors of our youth; and their total ignorance of the merit of the common law, though its equal at least, and perhaps an improvement on the other. But the principal reason of all that has hindered the introduction of this branch of learning is, that the study of the common law, being banished from hence in the times of popery, has fallen into a quite different channel, and has hitherto been wholly cultivated in another place. But as the long usage and established custom of ignorance of the laws of the land begin now to be thought unreasonable, and as by these means the merit of those [22] laws will probably be more generally known, we may hope that the method of studying them will soon revert to its ancient

qu. 23. § 5. “*Item quod jura civilia, et leges, et decreta scivit in summo, probatur hoc modo: sapientia advocati manifestatur in tribus; unum, quod obtineat omnia contra judicem justum et sapientem; secundo, quod contra adversarium astutum et sagacem; tertio, quod in causa desperata: sed beatissima virgo, contra judicem sapientissimum, Dominum; contra adversarium callidissimum, dyabolum; in causa nostra desperata; sententiam optatam obtinuit.*” (Perfections of the Christ-bearing Virgin (a work more divine than human). “Likewise that she had a perfect knowledge of civil rights, laws, and decrees is thus proved:—the wisdom of an advocate is manifested in three things—first, that he have a prevailing influence before a wise and just judge; secondly, against a subtle and sagacious adversary; and thirdly, in a desperate cause: The most blessed Virgin obtained the desired judgment from the most wise judge, the Lord—against our most cunning enemy, the devil—in our desperate cause.”) To which an eminent franciscan, two centuries afterwards, Bernardinus de Busti (Mariale, part. 4. ferm. 9), very gravely subjoins this note. “*Nec videtur incongruum mulieres habere peritiam juris. Legitur enim de uxore Joannis Andree glossatoris, quod tantam peritiam in utroque jure habuit, ut publice in scholis legere ausa sit.*” (Nor does a knowledge of the law seem inconsistent with the female character. For we read that the wife of John Andrew the lexicographer, was so skilled both in the civil and canon law, that she ventured to deliver lectures on both publicly in the schools.)

course, and the foundations at least of that science will be laid in the two universities; without being exclusively confined to the channel which it fell into at the times I have just been describing.

For, being then entirely abandoned by the clergy, a few stragglers excepted, the study and practice of it devolved, of course, into the hands of laymen; who entertained upon their parts a most hearty aversion to the civil law,<sup>n</sup> and made no scruple to profess their contempt, nay even their ignorance<sup>o</sup> of it, in the most public manner.

<sup>n</sup> Fortesc. de Laud. LL. c. 25.

° **Abbot of Torun's Case.**—The following is Blackstone's note: This remarkably appeared in the case of the Abbot of Torun, M. 22 Edw. III. 24 (1348), who had caused a certain prior to be summoned to answer at Avignon for erecting an oratory *contra inhibitionem novi operis* (contrary to the prohibition of a new work); by which words Mr. Selden (in Flet. 8. 5) very justly understands to be meant the title *de novi operis nuntiatione* (concerning the denunciation of a new work) both in the civil and canon laws (Ff. 39. 1. C. 8. 11. and Decretal. not Extrav. 5. 32), whereby the erection of any new buildings in prejudice of more ancient ones was prohibited. But Skipwith the king's serjeant, and afterwards chief baron of the exchequer, declares them to be flat nonsense; "*in ceux parolx, contra inhibitionem novi operis, ny ad pas entendement*" (in these words, "contrary to the prohibition of a new work," there is no meaning); and Justice Shardelow mends the matter but little by informing him, that they signify a restitution *in their law*; for which reason he very sagely resolves to pay no sort of regard to them. "*Ceo n'est que un restitution en leur ley, pur que a ceo n'avomus regard,*" etc. (This is but a restitution in their law; therefore we shall pay no regard to it.)

**Roman law in mediæval England.**—In the place of Hammond's note (1 Hammond's Black. 55) to this subject, the following passage by Sir Frederick Pollock is quoted: "It is at least misleading to say that 'the systematic study of the Roman law was formerly proscribed' (as Maine said) in England. . . . Roman law was not only taught at Oxford and Cambridge without interruption, but sometimes, though not often, cited, at least in a general way, in the king's courts (Selden ad Fletam, pp. 528-530). There is no reason whatever to suppose that anyone thought it needful or expedient to protect the common law against a Roman invasion. Blackstone (Comm. i. 20-22) contrived, by accumulating mistakes, to draw an imaginary picture of English aversion and contempt for the civil law. In the case cited by him, Y. B. 22 Edw. III. 14 (not 24), [The Abbot of Torun's Case], what really happened was this. Counsel said, by way of preliminary objection, that the court had no judicial knowledge of what the civilian—or rather, in the case in hand, canonist—process of *inhibitio novi operis* was: to which Justice Shardelowe replied in effect: 'That is only what they call restitution in their law, so we think nothing of your point; you must answer to the merits'; and the argument proceeded accordingly. Nothing here shows very gross ignorance, although the language might not satisfy a learned civilian; the court, so far from treating Roman words of art

But still, as the balance of learning was greatly on the side of the clergy, and as the common law was no longer *taught*, as formerly, in any part of the kingdom, it must have been subjected to many inconveniences, and perhaps would have been gradually lost and overrun by the civil (a suspicion well justified from the frequent transcripts of Justinian to be met with in Bracton and Fleta) had it not been for a peculiar incident, which happened at a very critical time, and contributed greatly to its support.

§ 25. *Restoration of the common law.*—The incident which I mean was the fixing the court of common pleas, the grand tribunal for disputes of property, to be held in one certain spot; that the seat of ordinary justice might be permanent and notorious to all the nation. Formerly, that, in conjunction with all the other superior [23] courts, was held before the king's capital justiciary of England in the *aula regis* (king's court), or such of his palaces wherein his royal person resided; and removed with his household from one end of the kingdom to the other. This was found to occasion great inconvenience to the suitors; to remedy which it was made an article of the great charter of liberties, both that of King John and King Henry the Third,<sup>p</sup> that "common

as nonsense, professed to understand them quite enough for the purpose in hand; and the only contempt in question was that of an abbot who was charged with having cited a prior to the pope's court at Avignon and persisted in disregard of the king's prohibition. But in the nineteenth century an over-zealous Romanizing lawyer called Shardelowe an old savage on the strength of Blackstone's misunderstanding. What is really curious in the matter is that Blackstone appears to have been misled by Selden (ad Fletam, p. 533), who cites this to prove that Roman law had become unknown in the king's courts in the reign of Edward III, though he does not use anything like Blackstone's rhetorical language about contempt and aversion. With all respect for Selden, I see no room for doubt that he did misunderstand the case; perhaps he was nodding a little, for he calls Shardelowe, J., 'Shardus.' His general thesis that knowledge of Roman law in England, except among professed canonists, declined rapidly after the reign of Edward II, is doubtless correct. But there was no question of hostility. Not the fourteenth or thirteenth, but the sixteenth century, was the time of recrimination between common lawyers and civilians, and perhaps of some real danger to the common law (Maitland, 'English Law and the Renaissance'; Pollock, 'The Expansion of the Common Law,' p. 88)."—MAINE, *Ancient Law*, with notes by Sir Frederick Pollock, 117.

<sup>p</sup> C. 11.



pleas should no longer follow the king's court, but be held in some certain place"; in consequence of which they have ever since been held (a few necessary removals in times of the plague excepted) in the palace of Westminster only. This brought together the professors of the municipal law, who before were dispersed about the kingdom, and formed them into an aggregate body; whereby a society was established of persons, who (as Spelman<sup>a</sup> observes), addicting themselves wholly to the study of the laws of the land, and no longer considering it as a mere subordinate science for the amusement of leisure hours, soon raised those laws to that pitch of perfection, which they suddenly attained under the auspices of our English Justinian, King Edward the First.

§ 26. 1. Inns of chancery and inns of court.—In consequence of this lucky assemblage, they naturally fell into a kind of collegiate order, and, being excluded from Oxford and Cambridge, found it necessary to establish a new university of their own. This they did by purchasing at various times certain houses (now called the inns of court and of chancery)<sup>12</sup> between the city of Westminster,

<sup>a</sup> Glossar. 334.

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<sup>12</sup> Inns of court.—The inns of court are the Inner Temple, the Middle Temple, Lincoln's Inn, and Gray's Inn. The inns of chancery were latterly Clifford's Inn, Clement's Inn, New Inn, Staple Inn, and Barnard's Inn. Besides these there were formerly Furnival's Inn, the Strand Inn, Lyon's Inn, and Thavies' Inn. See *Rex v. Barnard's Inn*, 5 Ad. & E. 17, and *Smith v. Kerr*, [1900] 2 Ch. 511.

"Throughout the later middle age English law had been academically taught. No English institutions are more distinctively English than the inns of court; of none is the origin more obscure. We are only now coming into possession of the documents whence their history must be gathered, and apparently we shall never know much of their first days. Unchartered, unprivileged, unendowed, without remembered founders, these groups of lawyers formed themselves and in course of time evolved a scheme of legal education: an academic scheme of the mediæval sort, oral and disputatious. For good and ill that was a big achievement: a big achievement in the history of some undiscovered continents. We may well doubt whether aught else could have saved English law in the age of the Renaissance. What is distinctive of mediæval England is not parliament, for we may everywhere see assemblies of estates, nor trial by jury, for this was but slowly suppressed in France. But the inns of court and the year books that were read therein, we shall hardly find their like elsewhere. At all events let us notice that where Littleton and Fortescue lectured, there Robert Rede lectures, Thomas More lectures, Edward Coke lectures, Francis



the place of holding the king's courts, and the city of London; for advantage of ready access to the one, and plenty of provisions in the other.<sup>r</sup> Here exercises were performed, lectures read, and degrees were at length conferred in the common law, as at other universities in the canon and civil. The degrees were those of barristers (first styled apprentices<sup>s</sup> from *apprendre*, to [24] learn) who answered to our bachelors; as the state and degree of a sergeant,<sup>t</sup> *servientis ad legem* (of a sergeant at law), did to that of doctor.

The crown seems to have soon taken under its protection this infant seminary of common law; and, the more effectually to foster

<sup>r</sup> Fortesc. c. 48.

<sup>s</sup> Apprentices or barristers seem to have been first appointed by an ordinance of King Edward the First in parliament, in the twentieth year (1291) of his reign. (Spelm. Gloss. 37. Dugdale, Orig. Jurid. 55.)

<sup>t</sup> The first mention which I have met with in our law books of sergeants or countors, is in the Statute of Westm. 1, 3 Edw. I, c. 29 (Fraud, 1275), and in Horn's Mirror, c. 1. § 10. c. 2. § 5. c. 3. § 1, in the same reign. But M. Paris in his life of John II, abbot of St. Alban's, which he wrote in 1255, 39 Hen. III, speaks of advocates at the common law, or countors (*quos banci narratores vulgariter appellamus* (whom we commonly call bench reporters), as of an order of men well known. And we have an example of the antiquity of the coif in the same author's history of England, A. D. 1259, in the case of one William de Bussy, who, being called to account for his great knavery and malpractices, claimed the benefit of his orders or clergy, which till then remained an entire secret; and to that end *voluit ligamenta coiffæ suæ solvere, ut palam monstraret se tonsuram habere clericalem; sed non est permissus*.—*Satelles vero eum arripiens, non per coiffæ ligamina sed per guttur eum apprehendens, traxit ad carcerem*. (He wished to untie the strings of his coif that he might prove to all his having the clerical tonsure; but this was not allowed. Then an officer seizing him, not by the strings of his coif but by his throat, dragged him to prison.) And hence Sir H. Spelman conjectures (*Glossar.* 335), that coifs were introduced to hide the tonsure of such renegade clerks, as were still tempted to remain in the secular courts in the quality of advocates or judges, notwithstanding their prohibition by canon.

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Bacon lectures, and highly technical were the lectures that Francis Bacon gave. Now it would, so I think, be difficult to conceive any scheme better suited to harden and toughen a traditional body of law than one which, while books were still uncommon, compelled every lawyer to take part in legal education and every distinguished lawyer to read public lectures."—MAITLAND, Eng. Law and the Renaissance, 26.

Among the literature on the inns of court may be mentioned the following: Fortescue, *De Laudibus Legum Angliæ*, by Amos (1825); Herbert, *Antiquities*

and cherish it, King Henry the Third in the nineteenth year of his reign issued out an order directed to the mayor and sheriffs of London, commanding that no regent of any law schools *within* that city should for the future teach law therein." The word "law," or *leges*, being a general term, may create some doubt at this distance of time whether the teaching of the civil law, or the common, or both, is hereby restrained. But in either case it tends to the same end. If the civil law only is prohibited (which is Mr. Selden's<sup>w</sup> opinion), it is then a retaliation upon the clergy, who had excluded the common law from *their* seats of learning. If the municipal law be also included in the restriction (as Sir Edward Coke<sup>x</sup> understands it, and which the words seem to import), then the intention is evidently this; by preventing private teachers within the walls of the city, to collect all the common lawyers into the one public university, which was newly instituted in the suburbs.

[25] In this juridical university (for such it is insisted to have been by Fortescue<sup>y</sup> and Sir Edward Coke<sup>z</sup>) there are two sorts of collegiate houses: -one called inns of chancery, in which the younger students of the law were usually placed, "learning and studying," says Fortescue,<sup>a</sup> "the originals and as it were the elements of the law; who, profiting therein, as they grew to ripeness so were they admitted into the greater inns of the same study, called the inns of court." And in these inns of both kinds, he goes on to tell us, the knights and barons, with other grandees and noblemen of the realm, did use to place their children, though they did not desire to have them thoroughly learned in the law, or to get their living by its practice; and that in his time were about two

<sup>u</sup> *Ne aliquis scholas regens de legibus in eadem civitate de cætero ibidem leges doceat.*

<sup>w</sup> In Flet. 8. 2.

<sup>x</sup> 2 Inst. Præm.

<sup>y</sup> C. 49.

<sup>z</sup> 3 Rep. pref.

<sup>a</sup> C. 49.

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of the Inns of Court (1804); Pearce, History of the Inns of Court (1848); Bellot, The Inner and Middle Temple (1902); Loftie, The Inns of Court (1895); Ringrose, The Inns of Court (1909); Dillon, Laws and Jurisprudence of England and America, Lect. III; Odgers, A Sketch of the Four Inns of Court, in Essays in Legal History, ed. by Vinogradoff, 233 ff. (1913).

thousand students at these several inns, all of whom he informs us were *fili nobilem*, or gentlemen born.

§ 27. a. *Decline of the inns.*—Hence it is evident, that (though under the influence of the monks our universities neglected this study, yet) in the time of Henry the Sixth it was thought highly necessary, and was the universal practice, for the young nobility and gentry to be instructed in the originals and elements of the laws. But by degrees this custom has fallen into disuse; so that in the reign of Queen Elizabeth, Sir Edward Coke<sup>b</sup> does not reckon above a thousand students, and the number at present is very considerably less. Which seems principally owing to these reasons: first, because the inns of chancery, being now almost totally filled by the inferior branch of the profession, are neither commodious nor proper for the resort of gentlemen of any rank or figure; so that there are very rarely any young students entered at the inns of chancery; secondly, because in the inns of court all sorts of regimen and academical superintendence, either with regard to morals or studies, are found impracticable and therefore entirely neglected: lastly, because persons of birth and fortune, after having finished their usual courses at the universities, have [26] seldom leisure or resolution sufficient to enter upon a new scheme of study at a new place of instruction. Wherefore few gentlemen now resort to the inns of court, but such for whom the knowledge of practice is absolutely necessary; such, I mean, as are intended for the profession: the rest of our gentry (not to say our nobility also), having usually retired to their estates, or visited foreign kingdoms, or entered upon public life, without any instruction in the laws of the land, and indeed with hardly any opportunity of gaining instruction, unless it can be afforded them in these seats of learning.

§ 28. *University instruction in law.*—And that these are the proper places, for affording assistances of this kind to gentlemen of all stations and degrees, cannot (I think) with any color of reason be denied. For not one of the objections, which are made to the inns of court and chancery, and which I have just now enumerated, will hold with regard to the universities. Gentlemen may here associate with gentlemen of their own rank and degree.

<sup>b</sup> 3 Rep. pref.

Nor are their conduct and studies left entirely to their own discretion; but regulated by a discipline so wise and exact, yet so liberal, so sensible and manly, that their conformity to its rules (which does at present so much honor to our youth) is not more the effect of constraint than of their own inclinations and choice. Neither need they apprehend too long an avocation hereby from their private concerns and amusements, or (what is a more noble object) the service of their friends and their country. This study will go hand in hand with their other pursuits; it will obstruct none of them; it will ornament and assist them all.

But if, upon the whole, there are any, still wedded to monastic prejudice, that can entertain a doubt how far this study is properly and regularly *academical*, such persons, I am afraid, either have not considered the constitution and design of an university, or else think very meanly of it. It must be a deplorable narrowness of mind that would confine these seats of instruction to the limited views of one or two learned professions. To the praise of this age be it spoken, a more open <sup>[27]</sup> and generous way of thinking begins now universally to prevail. The attainment of liberal and genteel accomplishments, though not of the intellectual sort, has been thought by our wisest and most affectionate patrons,<sup>c</sup> and very lately by the whole university,<sup>d</sup> no small improvement of our ancient plan of education: and therefore I may safely affirm that nothing (how *unusual* soever) is, under due regulations, improper to be *taught* in this place, which is proper for a gentleman to *learn*. But that a science, which distinguishes the criterions of right and wrong; which teaches to establish the one, and prevent, punish, or redress the other; which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart: a science, which is universal in its use and extent, accommodated to each individual, yet comprehending the whole community; that a science like this should ever have been deemed unnecessary to be studied in an university, is matter of astonishment and

<sup>c</sup> Lord Chancellor Clarendon, in his dialogue of education, among his tracts, p. 325, appears to have been very solicitous, that it might be made "a part of the ornament of our learned academies to teach the qualities of riding, dancing, and fencing, at those hours when more serious exercises should be intermitted."

<sup>d</sup> By accepting in full convocation the remainder of Lord Clarendon's history from his noble descendants, on condition to apply the profits arising from its publication to the establishment of a *manage* in the university.

concern. Surely, if it were not before an object of academical knowledge, it was high time to make it one: and to those who can doubt the propriety of its reception among us (if any such there be) we may return an answer in their own way; that ethics are confessedly a branch of academical learning, and Aristotle *himself has said*, speaking of the laws of his own country, that jurisprudence or the knowledge of those laws is the principal and most perfect branch of ethics.\*

§ 29. 1. The Vinerian professorship of law.—From a thorough conviction of this truth, our munificent benefactor, Mr. Viner, having employed above half a century in amassing materials for new-modeling and rendering more commodious the rude study of the laws of the land, consigned <sup>[28]</sup> both the plan and execution of these his public-spirited designs to the wisdom of his parent university. Resolving to dedicate his learned labors “to the benefit of posterity and the perpetual service of his country,”† he was sensible he could not perform his resolution in a better and more effectual manner, than by extending to the youth of this place those assistances, of which he so well remembered and so heartily regretted the want. And the sense, which the university has entertained of this ample and most useful benefaction, must appear beyond a doubt, from their gratitude in receiving it with all possible marks of esteem;‡ from their alacrity and unexampled dispatch in carrying it into execution;§ and, above all, from the laws and constitutions by which they have effectually guarded it from the neglect and abuse to which such institutions are liable.<sup>13</sup> We

\* Τηλεία μαλιστα ἀρετή, ὅτι τῆς τελείας ἀρετῆς χρῆσις ἐστίν. Ethic. ad Nicomach.

1. 5. c. 3.

† See the preface to the eighteenth volume of his Abridgment.

‡ Mr. Viner is enrolled among the public benefactors of the university by degree of convocation.

§ Mr. Viner died June 5, 1756. His effects were collected and settled, near a volume of his work printed, almost the whole disposed of, and the accounts made up, in a year and a half from his decease, by the very diligent and worthy administrators with the will annexed (Dr. West and Dr. Good of Magdalene, Dr. Whalley of Oriel, Mr. Buckler of All Souls, and Mr. Betts of University

<sup>13</sup> The statutes of the Vinerian foundation, given in Blackstone's note i, are omitted here as of no present interest comparable to the space they occupy.



have seen an universal emulation, who best should understand, or most [29] faithfully pursue, the designs of our generous patron: and with pleasure we recollect, that those who are most distinguished [30] by their quality, their fortune, their station, their learning, or their experience, have appeared the most zealous to promote the success of Mr. Viner's establishment.

§ 30. 2. Advantages of university teaching of law.—The advantages that might result to the science of the law itself, when a little more attended to in these seats of knowledge, perhaps, would be very considerable. The leisure and abilities of the learned in these retirements might either suggest expedients, or execute those dictated by wiser heads,<sup>k</sup> for improving its method, retrenching its superfluities, and reconciling the little contrarieties which the practice of many centuries will necessarily create in any human system; a task which those who are deeply employed in business and the more active scenes of the profession, can hardly condescend to engage in. And as to the interest, or (which is the same) the reputation of the universities themselves, I may venture to pronounce, that if ever this study should arrive to any tolerable perfection either here or at Cambridge, the nobility and gentry of this kingdom would not shorten their residence upon this account, nor perhaps entertain a worse opinion of the benefits of academical education. Neither should it be considered as a matter of light importance that while we thus extend the *pomæria* (bounds) of university learning, and adopt a new tribe of citizens within these philosophical walls, we interest a very [31] numerous and very powerful profession in the preservation of our rights and revenues.<sup>14</sup>

college), to whom that care was consigned by the university. Another half year was employed in considering and settling a plan of the proposed institution, and in framing the statutes thereupon, which were finally confirmed by convocation on the 3d of July, 1758. The professor was elected on the 20th of October following, and two scholars on the succeeding day. And, lastly, it was agreed at the annual audit in 1761, to establish a fellowship; and a fellow was accordingly elected in January following.—The residue of this fund, arising from the sale of Mr. Viner's Abridgment, will probably be sufficient hereafter to found another fellowship and scholarship, or three more scholarships, as shall be thought most expedient.

<sup>k</sup> See Lord Bacon's proposals and offer of a digest.

<sup>14</sup> Function of university schools of law.—We [university schools of law] must not be wanting to the position in which we find ourselves. Especially we



For I think it past dispute that those gentlemen, who resort to the inns of court with a view to pursue the profession, will find it expedient (whenever it is practicable) to lay the previous foundations of this, as well as every other science, in one of our learned universities. We may appeal to the experience of every sensible lawyer, whether anything can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious, lonely process to extract the theory of law from a mass of undigested learning; or else by an assiduous attendance on the courts to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little, therefore, is it to be wondered at, that we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search,<sup>1</sup>

<sup>1</sup> Sir Henry Spelman, in the preface to his Glossary, has given us a very lively picture of his own distress upon this occasion. "*Emisit me mater Londinum, juris nostri capessendi gratia; cujus cum vestibulum salutassem, reperissemque linguam peregrinam, dialectum barbaram, methodum inconcinnam, molem non ingentem solum sed perpetuis humeris sustinendam, excidit mihi (fateor) animus,*" etc. (My mother sent me to London to commence the study of the law; but when, having paid my respects to the vestibule of this branch of learning I was met by a foreign language, a barbarous dialect, an uncouth style, and a mass not only vast but always pressing upon one's shoulders, I confess my courage failed me.)

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must not be content with a mere lip service, with merely tagging our law schools with the name of a university, while they lack entirely the university spirit and character. What, then, does our undertaking involve, and that conception of the study of our English system of law, which, in Blackstone's phrase, "extends the pomœria of university learning and adopts this new tribe of citizens within these philosophical walls"? It means this, that our law must be studied and taught as other great sciences are studied and taught at the universities, as deeply, by like methods, and with as thorough a concentration and lifelong devotion of all the powers of a learned and studious faculty. If our law be not a science worthy and requiring to be thus studied and thus taught, then, as a distinguished lawyer has remarked, "A university will best consult its own

and addict themselves wholly to amusements, or other less innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives!

§ 31. Importance of a university education for lawyers.—The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice, which if ever it had grown to be general, must have proved of extremely [32] pernicious consequence. I mean the custom by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law and placing them, in its stead, at the desk of some skillful attorney; in order to initiate them early in all the depths of practice, and render them more dextrous in the mechanical part of business. A few instances of particular persons (men of excellent learning and unblemished integrity), who, in spite of this method of education, have shone in the foremost ranks of the bar, have afforded some kind of sanction to this illiberal path to the profession, and biased many parents of shortsighted judgment, in its favor: not considering that there are some geniuses formed to overcome all disadvantages, and that from such particular instances no general rules can be formed; nor observing that those very persons have frequently recommended by the most forcible of all examples, the disposal of their own offspring, a very different foundation of legal studies, a regular academical education. Perhaps too, in return, I could now direct their eyes to our principal seats of justice, and suggest a few hints in favor of university learning;<sup>m</sup> but in these all who hear me, I know have already prevented me.

Making, therefore, due allowance for one or two shining exceptions, experience may teach us to foretell that a lawyer thus edu-

<sup>m</sup> The four highest judicial offices were at that time filled by gentlemen, two of whom had been fellows of All Souls college; another student of Christ Church; and the fourth a fellow of Trinity college, Cambridge.

[Lord Northington, then Lord Keeper, and Willes, C. J. C. P., were of All Souls; Lord Mansfield, C. J. K. B., of Christ Church, and Sir Thomas Sewell, M. R., of Trinity.]

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dignity in declining to teach it." This is the plow to which our ancestors here in America set their hand and to which we have set ours; and we must see to it that the furrow is handsomely turned.—THAYER, Legal Essays, 372.

ated to the bar, in subservience to attorneys and solicitors," will find he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know: if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est*<sup>o</sup> (so the law is written) is the utmost his knowledge will arrive at; he must never aspire to form, and seldom expect to comprehend, any arguments drawn *a priori*, from the spirit of the laws and the natural foundations of justice.<sup>15</sup>

[33] Nor is this all; for (as few persons of birth, or fortune, or even of scholastic education, will submit to the drudgery of servitude and the manual labor of copying the trash of an office) should this infatuation prevail to any considerable degree, we must rarely expect to see a gentleman of distinction or learning at the bar. And what the consequence may be, to have the interpretation and enforcement of the laws (which include the entire disposal of our properties, liberties, and lives) fall wholly into the hands of obscure or illiterate men, is matter of very public concern.

§ 32. Groundwork of a lawyer's education.—The inconveniences here pointed out can never be effectually prevented, but by making academical education a previous step to the profession of

<sup>n</sup> See Kennet's Life of Somner, p. 67.

<sup>o</sup> Ff. 40. 9. 12.

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<sup>15</sup> Roman law in legal education.—Mr. James Bryce (now Viscount Bryce), author of "The American Commonwealth," says with reference to this passage of Blackstone:

"Blackstone is here founding, on the unfortunate results of the usage of his own time, an argument for making the future barrister begin with a systematic theoretical study of English law. His reasoning will be generally felt to be sound, but it does not exclude the further improvement of giving the learner some knowledge of the principles of Roman law before he addresses himself to English. I shall state some grounds for thinking that what might appear the longest way round, through Roman law, may really be the shortest way to the scientific mastery of our own."

These remarks of Lord Bryce occur in his inaugural address as Regius Professor of Civil Law at Oxford in 1871, on the subject "The Academical Study of the Civil Law." The lecture is well worth the perusal of the student or of the lawyer. It may be found at page 860 of his *Studies in History and Jurisprudence*.

the common law and at the same time making the rudiments of the law a part of academical education. For sciences are of a sociable disposition, and flourish best in the neighborhood of each other: nor is there any branch of learning, but may be helped and improved by assistances drawn from other arts. If, therefore, the student in our laws hath formed both his sentiments and style, by perusal and imitation of the purest classical writers, among whom the historians and orators will best deserve his regard; if he can reason with precision, and separate argument from fallacy, by the clear, simple rules of pure unsophisticated logic; if he can fix his attention, and steadily pursue truth through any, the most intricate, deduction, by the use of mathematical demonstrations; if he has enlarged his conceptions of nature and art, by a view of the several branches of genuine, experimental, philosophy; if he has impressed on his mind the sound maxims of the law of nature, the best and most authentic foundation of human laws; if, lastly, he has contemplated those maxims reduced to a practical system in the laws of imperial Rome; if he has done this or any part of it (though all may be easily done under as able instructors as ever graced any seats of learning), a student thus qualified may enter upon the study of the law with incredible advantage and reputation. And if, at the conclusion, or during [34] the acquisition of these accomplishments, he will afford himself here a year or two's further leisure, to lay the foundation of his future labors in a solid scientific method, without thirsting too early to attend that practice which it is impossible he should rightly comprehend, he will afterwards proceed with the greatest ease, and will unfold the most intricate points with an intuitive rapidity and clearness.

I shall not insist upon such motives as might be drawn from principles of economy, and are applicable to particulars only: I reason upon more general topics. And therefore to the qualities of the head, which I have just enumerated, I cannot but add those of the heart; affectionate loyalty to the king, a zeal for liberty and the constitution, a sense of real honor, and well-grounded principles of religion; as necessary to form a truly valuable English lawyer, a Hyde, a Hale, or a Talbot. And, whatever the ignorance of some, or unkindness of others, may have heretofore untruly suggested, experience will warrant us to affirm, that these endowments of loyalty and public spirit, of honor and religion, are nowhere to

be found in more high perfection than in the two universities of this kingdom.<sup>16</sup>

§ 33. *Method of these Commentaries.*—Before I conclude, it may perhaps be expected, that I lay before you a short and general account of the method I propose to follow, in endeavoring to execute the trust you have been pleased to repose in my hands. And in these solemn lectures, which are ordained to be read at the entrance of every term (more perhaps to do public honor to this laudable institution, than for the private instruction of individuals<sup>p</sup>) I presume it will best answer the intent of our benefactor

<sup>p</sup> See Lowth's *Oratio Crewiana*, p. 365.

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<sup>16</sup> *Legal education in England.*—At the present day, the inns of chancery have completely disappeared as institutions; though some of their buildings remain. But the inns of court still enjoy their ancient reputation with the sons of our nobility and gentry; and they exercise also the exclusive privilege of conferring the degree of *barrister at law*, the possession of which degree is an indispensable qualification for practicing as advocate in the superior courts. And for the obtaining of this degree, it is necessary to be enrolled as a student in one or other of these inns, and after a certain period to apply to its principal officers (or *benchers*) for a *call to the bar*. As a qualification for call, the student must (as the general rule) have kept commons for three years (i. e., twelve terms), by dining at least six times in each term in the hall of the society into which he has obtained admission; excepting that if he is a member of an university in the United Kingdom, dining three times in each term is sufficient. Moreover, no student may be called to the bar, unless he has passed a public examination in law for the purpose of ascertaining his fitness.

Accordingly, a public examination, for all the inns collectively, takes place periodically; and this examination is compulsory in the case of all students, except for certain colonial barristers who desire to be called to the English Bar.

The education and examination of gentlemen desirous of becoming solicitors of the supreme court have now for long (subject to the control of His Majesty's judges) been in the hands of The Law Society, a body which, having been founded in the year 1823, received its first royal charter in the year 1831. By virtue of the provisions of various acts of parliament, an applicant for admission to the solicitors' branch of the legal profession must (unless specially exempted), after having given proof of good general education, serve for a period varying in different cases from three to five years under articles of clerkship to a practicing solicitor, and must also, before being admitted, pass two qualifying examinations known respectively as the Intermediate and Final Examinations, conducted by the society. He is then certified by the society as having complied with the statutory requirements, and, upon presentation of



and the expectation of this learned body, if I attempt to illustrate at times such detached titles of the law, as are the most easy to be understood, and most capable of historical or critical ornament. But in reading the complete course, which is annually consigned to my care, a more regular method will be necessary; and, till a better is proposed, I [35] shall take the liberty to follow the same that I have already submitted to the public.<sup>a</sup> To fill up and finish that outline with propriety and correctness, and to render the whole intelligible to the uninformed minds of beginners (whom we are too apt to suppose acquainted with terms and ideas, which they never had opportunity to learn), this must be my ardent endeavor, though by no means my promise, to accomplish. You will permit me, however, very briefly to describe, rather what I conceive an academical expounder of the laws should do, than what I have ever known to be done.

§ 34. 1. **General map of the law.**—He should consider his course as a general map of the law,<sup>17</sup> marking out the shape of

<sup>a</sup> The analysis of the laws of England, first published, A. D. 1756, and exhibiting the order and principal divisions of the ensuing Commentaries; which were originally submitted to the university in a private course of lectures, A. D. 1753.

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his certificate, is admitted as a solicitor by the Master of the Rolls. For the education of persons serving under articles of clerkship to solicitors, the society makes provision by a system of oral lectures and classes and correspondence tuition.

Academical instruction in the law may, however, now be obtained in schools other than those of the inns of court and the Law Society; for though no provision for instruction in the common law was anciently made at either Oxford or Cambridge, that deficiency has been long since redressed by the munificence of private donors, who at each of these universities have founded professorships, with appropriate endowments for that purpose. And in the various colleges of the University of London, and the Universities of Manchester, Liverpool, Leeds, Sheffield, Bristol, Wales, and elsewhere in England, there are now also very effective schools of the common law.—STEPHEN, 1 Comm. (16th ed.), 8.

<sup>17</sup> **General map of the law.**—This brief but admirable sketch of the elements of preparatory education for the bar, and the methods of that education, is as appropriate to-day as when it was written. No doubt it marks out a longer and more thorough course than most law students will ever give before entering upon practice. Even the select and wealthy body of students to whom Blackstone spoke did not enter upon it with zeal and perseverance sufficient to insure success. But it was the experience of that age, as it is of our own,



the country, its connections and boundaries, its greater divisions and principal cities: it is not his business to describe minutely the subordinate limits, or to fix the longitude and latitude of every inconsiderable hamlet. His attention should be engaged, like that of the readers in Fortescue's inns of chancery, "in tracing out the originals and as it were the elements of the law." For if, as

that no advantage is gained in education by haste or by the omission of any topic which is really useful in full practice. If the lawyer meets with success enough to require a full and complete knowledge of his profession, he will be obliged at some time to recur to these subjects, and make up in mature life imperfectly, and yet with great toil, the omissions of his earlier course. There is no subject mentioned by Blackstone that a successful lawyer need not know, and will not regret it if he does not know.

It is worth notice, too, how fully in this projected course Blackstone has anticipated almost every topic to which the attention of scientific jurists and writers has since been led. Even the doctrines of the historical school of jurists, as presented by Sir Henry Maine and others, were anticipated by him in 1758 more clearly than any English jurist\* has stated them since.

In the passage (on page 35) beginning with, "These originals should be traced to their foundations," Blackstone has enumerated with remarkable fullness every source of our law which has been investigated by later students; "the customs of the Britons and Germans" are included by Dr. Stubbs in his admirable little *Compend of Select Documents*. The "Codes of the Northern Nations" included the *Leges Barbarorum*, which have recently had their full share of attention, if not in some cases, and especially that of the Salic law, more than that share. Blackstone no doubt included with these a group of laws closely related, Danish, Swedish, Norwegian, and Icelandic, which he set us the example of employing in the illustration of English law, though it has been little followed since, except by a few foreign students of that law, such as Jacob Grimm, Konrad Maurer, and Michelsen. The "laws of our own Saxon Princes" are now accessible among the publications of the *Rolls' series*, *Ancient Laws and Institutes of England*, edited by Benjamin Thorpe, London, 2 vols., 8vo., 1840. Of the Roman and feudal laws it is needless to say more here. English lawyers have just passed through one of their periodical fits of indiscriminate admiration for the former, and are beginning to study the facts of

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\* Let me say here once for all that by English jurists I mean any on either side of the Atlantic who write in the English language and study the common law of England. It would be a needless waste of words to repeat "English and American" where a single word will suffice. Indeed one could hardly be safe against criticism of that kind, except by such an awkward list of geographical terms as "English and American (both in the United States and Canada) and Australian," for there is hardly an autonomous colony of our race in any part of the world that has not already made some contributions of value to the study of English law.

Justinian<sup>r</sup> has observed, the tender understanding of the student be loaded at the first with a multitude and variety of matter, it will either occasion him to desert his studies, or will carry him heavily through them, with much labor, delay and despondence. These originals should be traced to their fountains, as well as our distance will permit; to the customs of the Britons and Germans, as recorded by Cæsar and Tacitus; to the codes of the northern nations on the Continent, and more especially to those of our own Saxon princes; to the rules of the Roman law either left here in the days of Papinian, or imported by Vacarius and his fol-<sup>[36]</sup> lowers; but, above all, to that inexhaustible reservoir of legal antiquities and learning, the feudal law, or, as Spelman<sup>s</sup> has entitled it, the law of nations in our western orb. These primary rules and fundamental principles should be weighed and compared with the precepts of the law of nature, and the practice of other countries; should be explained by reasons, illustrated by examples, and confirmed by undoubted authorities; their history should be deduced, their changes and revolutions observed, and it should be shown how

<sup>r</sup> *Incipientibus nobis exponere jura populi Romani, ita videntur tradi posse commodissime, si primo levi ac simplici via singula tradantur: alioqui, si statim ab initio rudem adhuc et infirmum animum studiosi multitudine ac varietate rerum oneravimus, duorum alterum, aut desertorem studiorum efficiemus, aut cum magno labore, sæpe etiam cum diffidentia (quæ plerumque juvenes avertit) serius ad id perducemus, ad quod, leviori via ductus, sine magno labore, et sine ulla diffidentia maturius perducere potuisset.* Inst. I. 1. 2. (Our object being the exposition of the law of the Roman people, we think that the most advantageous plan will be to commence with an easy and simple path, and then to proceed to details with a most careful and scrupulous exactness of interpretation. Otherwise, if we begin by burdening the student's memory, as yet weak and untrained, with a multitude and variety of matters, one of two things will happen: either we shall cause him wholly to desert the study of law, or else we shall bring him at last, after great labor, and often, too, distrustful of his own powers (the commonest cause, among the young, of ill-success), to a point which he might have reached earlier, without such labor and confident in himself, had he been led along a smoother path.—MOYLE'S Trans. Justinian's Inst.)

<sup>s</sup> Of Parliaments. 57.

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its historical connection with our own. That is to say, they are beginning to take Blackstone's advice, given a hundred and thirty years ago, as to both of these systems, that "their history should be deduced, their changes and revolutions observed, and it should be shown how far they are connected with, or have at any time been affected by the civil transactions of the kingdom" (p. 36).—HAMMOND.

far they are connected with, or have at any time been affected by, the civil transactions of the kingdom.

§ 35. **Hints to the law student.**—A plan of this nature, if executed with care and ability, cannot fail of administering a most useful and rational entertainment to students of all ranks and professions; and yet it must be confessed that the study of the laws is not merely a matter of amusement; for, as a very judicious writer<sup>t</sup> has observed upon a similar occasion, the learner “will be considerably disappointed, if he looks for entertainment without the expense of attention.” An attention, however, not greater than is usually bestowed in mastering the rudiments of other sciences, or sometimes in pursuing a favorite recreation or exercise. And this attention is not equally necessary to be exerted by every student upon every occasion. Some branches of the law, as the formal process of civil suits, and the subtle distinctions incident to landed property, which are the most difficult to be thoroughly understood, are the least worth the pains of understanding, except to such gentlemen as intend to pursue the profession. To others I may venture to apply, with a slight alteration, the words of Sir John Fortescue,<sup>u</sup> when first his royal pupil determines to engage in this study. \*<sup>“</sup>It will not be necessary for a gentleman, as such, to examine with a close application the critical niceties of the law. It will fully be sufficient, and he may well enough be denominated a lawyer, if under the instruction of a master he traces up the principles and grounds of the <sup>[37]</sup> law, even to their original elements. Therefore, in a very short period, and with very little labor, he may be sufficiently informed in the laws of his country, if he will but apply his mind in good earnest to receive and apprehend them. For, though such knowledge as is necessary for a judge is hardly to be acquired by the lucubrations of twenty years, yet, with a genius of tolerable perspicacity, that knowledge which is fit for a person of birth or condition may be learned in a single year, without neglecting his other improvements.”\*

\* In the first and second editions the Latin text of Fortescue, from which the quotation above is freely translated, is given: first omitted in the third edition, and this reference substituted for it.

<sup>t</sup> Dr. Taylor's Pref. to Elem. of Civil Law.

<sup>u</sup> De Laud. Leg. c. 8.

To the few, therefore (the very few I am persuaded), that entertain such unworthy notions of an university, as to suppose it intended for mere dissipation of thought; to such as mean only to while away the awkward interval from childhood to twenty-one, between the restraints of the school and the licentiousness of politer life, in a calm middle state of mental and of moral inactivity; to these Mr. Viner gives no invitation to an entertainment which they never can relish. But to the long and illustrious train of noble and ingenuous youth, who are not more distinguished among us by their birth and possessions, than by the regularity of their conduct and their thirst after useful knowledge, to these our benefactor has consecrated the fruits of a long and laborious life, worn out in the duties of his calling; and will joyfully reflect (if such reflections can be now the employment of his thoughts) that he could not more effectually have benefited posterity, or contributed to the service of the public, than by founding an institution which may instruct the rising generation in the wisdom of our civil polity, and inform them with a desire to be still better acquainted with the laws and constitution of their country.

## OF THE NATURE OF LAWS IN GENERAL.

§ 36. **Meaning of law.**—Law, in its most general and comprehensive sense, signifies a rule of action; and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say, the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action, which is prescribed by some superior, and which the inferior is bound to obey.<sup>1</sup>

<sup>1</sup> **Definition of law by Austin and by Holland.**—Austin's great task was therefore to distinguish between laws properly so called and laws improperly so called. The word "command" is the key to his analysis of law. A law properly so called is a command, an order issued by a superior to an inferior, and "the party to whom it is directed is liable to evil from the other in case he comply not with the desire." The evil is called a sanction, and the command or duty is said to be sanctioned by the chance of incurring the evil. Thus are inseparably connected the terms "command," "duty," and "sanction." To employ his own language, "each of the three terms signifies the same notion, but each denotes a different part of that notion, and connotes the residue." All commands, however, are not laws, that term being limited to those commands which oblige generally to the performance of acts of a class. Having thus arrived at a definition of laws properly so called, it was necessary in the next place, in order to prevent confusion, to differentiate them from the mass of things to which common speech gives the name of law. Such, for instance, to use Blackstone's classification, as (1) the laws of inanimate matter; (2) the laws of animal nutrition; (3) the laws of nature which are rules imposed by God on men and discoverable by reason alone; and (4) the revealed or divine law, which is part of the law of nature directly expounded by God. While all such laws may be said to embody "a rule of action dictated by some superior being," they are not commands in the only proper sense of that term, they are not commands addressed by a human superior to a human inferior. Austin therefore rejects them as metaphorical or figurative laws, laws improperly so called. Thus the conclusion was reached that of true laws those only are the subjects of jurisprudence which are laws strictly so called, or positive laws. Not, however, until Austin's conclusions—weakened and disfigured as they are by a lack of accurate knowledge of what the law then was, by an absolute ignoring of history, by entanglement with irrelevant and to some extent bad moral philosophy, and by a pedantic and repellent style—had passed through a mental crucible of the highest order, could it be said that the work which Hobbes so greatly advanced was finally systematized and completed on a strictly



§ 37. 1. **Law as order of the universe.**—Thus when the Supreme Being formed the universe, and created matter out of nothing, He impressed certain principles upon that matter, from which it can never depart, and without which it would cease to be. When He put the matter into motion, He established certain laws of motion, to which all movable bodies must conform. And, to descend from the greatest operations to the smallest, when a workman forms a clock, or other piece of mechanism, he establishes at his own pleasure certain arbitrary laws for its direction; as that the hand shall describe a given space in a given time; to which law as long as the work conforms, so long it continues in perfection, and answers the end of its formation.

If we further advance, from mere inactive matter to vegetable and animal life, we shall find them still governed by laws; more

scientific basis. In 1880 Thomas Erskine Holland published his *Elements of Jurisprudence*, characterized by an eminent critic as “the first work of pure scientific jurisprudence which has appeared in England; that is, of the general science of law distinctly separated from the ethical part of politics.” In Holland’s great work, now in the tenth edition, the principles of the Analytical School, after critical re-examination, have been restated under the three heads into which the subject logically divides itself: (1) the nature of sovereign political authority; (2) the nature of positive laws enforced by a sovereign political authority; (3) the rules of human actions, called laws merely by analogy, not so enforced. Every state is divisible into two parts, one of which is sovereign, the other subject. The sovereignty of the ruling part has two aspects. It is “external,” as independent of all control from without; “internal,” as paramount over all action within. Without external sovereignty no state is qualified for membership in the family of nations. The questions which arise with reference to internal sovereignty relate to the proportion borne by the sovereign part of the state to the subject part. “The primary function of constitutional law is to ascertain the political center of gravity of any given state. . . . The sovereign part of the state, as thus ascertained, is omnipotent. Since it is the source of all law, its acts can never be illegal.” Having thus described the nature of sovereignty, he defines a law properly so called to be “a general rule of external human action enforced by a sovereign political authority. All other rules for the guidance of human action are called laws merely by analogy; and any propositions which are not rules for human action are called laws by metaphor only.” The rules for the guidance of human action which are within the domain of the moral sciences and outside of the province of jurisprudence, because not enforceable by a sovereign political authority, he groups under the heads “Ethic and Nomology.” Ethic is the science of those rules which when known are themselves adopted by the will as its objects or



numerous indeed, but equally fixed and invariable. The whole progress of plants, from the seed to the root, and from thence to the seed again;—the method of animal nu- <sup>[39]</sup>trition, digestion, secretion and all other branches of vital economy;—are not left to chance, or the will of the creature itself, but are performed in a wondrous involuntary manner, and guided by unerring rules laid down by the great Creator.

§ 38. 2. Law as a rule of human action.—This, then, is the general signification of law, a rule of action dictated by some superior being: and, in those creatures that have neither the power to think, nor to will, such laws must be invariably obeyed, so long as the creature itself subsists, for its existence depends on that obedience.<sup>2</sup> But laws, in their more confined sense, and in which it is our present business to consider them, denote the rules, not of

aims. This rightness of will can never be enforced by external legislation. All that external legislation can do is to affect the external expression of the will in act. The science of this office of external regulation is called “nomology,” and is defined, in the words of Kant, to be “science of the totality of the laws for which an external legislation is possible.” This science of external action is divided, according to the authority by which the rules of which it treats are enforced, into (1) a science of rules enforced by an indeterminate authority; (2) a science of rules enforced by determinate authority. Under the first head are grouped the so-called laws of fashion, of honor, of morality, and of nature; under the second, rules imposed, or supposed to be imposed, upon mankind by God or gods, and generally known as divine laws.—HANNIS TAYLOR, the Science of Jurisprudence, 9.

2 Laws of nature and laws of man.—The nature and extent of the analogy between laws in the strict or political sense, and the uniformities in the course of physical events which we call laws of nature, have often been discussed. Blackstone and earlier writers pressed the comparison with rhetorical inexactness, which has been rebuked by the later analytical school with some excess of severity, as if the likeness were merely verbal and misleading. Early in this century the correction was more modestly but not less effectually made by Blackstone’s editor, Christian. “In all cases,” he says, “where it” (the word “law”) “is not applied to human conduct, it may be considered as a metaphor; and in every instance a more appropriate term may be found. . . . When we apply the word *law* to motion, matter, or the works of nature or of art, we shall find in every case that, with equal or greater propriety and perspicuity, we might have used the words *quality*, *property*, or *peculiarity*.” Still the resemblance, notwithstanding all criticism, is a real one. The laws made by princes and rulers aim with more or less success, though never with perfect success, at producing uniformity of conduct within the field of action to which

action in general, but of *human* action or conduct: that is, the precepts by which man, the noblest of all sublunary beings, a creature endowed with both reason and free will, is commanded to make use of those faculties in the general regulation of his behavior.

Man, considered as a creature, must necessarily be subject to the laws of his Creator, for he is entirely a dependent being. A being,

they apply. We observe in the course of nature uniformities which are constant. This constancy, compared with the partial and uncertain obedience given to human ordinances, has in all times presented itself to men as the perfect fulfillment in another region of that which the lawgiver can only strive to attain. By laws we can, more or less, make men behave in particular ways; the constraints of express enactment or customary rules are sufficient to some extent, but not altogether, to determine their acts and forbearances. But the powers of nature always behave in the same ways, and this readily suggests to our mind a constraint which is always present and always efficient. Seed-time and harvest, the changes of the moon, the courses of the stars, come round without fail. Thus it would be with men's actions if the law were always obeyed, and therefore we seem to see in nature a law more perfect than man's because never broken. In some such way as this the phrase "laws of nature" has come into common use, and in the practice of modern writers almost any general proposition in any branch of science may be called a law. That this manner of speaking should come to be regarded as containing an explanation of the facts is but one of innumerable instances of the tyranny constantly usurped over man by his own creatures—words. But in following this track of resemblance we have introduced unawares an important difference. At first sight the laws of nature seem to differ from those of man only in being inviolate; and their excellence in this respect is indeed a not uncommon topic of natural theology. But, when we consider it more curiously, the distinction is one of kind. The laws of nature are not more excellent than acts of parliament, but belong to another category. Christian has expressed the point as well as anybody: "When *law* is applied to any other object than man, it ceases to contain two of its essential ingredient ideas—namely, disobedience and punishment." A law of nature is obeyed, as we say, because there is no room for disobedience. In the case of laws in the proper sense, the law is one thing and the obedience—or, as it may be, disobedience—of any man subject to it is another thing: in the case of a law of nature there is no such difference. Human statutes, and even divine ones according to the majority of theologians, are commands addressed to agents who may or may not follow them. Their object is a certain uniformity, but the uniformity does not necessarily ensue. Nay, the law would still be a law if no single person obeyed it on any one occasion. But a law of nature is inseparable from uniformity; or rather it is the uniformity itself.

These considerations are such as by this time are pretty familiar to students of jurisprudence. Men of science have hitherto not troubled themselves much

independent of any other, has no rule to pursue, but such as he prescribes to himself; but a state of dependence will inevitably oblige the inferior to take the will of him, on whom he depends, as the rule of his conduct: not indeed in every particular, but in all

with the question, or at any rate have not added anything to the legal view of it. As to the attempts of philosophers who were neither men of science nor lawyers to clear up the general notion of law, they are best left in charitable silence. But lately Professor Huxley, in his admirable introduction to Messrs. Macmillan and Co.'s series of Science Primers, has brought a fresh and powerful scientific mind to bear upon this ancient comparison or metaphor, and shown once more that no subject is too worn to be put in some new light. His paragraph on "Laws of Nature" is quite short, and a considerable part of it may be given in his own words:

"When we have made out by careful and repeated observation that something is always the cause of a certain effect, or that certain events always take place in the same order, we speak of the truth thus discovered as a law of nature. Thus it is a law of nature that anything heavy falls to the ground if it is unsupported. . . . But it is desirable to remember that which is very often forgotten, that the laws of nature are not the causes of the order of nature, but only our way of stating as much as we have made out of that order. Stones do not fall to the ground in consequence of the law just stated, as people sometimes carelessly say; but the law is a way of asserting that which invariably happens when heavy bodies at the surface of the earth, stones among the rest, are free to move.

"The laws of nature are, in fact, in this respect similar to the laws which men make for the guidance of their conduct towards one another. There are laws about the payment of taxes, and there are laws against stealing or murder. But the law is not the cause of a man's paying his taxes, nor is it the cause of his abstaining from theft or murder. The law is simply a statement of what will happen to a man if he does not pay his taxes, and if he commits theft or murder; and the cause of his paying his taxes or abstaining from crime (in the absence of any better motive) is the fear of consequences which is the effect of his belief in that statement. A law of man tells [us] what we may expect society will do under certain circumstances; and a law of nature tells us what we may expect natural objects will do under certain circumstances. Each contains information addressed to our intelligence, and, except so far as it influences our intelligence, it is merely so much sound or writing.

"While there is this much analogy between human and natural laws, however, certain essential differences between the two must not be overlooked. Human law consists of commands addressed to voluntary agents, which they may obey or disobey; and the law is not rendered null and void by being broken. Natural laws, on the other hand, are not commands, but assertions respecting the invariable order of nature; and they remain laws only so long as they can be shown to express that order. To speak of the violation or the suspension of a law of nature is an absurdity. All that the phrase can really mean is that,

those points wherein his dependence consists. This principle, therefore, has more or less extent and effect, in proportion as the superiority of the one and the dependence of the other is greater or less, absolute or limited. And consequently, as man depends absolutely upon his Maker for everything, it is necessary that he should in all points conform to his Maker's will.

§ 39. 3. Law of nature.—This will of his Maker is called the law of nature.<sup>3</sup> For as God, when He created matter, and endued

under certain circumstances, the assertion contained in the law is not true; and the just conclusion is, not that the order of nature is interrupted, but that we have made a mistake in stating that order. A true natural law is an universal rule, and, as such, admits of no exceptions."

Professor Huxley, it will be seen, fully recognizes the difference insisted upon by Bentham and his followers in this country; and on that point we do not see how his exposition can be bettered. We can only rejoice that truths which down to our own time were ignored or imperfectly apprehended by the majority of learned men are now presented in clear, simple, and forcible language to everyone who sets about acquiring even the rudiments of scientific training.—POLLOCK, *Essays in Jurisprudence and Ethics*, 42.

3 The law of nature.—All legal rules are supposed to be reasonable and natural; even the worst have probably some considerations of reason to support them, and the more important doctrines of a legal system generally correspond to some deeply-rooted requirements of society. Even slavery was justified by the Greeks on grounds of the natural inferiority of barbarians and of vanquished nations. In this way it may be rightly said that important rules have a twofold justification, as legal commands and as reasonable propositions. But by saying so much we do not mean that there can be a proper system of law constructed on the basis of pure reason or of "human nature," as opposed to law produced by legislation, judicial decisions or custom. Yet this view has been put forward again and again in the course of history, and it has had a great influence in shaping the development of law. It has been said rather contemptuously that the law of nature is "jurisprudence in the air": and the definition need not be repudiated by supporters of this kind of law, for after all the air constitutes one of the most important elements of life, both for good and for evil.

The Greeks were struck by the great variety of positive laws, and asked themselves whether justice and right were only casual arrangements changing with circumstances and times, or whether behind this confusing variety there existed perennial notions of right and wrong, justice and injustice. While sophists and sceptics held the first view, idealistic philosophers from the time of Socrates, Plato and Aristotle, maintained the second. In contrast with shifting positive rules, they spoke of unwritten law ingrained in the heart of man, of a common law recurring among different tribes, of a law of nature which

it with a principle of mobility, established certain rules for the perpetual direction of that motion; so, when He created man, and endued him with free will to conduct himself in all parts of life, He

reasonable creatures were everywhere bound to recognize; and in Xenophon's reminiscences of Socrates we read that the family relations between man and wife, parents and children, were cited as concrete examples of these ever-recurring rules of the law of nature.

These were speculations of philosophers, but the great practitioners of law in Rome indorsed them with their authority. They had to deal with numberless legal enactments and customs over which their tribunals exercised sovereign authority. It was not a speculative, but an actual, problem for their prætors and proconsuls to reduce this heterogeneous mass to unity and reasonable order. In this way the question of the moral background to changing laws arose in full force, and the Romans eagerly took up the threads of Greek doctrine about a law of nature, as the reasonable basis of all particular laws and more especially of the common law of the empire. Ulpian was inclined to widen the boundaries of this law of nature so as to include even animals: perhaps he took his clue in this respect from the teaching of the Pythagoreans, for whom there was no gulf between animals and man. Others contented themselves with building on the foundations of the rational nature of man, and from this point of view treated a number of legal rules as necessary deductions from reason.

The jurist Paul remarks: "As leases are suggested by nature itself and are to be found in the law of all nations, a particular form of words is not necessary for their validity, but only consent. The same holds good in regard to sale." Wardship, again, is characterized by Gaius (Circ. A. D. 150) as an institution founded on natural reason, while the compilers of the Institutes under Justinian also speak of natural law in this case. (Gaius, I, 189; Inst. I, 20, 6.)

The tendency of the doctrine was, however, not suggested merely by practical considerations: its strongest elements were derived from philosophical ethics. Men like Papinian and Paul, Antoninus Pius, Marcus Aurelius, were under the sway of stoicism: they saw and worshipped the rule of nature in the world at large. Little wonder that they were convinced that reason and right were also the voice of nature, the clearest manifestation of divine power in the world!

In another setting, the same idealistic construction is observed in mediæval jurisprudence where it arose under the influence of Christianity and of the church. Though, according to the teaching of St. Augustine, the City of God is in Heaven and the city of the world is a creation of robbers, yet the road to the City of God lay through this world, and mankind had to prepare itself for future life by making the best of the time of trial on earth. God has not forsaken mankind in this trial: He has revealed His law to them and implanted it in their hearts as conscience and reason. The commonwealths of the earth build up laws of their own which partly serve the purpose of the moral education of men and partly reflect the selfish and sinful purposes of rulers, but in



laid down certain immutable laws of human nature, [40] whereby that free will is in some degree regulated and restrained, and gave him also the faculty of reason to discover the purport of those laws.

case of conflict men ought to conform to the eternal law of nature, of which the church is the principal interpreter.

Again, after the revival of learning and of secular culture, in the sixteenth, seventeenth, and eighteenth centuries, philosophers deduced a theory of law from a few principles of reason, in the same way as they constructed systems of metaphysics and ethics, of politics and of natural philosophy. With Kant the theory of the law of reason reached its highest point.

Sometimes attempts have been made to recognize reason as a source of positive law both in ancient and modern times. The Austrian Code (1811), for example, contains the following clause: "When a case cannot be decided in accordance either with the words or the spirit of a law, the court shall take into consideration similar cases decided by law, as well as the motives which suggested other laws of the same kind. Should the case still remain doubtful, it shall be decided in accordance with the law of nature, and with due regard to the circumstances of the case diligently collected and thoroughly considered."

Attempts of this kind to give the theory of the law of nature a direct bearing on the practice of courts have not been successful, while, on the other hand, the indirect influence of such theories in affecting the opinions of judges and legislators has been very great. The mitigation of slavery in the Roman empire, e. g., may be traced to a change of views expressed, among other things, in the proposition that men are free by nature and that slavery was introduced by the *jus gentium*, the positive law common to most nations (as distinct from the *jus naturale*, or natural law).

In the same way doctrines based on the law of nature have had a powerful influence on the formation of international law, on the reforms of public law in a democratic direction effected by means of the notion of contract, and on the radical alteration of the law of status by the doctrine of equality before the law.

There can be no doubt, for instance, that doctrines about the "rights of man," whatever may be thought of their concrete formulation, have exerted a potent influence on contemporary legal conceptions, and have themselves been derived from speculative doctrines of natural jurisprudence.

In English courts, references to the law of nature have never been favorably considered: but the indirect influence of doctrines based on it has been felt. In the famous case of the negro slave *Somersett*, which was decided in 1771 (shortly before the secession of the colonies), the slave was claimed by his master, a Virginian planter, while in England. Hargrave, counsel for *Somersett*, directed part of his argument against the assumption that slavery could be justified by the law of nature. He adopted Locke's reasoning that contract could not be the origin of slavery, because a man cannot divest himself of his right to life or to personal freedom. In regard to conquest and punishment as possible origins of slavery, Hargrave maintained that at the utmost they



Considering the Creator only as a Being of infinite *power*, He was able unquestionably to have prescribed whatever laws He pleased to His creature, man, however unjust or severe. But as He is also

might justify the enslaving of criminals and of vanquished enemies. But on no account were they sufficient to explain slavery inherited by birth. In giving the judgment which debarred the planter from asserting a right of mastery over the slave, Lord Mansfield declared that "slavery . . . is so odious, that nothing can be suffered to support it, but positive law. Whatever inconveniences," he continued, "may follow from the decision, I cannot say this case is allowed or approved by the law of England; and therefore the black must be discharged."

Another case in which the atmosphere of enlightened rationalism characteristic of the eighteenth century is strongly felt is *Omychund v. Barker* (1744), in which Lord Hardwicke laid it down that heathens might take a legally valid oath according to the ceremonies of their religion, because the essence of an oath is the belief in a Supreme Being capable of rewarding and punishing, and not the particular forms prescribed by Christian confessions.

Thus the law of nature or reason has operated as a literary, but not as a direct, source of law. It is a creation of jurisprudence and philosophy. It is no more a source of law in the technical sense of the term than the teaching of pandectists or of modern exponents of legal rules. The fact that it has been a most powerful ferment in the evolution of legal ideas does not make it a code to the clauses of which judges can turn in the administration of justice.

It cannot be treated as a code for this simple reason, amongst others, that it is not constant. In reviewing the course of its history, we can easily perceive that in all matters bearing on concrete problems of law it is subject to changes quite as important, if not so frequent and casual, as the changes of positive law. Can one speak, for instance, of a family law based on nature or reason? Would it be based on polygamy, or on strict monogamy as in the canon law, or on contractual monogamy, as at present, or on free selection of mates, as may conceivably be the case two or three centuries hence, or on eugenic selection by public authority, as some very advanced sociologists are urging? And is the relation between parents and children clearly prescribed by the law of nature? Children have been in charge of their mothers and under the absolute sway of their fathers, and at the educational disposal of the city state, and in the temporary care of both parents. Who knows whether the social element may not again prevail over the private organization of education? Is property likely to prove an institution of a perennial law of nature? The origins of property have been communistic; in its further history it has been treated more and more from the private, the individualistic point of view; it cannot be disputed that socialistic ideas are rapidly gaining ground in regard to it, that organized society claims a larger and increasing share in its distribution and use; can it be maintained that, say, the nationalization of the land or the monopoly of means of production by the state would be against the law of nature? People may consider such measures wrong, dangerous or mischiev-

a Being of infinite *wisdom*, He has laid down only such laws as were founded in those relations of justice, that existed in the nature of things antecedent to any positive precept. These are the eternal, immutable laws of good and evil, to which the Creator Himself in all His dispensations conforms; and which He has enabled human

ous, but they cannot be rejected by a simple appeal to eternal tenets of the law of reason. Again, punishment has certainly been regarded as a natural sequel to crime by all commonwealths, although most exalted moralists would have preferred to reserve punishment to God and to treat crime as a sin. But even in the actual practice of the law, are people agreed about the aim and scope of punishment? Is it a means of repression and amputation (Plato)? Is it a measure of educational discipline (Aristotle)? Is it principally a deterrent (Bentham)? Is it a necessary moral atonement (Kant)? Is it a measure of medical treatment (Lombroso)? In a word, one has not to go far to perceive that the contents of the law of nature are shifting, and that it would be impossible to reduce it to a unified and permanent code.

Does this mean that the law of nature or reason is a fanciful and absurd misconception? I am afraid the absurdity lies in supposing that a doctrine which has played such a part in the history of the world, which has appealed to minds of men of widely contrasting dispositions in entirely different circumstances, does not rest on solid foundations. Nor is it difficult to see what these foundations are. The law of nature is an appeal from Cæsar to a better informed Cæsar. It is an appeal by society at large, or by the best spirits of a given society, not against single decisions or rules, but against entire systems of positive law. Legislators are called in to amend law by separate statutes; judges may do a great deal in amending the law by decisions in individual cases, but the wisdom of legislators and the equity of judges are by themselves powerless against systems, because they start from a recognition of the authority of positive law in general. And yet law, being a human institution, ages not only in its single rules and doctrines, but in its national and historical setting, and the call for purification and reform may become more and more pressing with every generation. Public opinion, then, turns from reality to ideals. Speculation arises as to the essentials of law as conceived in the light of justice. Of course these conceptions of justice are themselves historical, but they are drawn not from the complicated compromises of positive law but from the simpler and more scientific teaching of philosophical doctrine. Thus the contents of the law of nature vary with the ages, but their aim is constant, it is justice; and though this species of law operates not in positive enactments, but in the minds of men, it is needless to urge that he who obtains command over minds will in the end master their institutions.

Reform and revolution cannot be produced by mere doctrines: material forces and circumstances have to be taken into account as well: moral lethargy may prove too great, the body politic too decrepit or too corrupt for sweeping changes. But the spread of doctrine claiming to pronounce judgment on posi-

reason to discover, so far as they are necessary for the conduct of human actions. Such, among others, are these principles: that we should live honestly, should hurt nobody, and should render to

tive law for the sake of justice is surely a force not to be disregarded or slighted by practical men.

It is significant that we are witnessing a revival of appeals to the law of nature in our own time. It comes from two sides. On the one hand there is a widely spreading conviction that existing systems of law are getting out of touch with fundamental requirements of modern society. It is not necessary nowadays to be a socialist in order to feel that the existing systems of positive law, which have sprung into being under the influence of feudal conceptions and of theories of free contract, will have to be largely transformed in order to meet the requirements of rising democracy. Schemes of reform and attempts at remedial legislation are being initiated everywhere; and though it would be out of the question for us to review such schemes and attempts in detail, we may notice that their growth undoubtedly testifies to a change in the leading conceptions of law.

There is another more modest contention, the admission of which, however, would undoubtedly strengthen the hands of partisans of reform. It is represented conspicuously by certain modern followers of Kant, headed by Stammler. Though granting that a law of nature as a set of perennial rules does not exist, they contend that every age ought to have its own law of nature, or rather its own "right-law" by the side of its positive law. That is, they maintain that rules of positive law have to justify their existence by reference to standards set up by the philosophical doctrine of the age. If laws are found wanting from this point of view, they ought to be corrected either by legislation or by judicial practice. Stammler's own attempt to formulate four standards by which "right-law" ought to be estimated cannot be said to be successful. It is heavily dogmatic, and leads to mere scholasticism. But the main view that in an enlightened age positive law has to be estimated by the standard of moral ideals seems to be incontestable.

I may add that in thus pleading for wider equity and greater latitude in interpreting and applying law, Stammler does not stand by any means alone. His view is substantiated by the spirit and acceptance of modern codes. The precise codification of laws might be expected to repress the growth of equity: but as a matter of fact, the promulgation of codes seems to have given a new impetus to the development of a critical and reforming spirit among Continental jurists.

We tread here on ground which does not belong properly to the law of nature in the original meaning of the term. But the less ostentatious teaching as to "right-law" and "equitable" law goes much further than the discretion of judges recognized at present by English courts would warrant. Appeals to reason and to the essence or nature of legal relations aim at systematic reforms of the law which may help to avoid social revolution.—VINOGRADOFF, *Common-Sense in Law*, 234.

everyone his due; to which three general precepts Justinian<sup>a</sup> has reduced the whole doctrine of law.<sup>4</sup>

But if the discovery of these first principles of the law of nature depended only upon the due exertion of right reason, and could not otherwise be obtained than by a chain of metaphysical disquisitions, mankind would have wanted some inducement to have quickened their inquiries, and the greater part of the world would have rested content in mental indolence, and ignorance its inseparable companion. As, therefore, the Creator is a Being, not only of infinite *power*, and *wisdom*, but also of infinite *goodness*, He has been pleased so to contrive the constitution and frame of humanity, that we should want no other prompter to inquire after and pursue the rule of right, but only our own self-love, that universal principle of action. For He has so intimately connected, so inseparably interwoven the laws of eternal justice with the happiness of each

<sup>a</sup> *Juris præcepta sunt hæc, honeste vivere, alterum non lædere, suum cuique tribuere.* Inst. I. 1. 3. (The precepts of the law are these, to live honorably, not to injure another, and to give to everyone his due.)

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<sup>4</sup> *Ulpian's juris præcepta.*—All members of a civilized commonwealth are under a general duty towards their neighbors to do them no hurt without lawful cause or excuse. The precise extent of the duty, as well as the nature and extent of the recognized exceptions, varies according to the nature of the case. But this does not affect the generality of the principle, any more than the infinite variety of matters about which contracts may be made, and the considerable though finite number of different known kinds of contracts, with special rules as to the effect and fulfillment of each of them, affect the truth of the general proposition that we must perform our contracts. In fact, the principle was enunciated long ago by Ulpian in his familiar statement of the commandments of the law, preserved in the introductory chapter of Justinian's Institutes: "*Juris præcepta sunt hæc: honeste vivere, alterum non lædere, suum cuique tribuere.*" Without endeavoring to force on Ulpian or his Stoic masters a more exact meaning than they had, we may find in his words a broad summary of a lawful man's duties which is founded on the permanent elements in human affairs, and is therefore still true and useful. *Honeste vivere* is to lead a life free from crime and scandal. *Suum cuique tribuere* is, literally, to give every man his due; that is, in fact, not to encroach or make unfounded claims on what belongs to others, and to perform whatever one has legally bound oneself to perform. *Alterum non lædere* is to forbear from inflicting unlawful harm in general. As the English church catechism has adapted Ulpian's words, it belongs to my duty towards my neighbor "To hurt nobody by word nor deed: To be true and just in all my dealing."—POLLOCK, *Torts* (9th ed.), 1.

individual, that the latter cannot be attained but by observing the former; and, if the former be punctually obeyed, it cannot but induce the latter. In consequence of which mutual connection of justice and human felicity, He <sup>[41]</sup> has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, as some have vainly surmised; but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." This is the foundation of what we call ethics, or natural law. For the several articles into which it is branched in our systems, amount to no more than demonstrating, that this or that action tends to man's real happiness, and therefore very justly concluding that the performance of it is a part of the law of nature; or, on the other hand, that this or that action is destructive of man's real happiness, and therefore that the law of nature forbids it.

This law of nature, being coeval with mankind and dictated by God Himself, is of course superior in obligation to any other. It is binding over all the globe in all countries, and at all times: no human laws are of any validity, if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.<sup>5</sup>

5 May judges disregard acts of parliament?—Besides this statement by Blackstone there are "expressions sometimes used by modern judges which imply that the courts might refuse to enforce statutes going beyond the proper limits (internationally speaking) of parliamentary authority. But to words such as those of Blackstone, and to the *obiter dicta* of the bench, we must give a very qualified interpretation. There is no legal basis for the theory that judges, as exponents of morality, may overrule acts of parliament. Language which might seem to imply this amounts in reality to nothing more than the assertion that the judges when attempting to ascertain what is the meaning to be affixed to an act of parliament, will presume that parliament did not intend to violate the ordinary rules of morality, or the principles of international law, and will therefore, whenever possible, give such an interpretation to a statutory enactment as may be consistent with the doctrines both of private and of international morality. A modern judge would never listen to a barrister who argued that an act of parliament was invalid because it was immoral, or because it went beyond the limits of parliamentary authority. The plain truth is that our tribunals uniformly act on the principle that a law alleged to be a bad law is *ex hypothesi* a law, and therefore entitled to obedience by the courts."—DICEY, *Law of the Constitution* (3d ed.), 59.



But in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason: whose office it is to discover, as was before observed, what the law of nature directs in every circumstance of life; by considering, what method will tend the most effectually to our own substantial happiness. And if our reason were always, as in our first ancestor before his transgression, clear and perfect, unruffled by passions, unclouded by prejudice, unimpaired by disease or intemperance, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

§ 40. 4. **Revealed law.**—This has given manifold occasion for the benign interposition of divine providence; which, in compassion to the frailty, the imperfection, and the blindness of human reason <sup>[42]</sup> hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. The doctrines thus delivered we call the revealed or divine law, and they are to be found only in the Holy Scriptures. These precepts, when revealed, are found upon comparison to be really a part of the original law of nature, as they tend in all their consequences to man's felicity. But we are not from thence to conclude that the knowledge of these truths was attainable by reason, in its present corrupted state; since we find that, until they were revealed, they were hid from the wisdom of ages. As then the moral precepts of this law are indeed of the same original with those of the law of nature, so their intrinsic obligation is of equal strength and perpetuity. Yet undoubtedly the revealed law is \*of infinitely more authenticity than that moral system, which is framed by ethical writers, and denominated\* the natural law. Because one is the law of nature, expressly declared so to be by God Himself; the other is only what, by the assistance of human reason, we imagine to be that law. If we could be as certain of the latter

\* In the first edition "(primarily speaking) of infinitely more authority than what we generally call."



as we are of the former, both would have an equal authority; but, till then, they can never be put in any competition together.<sup>6</sup>

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points, in which both the divine law and the natural leave a man at his own liberty; but which are found necessary for the benefit of society to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy: for, with regard to such points as are not indifferent,

**6 Religion and law.**—An interesting account of the identification in former ages of religion and law, and the gradual secularization of law, may be found in W. G. Miller's *Data of Jurisprudence*, pages 416 ff. He concludes the discussion as follows (p. 426):

"The chief rules in our law, borrowed directly from the Bible, are the list of degrees within which marriage is forbidden. Many accept the rules who would dispute the doctrine that they were binding solely because they were a divine revelation. Another rule, which is traced to the Hebrew Code in Exodus, is as to the liability for an animal which has been in the habit of doing damage. But this rule is adopted not because it was revealed, but because it is rational, and therefore natural and customary. Authority is found in revelation for many diverse laws of marriage and divorce. Mohammedans find authority for having four wives in the example of Jacob, and for a very simple form of divorce. Christians are monogamous as a general rule; some Christians hold marriage to be indissoluble and refuse divorce. Scots law quotes Scripture for divorce on the ground of desertion (Confession of Faith, xxiv, 6).

"The logical outcome of Blackstone's doctrine may be seen in the caricature of it by the early settlers in the New England states. They carried the laws of England with them, and Blackstone's doctrine in so crude a form that they incorporated chapters of the Jewish Scriptures in their published statutes, as being the law of God. De Tocqueville has pointed out the grossly iniquitous results—intolerance, persecution, and tyranny. (*Democracy in America*, Reeve's Trans. (1889), 1, 34; 2 Kent, Comm. 34. Cf. Bryce, *American Commonwealth*, c. 107.)

"This wholesale verbal adoption of the divine law might do little harm in the time of Alfred the Great (Thorpe, 20 et seq.), because the machinery of enforcement was different, the civil courts more lax and inefficient, the church more powerful than in modern times, and above all, the state of society and public opinion more uniform. It was sheer force of circumstances—the fact that society was more than religion—that religion was made for man, and not man for religion—which has produced toleration, freedom, and religious liberty both in Britain and America.

"The change of view sketched above as to the relation of religion to law has affected the relations of church and state, and the conduct of the individual

human laws are only declaratory of, and act in subordination to, the former. To instance in the case of murder: this is expressly forbidden by the divine, and demonstrably by the natural law; and from these prohibitions arises the true unlawfulness of this crime. Those human laws that annex a punishment to it do not at all increase its moral guilt, or [43] superadd any fresh obligation *in foro conscientiæ* (in the court of conscience) to abstain from its perpetration. Nay, if any human law should allow or enjoin us to commit it, we are bound to transgress that human law, or else

members of these bodies. When congresses of clergy and presbyteries press legal reforms on the government, it is only as citizens. They more often appeal to utilitarian reasons than to the revealed law of God. Even members of the Catholic church are compelled to adopt a similar attitude. When they demand what they think justice, they do not plead the law of God or of the church as a title so often as the fact that they are citizens, taxpayers, and ratepayers.

"We see, then, what is said to be revealed:—

- "(1) In the earliest stage the Deity deals with details of procedure, and reveals separate judgments on every case. This is still the Chinese view.
- "(2) As states become organized, and as the judicial function of administering law in accordance with custom, good faith and the observance of contracts becomes separated, the revelation takes the form of legislation—as with the Hebrews and the Hindus, who received codes in this way.
- "(3) As the conception of the relation of the Deity to the universe changes so does His relation to law. The legislation becomes more and more general. As the legislator lays down a general rule for the judge, so does God lay down a general rule for legislators. 'Divine' law becomes 'Eternal' law, which cannot change, as God is justice Himself.
- "(4) But laws regulate rights. If God reveals rules to settle collisions of rights, how were rights created? The Book of Genesis, and the theories of Grotius and others founded thereon, show that God gave man dominion over things and living creatures. He instituted the legal relations of property and marriage, parent and child, and inferentially all others, and the rights flowing therefrom. If we know the rights which are divine, the divine reason in us may find the laws.
- "(5) In like manner many moralists hold that what is revealed is duties—to God, to men, and to one's self.
- "(6) The doctrine then dwindles down to that of Erskine, that God created the world and human beings. Rights are involved in human nature and laws are involved in rights; and thus they are all ultimately divine."

we must offend both the natural and the divine.<sup>7</sup> But with regard to matters that are in themselves indifferent, and are not commanded or forbidden by those superior laws; such, for instance, as exporting of wool into foreign countries; here the inferior legislature has scope and opportunity to interpose, and to make that action unlawful which before was not so.

§ 41. 5. Law of nations.—If man were to live in a state of nature, unconnected with other individuals, there would be no occasion for any other laws, than the law of nature, and the law of God. Neither could any other law possibly exist: for a law always supposes some superior who is to make it; and in a state of nature we are all equal, without any other superior but him who is the author of our being. But man was formed for society; and, as is demonstrated by the writers on this subject,<sup>b</sup> is neither capable of living alone, nor indeed has the courage to do it. However, as it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many; and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. Hence arises a third kind of law to regulate this mutual intercourse called “the law of nations”; which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any; but depends entirely upon the rules of natural law, or upon mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which both communities are equally subject: and therefore the civil law<sup>c</sup> very justly observes, that *quod naturalis ratio inter omnes homines con-*

<sup>b</sup> Puffendorf, l. 7. c. 1. compared with Barbeyrac's Commentary.

<sup>c</sup> Ff. 1. 1. 9.

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<sup>7</sup> “Such statements are not to be regarded as legal propositions. In deciding doubtful points of law our courts can give due weight to moral considerations; but where our law, whether by statute or otherwise, is clear, they are bound to administer the law as they find it, irrespective of opinions upon its morality. (If it were mischievous in its operation and necessarily mischievous, it would, to my mind, be no argument, if the statute expressly authorized the thing”; per Ld. Halsbury, [1896] App. Cas. 467. “Our duty upon this occasion is to administer and not to make the law”; per Ld. Herschell, [1897] App. Cas. 460).”—BROOM, Legal Maxims (8th ed.), 13.

*stituit, vocatur jus gentium* (that rule which natural reason has dictated to all men, is called the law of nations).<sup>8</sup>

§ 42. 6. Municipal law.—<sup>[44]</sup> Thus much I thought it necessary to premise concerning the law of nature, the revealed law,

<sup>8</sup> *Jus gentium*.—Two distinct uses of the expression *jus gentium* are to be discriminated: First, the Roman jurists define *jus gentium* as comprising the principles of right and wrong recognized in the laws of all peoples or bodies of men politically organized. Justinian, having separated public from private law, reproduces from Ulpian a threefold division of Roman private law into precepts of natural law (*jus naturale*), of the law common to all nations or gentile law (*jus gentium*), and of the civil law or law peculiar to the citizens of Rome (*jus civile*). Gaius makes a twofold division, in which natural law and gentile law are regarded as synonymous and opposed to civil law. Such a division, however, has but little foundation in the facts of Roman law, and possesses no scientific value; and its philosophical air and emptiness constitute its sole interest. It probably owes its start to the ethical maxim of the Stoics inculcating the duty of conforming to nature; and this insignificant and purely theoretical matter appears to be the only trace of Stoical influence (it cannot be called impression) on Roman law. This fanciful *jus gentium*, corresponding so closely to natural law, is a late generalization on the basis of the real and most important *jus gentium* now to be mentioned.

Second, the original *jus gentium* was the practical outcome of the necessity that pressed upon the Romans to provide rules of law for the settlement of disputes between Roman citizens and aliens, and between aliens and aliens. It was that portion of the Roman law that grew up, typically and chiefly, in the edict of the alien prætor. The civil law being applicable to citizens alone, the prætor and the arbitrators must necessarily decide causes between aliens and between citizens and aliens, in accordance with their notions of what was equitable and just (*æquum et bonum*), influenced, of course, by such usages and notions as commonly prevailed in dealings between aliens and between citizens and aliens. This body of equitable principles constituted the *jus gentium* as opposed generally to *jus civile*. While the edict of the alien prætor constituted it law for aliens, the edict of the city prætor imposed it as law upon Roman citizens. *Jus gentium*, accordingly, is not a collection of rules common to the law of all political societies of men, but a collection of rules governing the intercourse of Roman citizens, with the members of all foreign nations reduced to subjection to Rome. Gradually precepts of the *jus gentium* were transferred to regulate the mutual intercourse of citizens, by two main agencies—the edict of the city prætor and the writings of the jurists.—HUNTER, Roman Law, 35.

The student is advised to read the third chapter of Maine's Ancient Law and Sir Frederick Pollock's note thereon. And in Sohm's Institutes of Roman Law (translated by Ledlie, 3d ed., pp. 70–131), he may find how the *jus civile* in the narrower sense as the law of a city, the law, that is, which obtained

and the law of nations, before I proceeded to treat more fully of the principal subject of this section, municipal or civil law; that is, the rule by which particular districts, communities, or nations are governed; being thus defined by Justinian,<sup>d</sup> “*jus civile est quod quisque sibi populus constituit*” (the civil law is that which each nation has established for itself). I call it *municipal* law, in compliance with common speech; for, though strictly that expression denotes the particular customs of one single *municipium* or free town, yet it may with sufficient propriety be applied to any one state or nation, which is governed by the same laws and customs.

§ 43. a. **Definition of municipal law.**—Municipal law, thus understood, is properly defined to be “a rule of civil conduct, prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong.”<sup>9</sup> Let us endeavor to explain its several properties, as they arise out of this definition.

<sup>d</sup> Inst. 1. 2. 1.

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only among *cives*, or citizens of the Roman community, came to be transformed, through the influence of the *jus gentium*, into a new “civil law,” or general law for all mankind.

<sup>9</sup> **Definition of law.**—In the preceding lectures, law has been seen in the process of forming, and in operation, under past and present conditions of society; the question now is, What is this phenomenon itself which we call law? What is it that is the resultant of conflicting social forces? The current English and American definition, given a hundred and forty years ago by Blackstone, runs thus: “Law is a rule of civil conduct prescribed by the supreme power in a state, commanding what is right and forbidding what is wrong.” That this is unsatisfactory has often been declared, but the definition is still accepted in law schools and in text-books around the world, and we cannot ignore it. That it is dangerous as well as unsound under modern conditions, whether of equality or of inequality, is worth pointing out at some length. *We*, at any rate, must get rid of it.

The chief objection is, that the definition as a whole naturally suggests, and in connection with Blackstone’s context and the practice of the time clearly teaches, that the sovereign of a people may be external, and by implication that the law begins with, and is founded upon, abstract principles. Its language indeed suggests a theocratic original; the definition, especially in connection with the discussion accompanying it, reads like an attempt to generalize the decalogue, with the substitution of the words “prescribed by the supreme power in a state” for, “And God spake all these words”; the analogy being plain, that the supreme power in a state is external to the people, as God is external to His people, and so declares the law forever. And now observe the



§ 44. (1) It is a "rule."—And, first, it is a *rule*: not a transient, sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. Therefore, a particular act of the legislature to confiscate the goods of Titius, or to attain him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law. But an act to declare that the

actual language of the context. "The general signification of law," the author of the Commentaries says, is that of a "rule of action dictated by some superior being." It is true Blackstone says this in his preliminary discussion concerning law in general, before he has reached the subject of municipal law; but he finds the very type of all law in the words just quoted. The only difference he makes—and this in the very next sentence—between the "general signification of law" and law "in the more confined sense," is that law in this latter sense consists of "rules of *human* action or conduct." There is no suggestion of any difference in regard to the sovereign, on the point of externality. Indeed, a little further on, where Blackstone is considering the "law of nature," he speaks in the same terms of all law. In a state of nature "there would be no occasion for any other laws than the law of nature and the law of God. Neither could any other law possibly exist; for a law always supposes some superior who is to make it." Blackstone's law was an echo of theology—theology too of the eighteenth century.

It is true that in the course of his remarks Blackstone finds occasion to quote Justinian's precept, "*Jus civile est quod quisque sibi populus constituit*"; but he is making the quotation, not to show that the sovereign must not be external, but to justify his own use of the term "municipal or civil law," as the law governing "districts, communities, or nations." The whole preliminary discussion is based on the proposition that human laws all depend upon the divine; and the conclusion is plain, in the absence, in a discussion of distinctions, of any suggestion to the contrary, that as the Author of the divine laws is external to those upon whom such laws are to operate, so the supreme power in a state, from which proceed the laws which are to operate in civil affairs, is external to the people. It is a fact to be noticed that the rule of conduct is prescribed by supreme power, not in *the* state, but "in *a* state"; any state satisfies the definition. Plainly, if Blackstone's definition was to make any distinction at all, the point that there could be no external sovereign in his conception of law was important enough to require him to make it clear beyond a doubt.

What the face of the definition and the context tell us, the practice of the time so fully exemplifies that one cannot be permitted to doubt that the definition was to be taken as consistent with the practice, or, more likely, as based upon it. Blackstone of course knew what was going on, at the very time of his definition, between Great Britain and her American colonies; could there



crime of which Titius is accused shall be deemed high treason; this has permanency, uniformity, and universality, and therefore is properly a *rule*. It also is called a *rule*, to distinguish it from *advice* or *counsel*, which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends

have been a better time to repudiate external sovereignty? Blackstone gave no sign—his definition was given, it remained unchanged. The Commentaries were already famous at the time of the American revolution; at home they were held an authority as the work of one who had been appointed a justice of the common pleas in the year 1770, just after the Commentaries were completed. The dispute with America was a plain one. Parliament claimed the right to make laws for the colonies “in all cases whatsoever”; America held that parliament was an external power touching matters of domestic concern in this country, and severed her connection with the mother state.

The idea and the practice prevailed throughout Europe; everywhere on that side of the Atlantic the conception of law, in conformity with theology, included external sovereignty. The “social contract” itself had been taken, even in England, to support absolute monarchy. Hobbes had held that, in virtue of that contract, interpreted by his idea of the state as the end and aim of all things social, the people had contracted away their rights in favor of the king. All this was object lesson for Blackstone, and Blackstone was faithful to it. His definition can have but one meaning: it could be accepted by the autocrat of all the Russias. A remark is proper here. The reason why a sovereign who is external is such, is not because the head of the state has his home beyond the sea; it is because he has no authority. “Lynch law,” or the “law” of a vigilance committee, proceeds from an external sovereign. The moment your external sovereign receives rightful authority, that moment he ceases to be external. The supreme power of the state is not, under American law, an external sovereign, if that power is justly exercised over a people. It certainly is not external in any objectionable sense as it ordinarily exists in a state. Supreme power is but a necessary phase of organized society, of which every member is a part. In the nature of things the state is only (for the present purpose) what the word etymologically declares, a standing—a standing or holding together of the people; and that imports supreme power. It is external in reference only to individuals, as power always must be. Blackstone's definition would permit the power to be external to the whole body of citizens, whereas supreme power should be one with them, and nothing more.

It must further be particularly observed that the objection to the external sovereign is, not that he cannot lay down law—whatever the courts will enforce is law, because it binds—the objection is that his control is dangerous, that the law he lays down is a bad kind of law, likely to result in disorder and revolt.

The definition is also unsound in detail. “Law is a rule of civil conduct.” This statement, taken as a whole, is indefinite where one is entitled to call

not upon *our approbation*, but upon the *Maker's will*. Counsel is only matter of persuasion, law is matter of injunction; counsel acts only upon the willing, law upon the unwilling also.

[45] It is also called a *rule* to distinguish it from a *compact* or *agreement*; for a compact is a promise proceeding *from* us, law is a command directed *to* us. The language of a compact is, "I will, or will not, do this"; that of a law is, "thou shalt, or shalt not, do it." It is true there is an obligation which a compact carries with

for definite information. One may well expect the definition to tell us on what ground the rule of civil conduct is based. Is it based upon some eternal principle, or on convenience, or on power? No answer on the face of the definition is given. The word "rule" too, well enough if understood as probably it was intended, needs explanation beyond any it receives. Besides meaning regulation, rule naturally suggests requirement; and the words "commanding what is right and prohibiting what is wrong" show that that is the intended meaning. Now much of the law, taken in a straightforward way of stating it—in the only language, it may be, in which it is expressed, especially in the case of a statute—may not be requirement at all. So taken it may simply be a grant of authority for acquiring rights which before had no existence except in the state. The legislature passes a statute authorizing a town to borrow money, to vote on giving bonds for a certain purpose, to become incorporated, authorizing the formation of trading corporations, or the doing any of a score of things, where no right whatever existed before. The word "rule," in the sense of requirement, is inapplicable to such law taken only as it is stated, that is, in its own direct terms. A distinction should have been made, if not for the expert at least for the inexpert; and Blackstone was writing for the latter. He ought, it may fairly be urged, to have told those whom he was teaching that, in regard to laws granting authority, the word "rule" was applicable only in a collateral way, to the course, to wit, to be pursued in regard to the authority—that in its proper sense of requirement it meant nothing more than that the authority is usually subject to conditions to be complied with, and that as an incident third persons must respect it.

One may not unreasonably object, in the next place, to the word "prescribed"—"a rule of civil conduct prescribed by the supreme power." By making that word part of his definition, Blackstone makes it necessary to the same; if there could be any doubt, the fact is made clear by what follows. Blackstone says that in using this term he means that the rule must be "notified." "A bare resolution," he declares, will not be enough. "It is *requisite* that this resolution be notified to the people who are to obey it."

Is it necessary to the existence of a law that it be "notified to the people"? If it is, then the American colonies had very little law. At that time legislation was printed but fitfully, and then only in part; and the decisions of the courts were never published at all, or published only of some case calculated to create public excitement—an unusual thing. Are the people of our territories, where

it, equal in point of conscience to that of a law; but then the original of the obligation is different. In compacts, we ourselves determine and promise what shall be done, before we are obliged to do it; in laws, we are obliged to act without ourselves determining or promising anything at all. Upon these accounts law is defined to be "*a rule.*"

§ 45. (2) It is "*a rule of civil conduct.*"—Municipal law is also "*a rule of civil conduct.*" This distinguishes municipal law

the law, at any rate the judicial law, is seldom published—are they without law? And what is to be said of the people of our smaller states, like Rhode Island and Delaware, where the decisions are published only at intervals of several years—only when the accumulation is enough to make a respectable volume? Are these decisions meantime of no general force? Even in the large and populous states, where statutes and decisions are published at very short intervals, there is much law that is not prescribed.

What statute or decision ever prescribed that no one may take another's property without permission? The fact that there is a law covering the case is indeed plain; but that is not because it has been prescribed in any law book or other publication. To prescribe indeed means more than to give requisite notice; even of that meaning it is barely patient. More properly it signifies to set down in direct terms, with fixed bounds. To leave a matter to inference is not to prescribe it. And then if it be said, as Blackstone seems to say, that much of the law not prescribed in law books is divine law, "*prescribed in revelation,*" it must be replied that even in regard to that part the law has not been "*prescribed by the supreme power in a state*"; though it must be admitted that where the sovereign is external to the people, the rule must be prescribed, for it is not that people's own "*rule of conduct.*"

But in a larger and more important sense the word creates a false impression, especially of the making of what is known as common law. Common law is not laid down with fixed bounds; it is peculiarly a reflection of times and conditions of society, usually tardy, but following on and changing more or less accordingly. The times may, it is true, be a long dead level, untouched by serious social change; they may be as they were in Blackstone's day and for generations before. On the other hand, they may be as they were in the first half of the nineteenth century; they may be as they have been since our Civil War; they may be as they are to-day, fairly revolutionary. With social, economic, or political change the law may change in substance; but even in a stationary condition of society, the common law will seldom have sharply drawn lines. Even its most definite rules are almost certain to have a penumbra—a penumbra which may spread back towards the rule itself until the whole field becomes indistinct; to be lighted up again perhaps by a new rule, with a new penumbra, subject to the same process. Examples come ready to hand even from comparatively stagnant times. There is Chief Justice Shaw's fellow-

from the natural or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith. These regard man as a creature, and point out his duty to God, to himself, and to his neighbor, considered in the light of an individual. But municipal or civil law regards him also as a citizen, and bound to other duties towards his neighbor, than those of mere nature and religion: duties which he has engaged in by enjoying the benefits of the common union; and

servant rule. (*Farwell v. Boston & W. R. Corp.*, 4 Met. (Mass.), 49, 38 Am. Dec. 339.) The penumbra was there; and now, what with statute and judge-made law, in the social changes which have taken place, the whole sky is darkened. There was again the older rule that false representation, even *scienter*, could not be a defense to contract. That seemed to be as hard and fast a rule as could be laid down; but even that rule, or perhaps I ought to say, that rule especially, had its penumbra, a veil spreading over from equity; and then finally common-law judges replaced the rule with a better, the one they had refused to admit. Conversely, even the age-long darkness of savage rules in the criminal law has a lighter edge; there is mocking of Tyburn (Tyburn gallows) in wager of battle (the last case was *Ashford v. Thornton*, 1 Barn. & Ad. 405, 1818), and the sky was clear.

Blackstone's word "prescribed," taken as words of definition should be taken, in its natural sense, would deny this common quality of judicial law. A definition of law need not declare that laws have a fading border-land, but definition should not contradict the fact. You may define the sun without saying that that fiery planet is apt to make it hot for men in midsummer, but you must not use a word which would seem to say that it cools the air.

"Commanding" and "prohibiting" are words out of place. There are few such words in our law; the most that can be said is that constitutions and statutes make use of them more or less; judicial law seldom if ever does. Certain legal precepts, such as *mandamus* and injunction, run indeed in words of command or prohibition; but a precept or a writ is not a law—it is only a direction made according to law. The law is general, the precept particular. Even if such instruments were laws, the fact would not justify the use of the words in question, for precepts of the kind are applicable to but few cases; they would make only a small part of the law. So in general of the decisions of the courts; taken singly, these are not, properly speaking, law, they are merely according to law. They are particular, applicable to A and B, parties to a suit, while the law is general. The law may, of course, be seen in a decision; it may be stated in terms in it; but the decision, whatever its form, whether of command, prohibition, or anything else, simply falls within the law.

If it be said that the criticism is only one of words—that the law must be obeyed or unpleasant things may follow, and that therefore, in effect, the law does command and prohibit—the answer in the first place is, that for beginners the words are misleading, and in the second place that the statement

which amount to no more than that he do contribute on his part to the subsistence and peace of the society.

§ 46. (3) It is "a rule prescribed."—It is likewise "a rule *prescribed*." Because a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But the manner in which this notification is to be made, is matter of very great indifference.

at best is true only of portions of the law. In the case of laws conferring authority, as we have already seen, it is only in the course to be pursued in regard to the exercise of the authority that any command or prohibition can be said to be made. Surely the authority itself is given by law, though where it is confined to particular persons others may be said in some remote sense to be prohibited from interfering. The point is, that the law says that the town or the railway or other body *may* do the thing authorized; enough for the criticism that the town or other person has an authority, without being "commanded" to do what otherwise would be unlawful.

As a matter of fact, Blackstone's definition makes the word "command" suitable even to permission and so compels it to commit suicide; for he says that law "commands what is right," and according to his own explanation of the word, as will presently appear, whatever the sovereign declares is "right"—not morally but legally—and the declaration may be only a grant of authority. A man is commanded to do what he may do or not, as the pleases! Plainly Blackstone overlooked one part of the law.

The words "right" and "wrong" required Blackstone himself to justify them. In their natural sense, when taken together as in the definition, and in connection with the words "command" and "prohibit," they import things right or wrong in themselves, right or wrong in plain morals. But that is the very sense in which, as Blackstone explains, they are not to be taken. In that sense the words fall, not under municipal but under divine law; rights "which God and nature have established . . . need not the aid of human laws to be more effectively invested in every man than they are." "So that, upon the whole," he goes on to say, "the declaratory part," by which he means the determining part, "of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong."

And now, having emptied the words of their natural meaning, Blackstone finds himself compelled to empty them of all meaning, or at least of all value for the purpose of a definition; for he says that as the words are not to be understood as referring to what is intrinsically right or wrong, their meaning must be found in the declarations of the sovereign. Things are, within the purport of the definition, "right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper for promoting the welfare of society," etc. This "municipal legislator" is the external sovereign,



It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified *viva voce* (by word of mouth), by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed, [46] to be publicly read in churches and other assemblies. It may lastly be notified by writing, printing, or the like, which is the general course

and he acts as he thinks fit. There is no hint that changes in society affect the question of legal rights.

Whatever social order prevails in the state, Blackstone's definition must be set aside.

Is it possible in the teaching of the law school to find a trustworthy, working definition of law, as the term is understood in America? The examination of Blackstone's definition may have helped the way. We have seen that certain things should be rejected, and we have seen some things which should replace what is to be rejected. This cannot be reckoned as anything short of gain. The facts may be recounted:

1. A definition of a modern system of law should not suggest that the sovereign may be external.
2. The expression "rule of civil conduct" is indefinite, and "rule" should be explained.
3. The word "prescribed" is unsatisfactory, whether in the sense that law must be "notified to the people," or that it is to be set down in fixed terms; it is enough, so far as any requirement of notice is concerned, that the law proceeds from the people; instead of being set down in fixed terms, it is a product of times and conditions, changing in light and shade and in substance accordingly.
4. The definition should not declare that law consists in commands and prohibitions.
5. It should not tell us that law is predicated of right and wrong as shown in the declarations of the sovereign, without regard to changes in society.

It is proper, however, to state, that definition of a comprehensive term like law need not exclude things not intended to be covered by it; enough that it does not suggest them as within it. Such a definition is to be taken as including only what it affirms or fairly implies, taken in connection with any remarks accompanying it and relevant external facts. It is still more important to observe that no definition of the term "municipal law" can be trustworthy and useful which puts the term in a strait-jacket of hard-and-fast lines and specific dimensions. It would be "perilous" indeed to put any such definition to use in the administration of justice. There are great indeterminate forces in relation to law, and it should be part of a trustworthy and useful definition of the term to find the place for the play of them and make allowance accordingly; and that, too, in some larger sense than the play of mere light and shade. A correct analysis of the typical phenomena of law—a grip on things as they are—should lead to the desired result.

The first thing to be said is, that one must be careful not to be misled by figures of speech. We constantly use the term "law" figuratively, and prop-



taken with all our acts of parliament. Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who (according to Dio Cassius) wrote his laws in a very small character, and hung them upon high pillars, the more effectually to ensnare the people.

erly enough; but in the present inquiry we must be on our guard against taking figure for fact. We say that the law authorizes or does not authorize one to do so-and-so, as though the law had personality; what we mean is that it is lawful or unlawful to do the thing. We say that the law deals with a question in such-and-such a way; what we mean is that the courts deal with it in that way. We speak of setting the law in motion; what in reality we set in motion is the machinery of justice, the courts. We may speak of law as the "life" or the "life-blood" of the state; the figure carries a certain true idea. But while language of the kind is inevitable with men of imagination, it must not be taken to imply that law is a distinct cause of things. Law is not life; life is behind the law—law is a reflection of social forces, and that through a refracting medium; it is the servant of the dominant power in society. Law is only another word for the very things, it may be, which in figurative language it is put as creating. Law does not, for instance, create relations of right and duty; law does not even make the relations binding, in any sense of a force distinct from those relations. The relations are necessarily binding in any organized political society; and that, so far, is municipal law. Relations of right and duty—a subject to be dwelt upon later—find their binding energy in the existence of the state; such binding energy is part and parcel of the same—the most essential part of it, not a product but a part of it. So it is that these relations go to make municipal law. What then is meant by municipal law must be found, not by supposing that law is something standing apart, but by considering the elements which go to make it.

In the examination of Blackstone's definition we noticed two phases of law, in the first of which the law appears in the form of requirement, in the second, of grant of authority. Now, requirement imports right and duty in corresponding relation; duty being the term evolved in recent times from the idea of requirement or Blackstone's "command" and "prohibition." A has a right of possession in land; B and all others are required to respect that right, that is, they are under a duty to A to respect it; and so there exists a relation of right and duty between A and other persons. A, again, has a right of contract against B; B must perform his contract, that is, he is under a duty to A to respect A's right; and so there exists a relation of right and duty between the two. Or we may equally well say, as before, of both cases, that a corresponding relation exists between the right of A and the duty of B, or of B and all others.

This is the great field of law; it is evidently what was in Blackstone's mind in framing his definition; it is what usually is in the mind of a lawyer in our day when he thinks of law.—M. M. BIGELOW, in *Centralization and the Law*, pp. 135–152.

There is still a more unreasonable method than this, which is called making of laws *ex post facto* (after the fact), when after an action, indifferent in itself, is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.<sup>10</sup> Here it is impossible

<sup>10</sup> *Ex post facto* laws.—The original meaning of *ex post facto* applies to civil and criminal law alike. (Co. Litt. 241; Fearne's Con. Rem. 175, 203; Powell on Devises, 113, 133, 134; 2 Ld. Raym. 1352.) There are even some early American cases in which the same has been held. (Denn v. Goldtrap (1795), 1 N. J. L. 272; State v. Parkhurst (1802), 9 N. J. L. 427, 444.) No clearer example can be given of Blackstone's controlling influence over the early law of the United States, than the fact that this passage, which (as Judge Dixon has correctly said, Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558) does not define the term, but merely illustrates it from the criminal law, should have settled the American sense of the term as relating only to penal or criminal law. It was from him, no doubt, that the limitation passed into the original constitution of Massachusetts (part 1, § 24); while in other states, still following him, the term "retrospective laws" was used, but with limitations that confined it to criminal law, e. g., Maryland, art. 15; North Carolina, art. 24; Delaware, art. 11. But the application of the term was fully settled by the case of Calder v. Bull (1798), 3 Dall. (U. S.) 386, 1 L. Ed. 648, in which it was held that a retrospective act, granting a new trial in a civil case, was not *ex post facto* within the meaning of the United States constitution. Patterson, J., quotes the above passage of the Commentaries, and adds: "Here the meaning annexed to the term *ex post facto* laws unquestionably refers to crimes, and nothing else." (3 Dall. 396, 1 L. Ed. 653.) The four classes of *ex post facto* laws given by Chase, J., in the same case (3 Dall. 390, 1 L. Ed. 650), though purely a *dictum*, have been accepted by the courts ever since as correct.

"1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. 4th. Every law that changes the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense, in order to convict the offender." It is not, however, exhaustive, and was not intended by the author to be, since he winds up with a reference to "all these and similar laws" as unjust. A fifth class may be added by the great weight of recent authority, viz., acts which make an offense punishable after it has once been fully barred by a statute of limitations. (Moore v. State, 43 N. J. L. 203, 39 Am. Rep. 558.)

Sixthly, it has been held not necessary that the law should belong to the class known as criminal statutes, or provide for criminal procedure and punishment, to bring it within the constitutional prohibition of *ex post facto* laws.

that the party could foresee that an action, innocent when it was done, should be afterwards converted to guilt by a subsequent law; he had therefore no cause to abstain from it; and all punishment for not abstaining must of consequence be cruel and unjust.\* All laws should be therefore made to commence *in futuro* (at a future period), and be notified before their commencement; which is implied in the term "*prescribed*." But when this rule is in the usual manner notified or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if ignorance of what he *might* know, were admitted as a legitimate excuse, the laws would be of no effect, but might always be eluded with impunity.<sup>11</sup>

\* Such laws among the Romans were denominated *privilegia*, or private laws, of which Cicero (De Leg. 3. 19. and in his oration *pro domo*, 17) thus speaks: "*Vetant leges sacratæ, vetant duodecim tabulæ, leges, privatis hominibus irrogari; id enim est privilegium. Nemo unquam tulit, nihil est crudelius, nihil perniciosius, nihil quod minus hæc civitas ferre possit*" (The sacred laws forbid, the twelve tables forbid, that the interests of private individuals should be affected by special laws; for that is privilege. There has never been an instance of it: nothing could be more cruel, nothing more injurious, nothing which to this nation could be less tolerable).

The deprivation or suspension of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. Disqualification from office may be punishment, as in cases of conviction upon impeachment. Disqualification from the pursuit of a lawful vocation, or from positions of trust, or from the privileges of appearing in the courts, or acting as an executor, etc., may also be and has often been imposed as punishment. (Cumplings v. Missouri, 4 Wall. 277, 18 L. Ed. 356; Ex parte Garland (1866), 4 Wall. 333, 18 L. Ed. 366; Fletcher v. Peck, 6 Cranch, 137, 3 L. Ed. 178.)

Finally, laws of all those classes operating in favor of the individual, as by remitting penalties, making convictions more difficult, etc., are not *ex post facto* laws within the meaning of the prohibition.—HAMMOND.

11 **Retrospective legislation.**—Every *ex post facto* law is retrospective, but every retrospective law is not *ex post facto*. The latter class only is prohibited by the federal constitution (3 Dall. 390, 1 L. Ed. 650); so, also, in most of the states. Some few, as New Hampshire, Texas, Tennessee, prohibit all retrospective legislation, civil as well as criminal. But it will be found on examining the decisions that the express prohibition of retrospective laws has very little effect, and that the decisions as to retrospective legislation are substantially the same in both classes of states. The explanation of this is worth considering. It will furnish the student with a valuable illustration of the controlling influence exercised by legal principles, and the subject matter of law over positive rules, even when enacted by the highest authority, as by the

§ 47. (4) It is "a rule prescribed by the supreme power in a state."—But further: municipal law is "a rule of civil conduct prescribed by the supreme power in a state." For legislature, as

people of a state in their written constitutions. It is evident, upon a moment's reflection, that no new law can be retroactive in the literal sense of the term. The acts and events of past time are unchangeable by any human power, even if we may not say with the heathen poet, that even the Deity—

non tamen irritum

Quodcunque retro est, efficiet, neque

Diffinget, infectumque reddet

Quod fugiens semel hora vexit.

—Horatii Carm. III, 29, 45.

(but what is gone,

He will not, cannot turn to nought;

Nor cancel, as a thing undone,

What once the flying hour has brought.

Conington's Translation.)

This is so clear that it may seem hardly worth stating, much less proving; but the example of Savigny, *System*, book 8, 382, section 385, may be authority for the formal statement of so plain a truth. But the more thoroughly one studies the common law, the more deeply he will be impressed with the fact that no line of exact demarcation can be drawn between its rules and those of logic or philosophy; and that often the surest way to avoid doubts and difficulties is to trace them into the philosophical or metaphysical questions out of which they spring. Again, it is equally evident, that when the law has been changed by the introduction of a new statute, there is, *prima facie*, no reason why the discarded rule should be applied to any act or event subsequent to the change. These two considerations would seem to make retrospective legislation in the strict sense of the term impossible. In order to ascertain what the term really does mean, we must look beyond the definition of a law and examine what is meant by a right. Retrospective legislation is that which changes a right or a duty in the interval between its origin and its final effect or completion. Wherever no lasting right can exist, the term becomes meaningless; wherever a lasting right vested in any private person exists, retrospective legislation affecting it becomes contrary to the common principles of justice. This is really the definition given of the terms by Lord Mansfield in *Couch v. Jeffries*, 4 Burr. 2460, who says in substance that retrospective legislation is that which takes away vested rights; to the same effect, 1 Kent, Comm. 455, and Story, J., in *Society v. Wheeler*, 2 Gall. 105, Fed. Cas. No. 13,156. Consequently, the provision found in most of our constitutions prohibiting the impairment of the obligation of contracts, and that forbidding private property to be taken for public use, operate substantially as rules to determine in what cases legislation may be retrospective. (Satterlee

was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite

v. Matthewson (1829), 2 Pet. 407, 7 L. Ed. 467; Ogden v. Saunders (1827), 12 Wheat. 262, 6 L. Ed. 623; and the able discussion of vested rights in Cooley's Constitutional Limitations, 358, and following.) The rights of parties cannot be changed by legislation, but no party has a vested right in any particular remedy. The organization of courts, the forms and processes of action, the rules of evidence and procedure, and even the rules which determine the parties to actions may be changed, and a new rule made applicable to causes of action already existing, providing a substantial right is not thereby affected. (Willard v. Harvey (1856), 24 N. H. 351.) Hence, too, it will be seen that much of the fluctuation in cases upon the retrospective effect of laws grows out of the difficulty of distinguishing between remedies that do and remedies that do not impair the obligation of a contract.

That these principles apply alike in states where retrospective legislation is prohibited, and in those in which it is allowed, compare Rich v. Flanders (1859), 39 N. H. 304; Webb v. Den (1854), 17 How. 576, 15 L. Ed. 35; Briggs v. Hubbard (1846), 19 Vt. 91; Ross' Case (1824), 2 Pick. (Mass.) 169 (in which, by the way, the same thing was said of *ex post facto* laws, and it was held that they would be invalid on general principles, even without any constitutional prohibition). (Officer v. Young (1833), 5 Yerg. (Tenn.) 320, 26 Am. Dec. 268; De Cordova v. Galveston (1849), 4 Tex. 470; Dash v. Van Kleeck (1811), 7 Johns. (N. Y.) 477, 5 Am. Dec. 291.

I think, then, the whole matter may be briefly summed up thus:

1. Laws of procedure and evidence and the adjective law generally operate from the date of their passage (or other date when they take effect), and therefore govern the remedy of wrongs and enforcement of rights alike in all cases, whether the cause of action arose before the law took effect or afterwards. The presumption is that they do not affect the rights and duties so enforced: the principle—*nova constitutio futuris dat formam non præteritis* (Bracton, fol. 228, 2 Inst. 202)—applies to them simply, and there is no question of retroaction.

2. But if it can be shown that the application of a new rule of adjective law operates to take away or diminish a substantive right or render more burdensome a substantive duty, existing at the time when the new law came into effect, the question of retroaction arises, and the new law will not be applied unless its terms require it.

3. If the terms do require it, and of course if the new law is one expressly intended to operate upon such rights and duties, then the precedents will sustain its retrospective application when the new rule confirms or enforces the equitable rights of the parties interested, though vested legal rights inconsistent with the former may be taken away, e. g.:

(a) By the confirmation of title to land under irregular sales or other proceedings lacking some technical requirement, but substantially just. (Wilkin-



to the very essence of a law, that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.<sup>12</sup>

§ 48. (a) **Nature of civil government.**—[47] This may lead us into a short inquiry concerning the nature of society and civil government; and the natural, inherent right that belongs to the sovereignty of a state, wherever that sovereignty be lodged, of making and enforcing laws.

§ 49. (b) **Foundations of society.**—The only true and natural foundations of society are the wants and the fears of individuals. Not that we can believe, with some theoretical writers, that there ever was a time when there was no such thing as society either natural or civil; but that, from the impulse of reason, and through a sense of their wants and weaknesses, individuals met together in a large plain, entered into an original contract, and chose the tallest man present to be their governor.<sup>13</sup> This notion, of an actu-

son v. Leland, 2 Pet. 627, 7 L. Ed. 542; Kearney v. Taylor, 15 How. 494, 14 L. Ed. 787; Hussey v. Smith, 99 U. S. 20, 25 L. Ed. 314; Randals v. Kreiger, 23 Wall. 137, 23 L. Ed. 124.)

(b) By validating the proceedings of courts, magistrates, or administrative officers, so as to take away vested rights which owe their continued existence only to some defect or irregularity of proceeding. (Thompson v. Lee County, 3 Wall. 327, 18 L. Ed. 177; Beloit v. Morgan, 7 Wall. 619, 19 L. Ed. 205; New Orleans v. Clark, 95 U. S. 644, 24 L. Ed. 521.) With respect to this latter class, the condition that the defect overruled must be one that the legislature could have prevented in advance, has often been expressed as an essential one to the exercise of the power. (Cooley's Const. Lim. 371, 382, and cases cited.) The same condition seems also to apply to the former class. If the case is one where the legislature could not have said in advance that the irregular sale or other proceeding should be legal and sufficient, without impairing the obligation of a contract, or taking private property, or destroying rights without due process of law, then the objection to the retrospective character of such laws is fatal.

4. Acts impairing the obligation of contracts, or taking private property without compensation, must in their very nature be retrospective, and are unconstitutional in both aspects.—HAMMOND.

<sup>12</sup> Professor Hammond has a learned note on the meaning of *sovereignty*. (1 Hammond's Black. 137.) A valuable discussion of the same subject may be found in Crane and Moses, *Politics*, 33 ff.

<sup>13</sup> *Social contract*, in political philosophy, a term applied to the theory of the origin of society associated chiefly with the names of Hobbes, Locke,



ally existing unconnected state of nature, is too wild to be seriously admitted: and besides it is plainly contradictory to the revealed accounts of the primitive origin of mankind, and their preservation two thousand years afterwards; both which were effected by the means of single families. These formed the first natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals, actuated by their

and Rousseau, though it can be traced back to the Greek Sophists. According to Hobbes (*Leviathan*), men lived originally in a state of nature in which there were no recognized criteria of right and wrong, no distinction of *meum* and *tuum*. Each person took for himself all that he could; man's life was "solitary, poor, nasty, brutish and short." The state of nature was therefore a state of war, which was ended by men agreeing to give their liberty into the hands of a sovereign, who thenceforward was absolute. Locke (*Treatise on Government*) differed from Hobbes in so far as he described the pre-social state as one of freedom, and held that private property must have been recognized, though there was no security. Rousseau (*Contrat social*) held that in the pre-social state man was unwarlike and even timid. Laws resulted from the combination of men who agreed for mutual protection to surrender individual freedom of action. Government must therefore rest on the consent of the governed, the *volonté générale*. Though it is quite obvious that the theory of a social contract (or compact, as it is also called) contains a considerable element of truth—that loose associations for mutual protection preceded any elaborate idea or structure of law, and that government cannot be based exclusively on force—yet it is open to the equally obvious objection that the very idea of contract belongs to a more advanced stage in human development than the hypothesis itself demands. Thus the doctrine, yielding as a definite theory of the origin of society to the evidence of history and anthropology, becomes interesting primarily as revolt against mediæval and theocratic theories of the state.—*Encyc. Brit.* (11th ed.).

Professor Hammond has discussed very fully the theory of the social contract. 1 Hammond's *Black*. 144.

wants and their fears; yet it is the *sense* of their weakness and imperfection that *keeps* mankind together; that demonstrates the necessity of this union; and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by the original contract of society; which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied, [48] in the very act of associating together: namely, that the whole should protect all its parts, and that every part should pay obedience to the will of the whole; or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection could be certainly extended to any.

§ 50. (c) **Establishment of government.**—For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order. Unless some superior be constituted, whose commands and decisions all the members are bound to obey, they would still remain as in a state of nature, without any judge upon earth to define their several rights, and redress their several wrongs. But, as all the members which compose this society were naturally equal, it may be asked, in whose hands are the reins of government to be entrusted? To this the general answer is easy; but the application of it to particular cases has occasioned one-half of those mischiefs, which are apt to proceed from misguided political zeal. In general, all mankind will agree that government should be reposed in such persons, in whom those qualities are most likely to be found, the perfection of which is among the attributes of Him who is emphatically styled the Supreme Being; the three grand requisites, I mean, of wisdom, of goodness, and of power: wisdom, to discern the real interest of the community; goodness, to endeavor always to pursue that real interest; and strength, or power, to carry this knowledge and intention into action. These are the natural foundations of sovereignty, and these are the requisites that ought to be found in every well-constituted frame of government.

§ 51. (d) **Sovereignty.**—How the several forms of government we now see in the world at first actually began, is a matter of great uncertainty, and has occasioned infinite disputes. It is not my business or intention to enter into any of them. However they began, or by <sup>[49]</sup> what right soever they subsist, there is and must be in all of them a supreme, irresistible, absolute, uncontrolled authority, in which the *jura summi imperii*, or the rights of sovereignty, reside. And this authority is placed in those hands, wherein (according to the opinion of the founders of such respective states, either expressly given, or collected from their tacit approbation) the qualities requisite for supremacy, wisdom, goodness, and power, are the most likely to be found.

§ 52. (e) **Forms of government.**—The political writers of antiquity <sup>14</sup> will not allow more than three regular forms of government; the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a democracy; the second, when it is lodged in a council, composed of select members, and then it is styled an aristocracy; the last, when it is entrusted in the hands of a single person, and then it takes the name of a monarchy. All other species of government, they say, are either corruptions of, or reducible to, these three.

§ 53. (f) **Laws made by sovereign.**—By the sovereign power, as was before observed, is meant the making of laws; for wherever that power resides, all others must conform to, and be directed by it, whatever appearance the outward form and administration of the government may put on. For it is at any time in the option of the legislature to alter that form and administration by a new edict or rule, and to put the execution of the laws into whatever hands it pleases; by constituting one, or a few, or many executive magistrates, and all the other powers of the state must obey the legislative power in the execution of their several functions, or else the constitution is at an end.

<sup>14</sup> A learned and judicious account of these ancient views of forms of government will be found in President Theodore D. Woolsey's *Political Science*, part 3, c. 2, vol. 1, pp. 466-486.—HAMMOND.

§ 54. (g) Merits and demerits of different forms of government.—In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found, than either of the other qualities of government. Popular assemblies are frequently foolish in their contrivance, and weak in their execution; but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. In <sup>[50]</sup> aristocracies there is more wisdom to be found, than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens; but there is less honesty than in a republic, and less strength than in a monarchy. A monarchy is indeed the most powerful of any; for by the entire conjunction of the legislative and executive powers all the sinews of government are knit together, and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes.<sup>15</sup>

Thus these three species of government have, all of them, their several perfections and imperfections. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients, as was observed, had in general no idea of any other permanent form of government but these three: for though Cicero<sup>†</sup> declares himself of opinion, “*esse optime constitutam rempublican, quæ ex tribus generibus illis, regali, optimo, et populari, sit modice confusa*” (that the best constituted republic, is that which is duly compounded of

† In his fragments, de rep. l. 2.

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<sup>15</sup> This paragraph is a brief imitation of Montesquieu's famous third book of the *Esprit des Loix*, in which he treats “of the principles of the three forms of government.” B. was not disposed, however, to translate the passage in which M. attributes the failure of republican government in England in the time of the great rebellion to the lack of virtue. As those who took part in public affairs had no virtue, as their ambition was piqued by the success of the boldest adventurer (Cromwell), as each faction was uncontrolled except by the other faction, the government was constantly changing. The baffled people sought for democracy, but found it nowhere, and at last had to find rest under the power it had once driven out. (*Esprit des Loix*, Liv. III. c. 3.)—HAMMOND.

these three forms, the monarchical, aristocratic, and democratic); yet Tacitus treats this notion of a mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.<sup>5</sup>

§ 55. (h) The British constitution.—But, happily for us of this island, the British constitution has long remained, and I trust will long continue, a standing exception to the truth of this observation. For, as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and dispatch, that are to be found in the most absolute monarchy: and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other; first, the king; secondly, the lords, spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, [51] their birth, their wisdom, their valor, or their property; and, thirdly, the house of commons, freely chosen by the people from among themselves, which makes it a kind of democracy; as this aggregate body, actuated by different springs, and attentive to different interests, composes the British parliament, and has the supreme disposal of everything; there can no inconvenience be attempted by either of the three branches, but will be withstood by one of the other two; each branch being armed with a negative power, sufficient to repel any innovation which it shall think inexpedient or dangerous.<sup>16</sup>

§ “*Cunctas nationes et urbes populus aut primores, aut singuli regunt: delecta ex his et constituta reipublicæ forma laudari facilius quam evenire, vel, si evenit, haud diuturna esse potest.*” Ann. l. 4. (The government of all cities or countries is either democratic, aristocratic, or monarchical. It is more easy to approve of a government composed of these three in the form of a republic than to bring it into being; and if effected, it cannot be lasting.)

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<sup>16</sup> The change wrought by the lapse of a century in the British constitution is strikingly shown by the following passage from an English writer: “We would like to ask constitutionalists whether the consequences of either the sovereign or the peers acting in their undoubted theoretical rights, and vetoing or rejecting bills passed by large majorities in the commons, would not reveal the rottenness of the theory, and the sentiment by which it is surrounded. The golden mean is preserved, the ark of freedom is kept untouched, because the supreme power in the state is now vested in actual fact, beyond revocation or limitation by, sovereign or peers, in the popular branch of the legislature.”



§ 56. (i) *Merits of the British constitution.*—Here, then, is lodged the sovereignty of the British constitution; and lodged as beneficially as is possible for society. For in no other shape could we be so certain of finding the three great qualities of government so well and so happily united. If the supreme power were lodged in any one of the three branches separately, we must be exposed to the inconveniences of either absolute monarchy, aristocracy, or democracy; and so want two of the three principal ingredients of good polity, either virtue, wisdom, or power. If it were lodged in any two of the branches; for instance, in the king and house of lords, our laws might be providently made, and well executed, but they might not always have the good of the people in view; if lodged in the king and commons, we should want that circumspection and mediatory caution, which the wisdom of the peers is to afford: if the supreme rights of legislature were lodged in the two houses only, and the king had no negative upon their proceedings, they might be tempted to encroach upon the royal prerogative, or perhaps to abolish the kingly office, and thereby weaken (if not totally destroy) the strength of the executive power. But the constitutional government of this island is so admirably tempered and compounded, that nothing can endanger or hurt it, but destroying the equilibrium of power between one branch of the legislature and the rest. For if ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would [52] soon be an end of our constitution. The legislature would be changed from that, which (upon the supposition of an original contract, either actual or implied) is presumed to have been originally set up by the general consent and fundamental act of the society:

(Westminster Review, April, 1860, p. 171, of Am. reprint.) Certainly there has been no retrograde movement in the twenty years since this was published. Perhaps the most useful lesson that the student of constitutional law can draw from English history is the futility of looking to any form of organization for permanent strength. The most stable government since the fall of Rome has owed its stability to the constant advance it has made in the direction of popular government, wholesomely checked by the tenacity with which the crown and the peers have held their power until it could be held in each case no longer. —HAMMOND.



and such a change, however effected, is according to Mr. Locke<sup>b</sup> (who perhaps carries his theory too far) at once an entire dissolution of the bands of government; and the people are thereby reduced to a state of anarchy, with liberty to constitute to themselves a new legislative power.

§ 57. (j) Legislative power supreme.—Having thus cursorily considered the three usual species of government, and our own singular constitution, selected and compounded from them all, I proceed to observe, that, as the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action*. And this may be discovered from the very end and institution of civil states. For a state is a collective body, composed of a multitude of individuals, united for their safety and convenience, and intending to act together as one man. If it therefore is to act as one man, it ought to act by one uniform will. But, inasmuch as political communities are made up of many natural persons, each of whom has his particular will and inclination, these several wills cannot by any *natural* union be joined together, or tempered and disposed into a lasting harmony, so as to constitute and produce that one uniform will of the whole. It can therefore be no otherwise produced than by a *political* union; by the consent of all persons to submit their own private wills to the will of one man, or of one or more assemblies of men, to whom the supreme authority is entrusted: and this will of that one man, or assemblage of men, is in different states, according to their different constitutions, understood to be *law*.<sup>17</sup>

Thus far as to the *right* of the supreme power to make laws; but further, it is its *duty* likewise. For since the re-<sup>[53]</sup>spective mem-

<sup>b</sup> On government, part. 2. § 212.

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<sup>17</sup> **Constitutions.**—Blackstone uses the word “constitution” in two quite distinct meanings: sometimes in the older sense of a mere law, usually a law of positive enactment, in which sense it was employed by the civilians and canonists; sometimes, as here, in the modern sense for the entire structure and organization of the state, the sense in which it is most familiar to American lawyers, although, of course, without any reference to written constitutions,

bers are bound to conform themselves to the will of the state, it is expedient that they receive directions from the state declaratory of that its will. But, as it is impossible, in so great a multitude, to give injunctions to every particular man, relative to each particular action, it is therefore incumbent on the state to establish general rules, for the perpetual information and direction of all persons in all points, whether of positive or negative duty. And this, in order, that every man may know what to look upon as his own, what as another's; what absolute and what relative duties are required at his hands; what is to be esteemed honest, dishonest, or indifferent; what degree every man retains of his natural liberty; what he has given up as the price of the benefits of society; and after what manner each person is to moderate the use and exercise of those rights which the state assigns him, in order to promote and secure the public tranquillity.

§ 58. (5) Definition of law continued.—From what has been advanced, the truth of the former branch of our definition, is (I trust) sufficiently evident; that “*municipal law is a rule of civil conduct prescribed by the supreme power in a state.*” I proceed now to the latter branch of it; that it is a rule so prescribed, “*commanding what is right, and prohibiting what is wrong.*”

§ 59. (6) “Commanding what is right, prohibiting what is wrong.”—Now, in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established

which were unknown, at least by that name, when he wrote. For examples of the former meaning see “the wisdom of our late constitutions,” page \*16; “the imperial decrees or constitutions of successive emperors,” page \*81; “the legatine constitutions were ecclesiastical laws,” page \*83; “the provincial constitutions,” page \*83. The two senses of the word are quite distinct, and probably have been so from the beginning. It may be inferred that the modern sense is really the older, not only from its derivation but from such expressions as that of Cicero, “*Nec unius temporis nec hominis esse constitutionem rei publicæ*”: but in the long interval between the classic period of Latin and the seventeenth century it had quite passed out of use and given way to the other. In Blackstone the two may usually be easily distinguished by the context; but it will be noticed, also, that when he uses the word for mere laws it is commonly in the plural, while in the other sense it is in the singular, unless the plural is required, as here, by a reference to more than one state.—HAMMOND.

and ascertained by law. And when this is once done, it will follow, of course, that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains, therefore, only to consider in what manner the law is said to ascertain the boundaries of right and wrong; and the methods which it takes to command the one and prohibit the other.

§ 60. (7) Several parts of a law.—For this purpose every law may be said to consist of several parts:<sup>18</sup> one, *declaratory*; whereby the rights to be observed, and the wrongs to be eschewed, are clearly defined and [54] laid down: another, *directory*; whereby

<sup>18</sup> The parts of a law.—This must not be understood to mean that we find, as a rule, in each law the four distinct parts here mentioned by Blackstone, but that these are four distinct modes in which any law may operate, so implying one another that from a law stated in either mode the others may generally be inferred. Thus, for example, the declaratory part is, as B. says, that by which the rights to be observed and the wrongs to be eschewed are clearly defined and laid down: and when the existence of a right or a wrong is thus declared, the courts will infer from it the direction to respect the one or avoid the other, and the existence of a remedy whenever that direction is not followed. The vindicatory part, when properly distinguished from the remedial, has limitations indeed of its own. The commission of an unlawful act is not necessarily punishable. Many of our states, as has been shown elsewhere, deny to the courts the power of punishing such an act as a crime or a misdemeanor, unless an express statute to that effect has been enacted. (See Lieber's *Hermeneutics*, 3d ed. by Hammond, note J, p. 293.) And this is no modern rule. The maxim, *nulla pana sine lege*, has long been familiar in European law. For its history, see *Hermeneutics*, pp. 294–296; and for its American application, *United States v. Morris*, 14 Pet. 464, 10 L. Ed. 543; *Ferrett v. Atwill*, 1 Blatchf. 151, Fed. Cas. No. 4747; *United States v. Clayton*, 2 Dill. 219, Fed. Cas. No. 14,814; 1 Green's *Crim. Rep.* 439; 1 Bishop on *Crim. Law*, §§ 36, 134, 135. But this exception has no bearing upon private law, in which the existence of a right, the direction to respect it, and the remedy for its violation, so generally imply each other that they are almost convertible terms.

The declaration of a right rarely is found in formal language; and a right itself in legal language is less often designated by that name than by the common terms for the different kinds of rights. When a constitution or a statute defines the age and other conditions upon which suffrage is to be exercised, the law at once converts that exercise into a right, and gives a remedy for any unlawful interference with it. The question whether the plaintiff in

the subject is instructed and enjoined to observe those rights, and to abstain from the commission of those wrongs: a third, *remedial*; whereby a method is pointed out to recover a man's private rights, or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindictory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs, and transgress or neglect their duty.

§ 61. (a) **Declaratory part.**—With regard to the first of these, the *declaratory* part of the municipal law, this depends not so much

such a case must also show some actual damage proceeding from the infringement of his right is one upon which the courts have differed.

If a statute gives to a person or to a corporation the power of flooding land, or of constructing a railroad or other easement, the exercise of such power at once becomes a right, and every interference with it a wrong, to which the law annexes the common remedies. Even when a court recognizes a new kind of property, as in the case of ice, the law at once annexes all the directions and remedies which belong to property in general to the right thus declared. One important limitation must be made here. If the legislature has not only declared a new right, but has expressly given a remedy for its enforcement, that remedy alone can be pursued; on the principle, *expressum facit cessare tacitum*. It will be presumed that the legislature did not intend to add the usual common-law remedies by implication, since they have given a special one. (Cole v. City of Muscatine, 14 Iowa, 296.) Here, again, the courts have introduced a distinction not always easy to apply. If the act thus forbidden would constitute a common-law wrong, independent of the statute, the addition of a special remedy will not prevent the use of that given by the common law, e. g., a statute regulates the taking of land under the power of eminent domain for a railroad, and prescribes how it may be condemned. A railroad corporation enters upon land without taking the necessary steps for condemnation; must the owner pursue the statutory remedy, or may he treat the entry as a common-law trespass and recover damages on that ground? Upon this point decisions are conflicting, but the latter is the more correct doctrine.

Some courts distinguish the cases where the owner has the right to set in motion the process of condemnation from those where the railroad company alone can do it, giving the common-law action to the owner in the latter case but not in the former.

Still more frequently the law gives the remedy for acts not previously characterized either as rights or as wrongs, which are at once enrolled under those categories as a consequence. If a statute gives an action where none existed at common law, the necessary inference at once is that the case of such action includes both a right and a wrong: a wrong by the defendant for which a

upon the law of revelation or of nature, as upon the wisdom and will of the legislator. This doctrine, which before was slightly touched, deserves a more particular explication. Those rights, then, which God and nature have established, and are therefore called natural rights, such as are life and liberty, need not the aid of human laws to be more effectually invested in every man than they are; neither do they receive any additional strength when declared by the municipal laws to be inviolable. On the contrary, no human legislature has power to abridge or destroy them, unless the owner shall himself commit some act that amounts to a forfeiture. Neither do divine or natural *duties* (such as, for instance, the worship of God, the maintenance of children, and the like) receive any stronger sanction from being also declared to be duties by the law of the land. The case is the same as to crimes and misdemeanors, that are forbidden by the superior laws, and therefore styled *mala in se* (crimes in themselves), such as murder, theft,

recovery is sought; a right in the plaintiff of which that act is an infringement. And this is a logical and necessary conclusion to which there can hardly be an exception; for right and wrong are the parents of all actions, as the old books say.

Finally, when an act previously innocent is made penal, this vindictory law implies a declaration that it is wrong, a direction not to do it, including the important corollaries that it is legally void when done, and that no contract or agreement to do it can be binding, and a remedy for all damage resulting from it. It makes no difference in this respect whether the act is *malum in se* or *malum prohibitum*, since the addition of the legal penalty would now be regarded as adding new force and effect in such cases, contrary to Blackstone's doctrine. (1 Comm. 53.)

And although the act be merely prohibited by positive law, that prohibition is evidence of the will of the state that it should not be done, and is held to impose a conscientious duty of obedience on all citizens: "Where a statute inflicts a penalty for doing an act, though the act be not prohibited, yet the thing is unlawful: for it cannot be intended that a statute would inflict a penalty for a lawful act." (*Bartlett v. Viner*, Skin. 322; *Griffith v. Wells*, 3 Denio (N. Y.), 226.) An exception is sometimes made in the case of penalties imposed merely for revenue purposes or to insure uniformity in a course of conduct otherwise indifferent; and generally the ordinances of municipal corporations and the penalties they impose do not come within the rule. Finally, an important distinction is made in the remedial effect of all such actions. The plaintiff must show not only that the defendant has committed the wrong thus established, but also that such wrong has produced a special



and perjury; which contract no additional turpitude from being declared unlawful by the inferior legislature. For that legislature in all these cases acts only, as was before observed, in subordination to the great lawgiver, transcribing and publishing His precepts. So that, upon the whole, the declaratory part of the municipal law has no force or operation at all, with regard to actions that are naturally and intrinsically right or wrong.<sup>19</sup>

[55] But, with regard to things in themselves indifferent, the case is entirely altered. These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper, for promoting the welfare of the society, and

and substantial harm to himself, independently of its harmful effects as a breach of the general law or a wrong to the community. It is only when the wrong thus committed is a breach of some common-law right of security, liberty, or property for which a direct action would lie at common law, that its commission is sufficient to sustain the action without proof of *damnum*.

19 *Malum in se* and *malum prohibitum*.—The distinction of *malum in se* and *malum prohibitum* as originally recognized in the common law, answers to the distinction between the natural and positive law, or in Coke's language, the former is an offense against the common law and the latter against some statute. (Coke, 4 Inst., c. 5, p. 63, and c. 20, p. 153.) Coke gives as instances of both examples which would hardly be recognized to-day, such as the offense of forestalling and engrossing as *mala in se*; but the difference in his view is substantially the same with that of Blackstone. It is still recognized by judges and courts, although it has frequently been repudiated: but it loses all its force and meaning when ethics and law are properly discriminated, and the latter term is limited to such rights and wrongs as affect the state or private individuals. In that case, the moral character of an act has no bearing upon its legal quality. There may be a conflict between the requirements of law and those of conscience, but neither can properly overrule or avoid the other. All wrongs are prohibited, and prohibited only, so far as the state is concerned. With their quality as wicked or unconscientious, the judge has nothing to do, as even "murder, and theft, and perjury, which contract no additional turpitude from being declared unlawful by the human legislature," in Blackstone's words, are held to be punishable only so far as the state has made them so, and not by virtue of any moral prohibition. Some states require a positive legal prohibition, in all cases; others still recognize, as England does, common-law offenses, which may be punished although no legislative act has forbidden them or attached a penalty to them; but even in the latter case they are punished, not because they are immoral, but because the law of the state has forbidden them, as shown by judicial precedents, or by such other authorities as the courts deem themselves bound by. The distinction may be still useful so far as to express the greater or less turpitude of a crime, but not



more effectually carrying on the purposes of civil life. Thus our own common law has declared, that the goods of the wife do instantly upon marriage become the property and right of the husband; and our statute law has declared all monopolies a public offense: yet that right, and this offense, have no foundation in nature; but are merely created by the law, for the purposes of civil society. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it becomes right or wrong, as the laws of the land shall direct. Thus, for instance, in civil duties; obedience to superiors is the doctrine of revealed as well as natural religion: but who those superiors shall be, and in what circumstances, or to what degrees they shall be obeyed, it is the province of human laws to determine. And so, as to injuries or crimes, it must be left to our own legislature to decide, in what cases the seizing another's cattle shall amount to \*a trespass or a theft;\* and where it shall be a justifiable action, as when a landlord takes them by way of distress for rent.

§ 62. (b) Directory part.—Thus much for the *declaratory* part of the municipal law: and the *directory* stands much upon the same footing; for this virtually includes the former, the declaration

\* Previous to ninth edition, "the crime of robbery."

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as forming two classes of crimes, the punishment of which rests upon different bases.

If the distinction is to be maintained, it is not easy to determine where the line shall be drawn. Blackstone evidently draws it between ethics on the one side, and matters indifferent on the other, without reference to the question whether there has been positive legislation or not; since, as he says distinctly, a statute forbidding a thing wrong in itself has no force or operation at all. Coke, on the other hand, makes the distinction substantially the same with that of common law and statute; *mala in se* being common-law crimes, as distinct from those created by positive legislation. (4th Inst., pp. 63, 153.) But many acts which could not be punished criminally without an express statute for that purpose, because they were unknown to our fathers, involve much more moral turpitude than many of the common-law crimes mentioned by Coke, such as forestalling and engrossing. For example, a considerable number of the most heartless and atrocious frauds are of so recent introduction that no court would feel authorized to punish them in any state without an express statute. This vagueness of distinction is another strong reason for allowing the terms to fall into disuse.—HAMMOND.

being usually collected from the direction. The law that says, "thou shalt not steal," implies a declaration that stealing is a crime. And we have seen<sup>i</sup> that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

§ 63. (c) Remedial part.—The *remedial* part of a law is so necessary a consequence of the former two, that laws must be very vague and imper- [56] fect without it. For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights, when wrongfully withheld or invaded. This is what we mean properly, when we speak of the protection of the law. When, for instance, the *declaratory* part of the law has said, "that the field or inheritance, which belonged to Titius' father, is vested by his death in Titius"; and the *directory* part has "forbidden anyone to enter on another's property, without the leave of the owner": if Gaius after this will presume to take possession of the land, the *remedial* part of the law will then interpose its office: will make Gaius restore the possession to Titius, and also pay him damages for the invasion.

§ 64. (d) Vindictory part, or sanction.—With regard to the *sanction* of laws, or the evil that may attend the breach of public duties; it is observed, that human legislators have for the most part chosen to make the sanction of their laws rather *vindictory* than *remuneratory*, or to consist rather in punishments, than in actual particular rewards. Because, in the first place, the quiet enjoyment and protection of all our civil rights and liberties, which are the sure and general consequence of obedience to the municipal law, are in themselves the best and most valuable of all rewards. Because also, were the exercise of every virtue to be enforced by the proposal of particular rewards, it were impossible for any state to furnish stock enough for so profuse a bounty. And further, because the dread of evil is a much more forcible principle of human actions than the prospect of good.<sup>k</sup> For which reasons, though a prudent bestowing of rewards is sometimes of exquisite use, yet

<sup>i</sup> See page \*43.

<sup>k</sup> Locke, Hum. Und. b. 2. c. 21.

we find that those civil laws, which enforce and enjoin our duty, do seldom, if ever, propose any privilege or gift to such as obey the law; but do constantly come armed with a penalty denounced against transgressors, either expressly defining the nature and quantity of the punishment, or else leaving it to the discretion of the judges, and those who are entrusted with the care of putting the laws in execution.

[57] Of all the parts of a law the most effectual is the *vindictory*. For it is but lost labor to say, "do this, or avoid that," unless we also declare, "this shall be the consequence of your noncompliance." We must therefore observe, that the main strength and force of a law consists in the penalty annexed to it.<sup>20</sup> Herein is to be found the principal obligation of human laws.

Legislators and their laws are said to *compel* and *oblige*; not that by any natural violence they so constrain a man, as to render it impossible for him to act otherwise than as they direct, which is the strict sense of obligation: but because, by declaring and exhibiting a penalty against offenders, they bring it to pass that no man can easily choose to transgress the law; since by reason of the impending correction, compliance is in a high degree preferable to disobedience. And even where rewards are proposed as well as punishments threatened, the obligation of the law seems chiefly to consist in the penalty: for rewards, in their nature can only *persuade* and *allure*; nothing is *compulsory* but punishment.

§ 65. *Mala in se* and *mala prohibita*.—It is true, it hath been holden, and very justly, by the principal of our ethical writers, that human laws are binding upon men's consciences. But if that were the only, or most forcible obligation, the good only would regard the laws, and the bad would set them at defiance. And true as this principle is, it must still be understood with some restriction. It holds, I apprehend, as to *rights*; and that, when the law has determined the field to belong to Titius, it is matter of conscience no longer to withhold or to invade it. So also in regard to *natural duties*, and such offenses as are *mala in se*: here we are bound in

<sup>20</sup> In a case in which the penal clause was held unconstitutional, the court said: "It is not to be supposed that the legislature would have enacted this statute without such clause; and hence, the whole act fails." (*State v. Hipp*, 38 Ohio St. 199, 230.)

conscience, because we are bound by superior laws, before those human laws were in being, to perform the one and abstain from the other. But in relation to those laws which enjoin only *positive duties*, and forbid only such things as are not *mala in se* but *mala prohibita* merely, [58] without any intermixture of moral guilt, annexing a penalty to noncompliance,<sup>1</sup> here I apprehend conscience is no further concerned, than by directing a submission to the penalty, in case of our breach of those laws: for otherwise the multitude of penal laws in a state would not only be looked upon as an impolitic, but would also be a very wicked thing; if every such law were a snare for the conscience of the subject. But in these cases the alternative is offered to every man; “either abstain from this, or submit to such a penalty”: and his conscience will be clear, whichever side of the alternative he thinks proper to embrace. Thus, by the statutes for preserving the game, a penalty is denounced against every unqualified person that kills a hare, and against every person who possesses a partridge in August. And so, too, by other statutes, pecuniary penalties are inflicted for exercising trades without serving an apprenticeship thereto, for not burying the dead in woolen, for not performing the statute work on the public roads, and for innumerable other positive misdemeanors. Now these prohibitory laws do not make the transgression a moral offense, or sin: the only obligation in conscience is to submit to the penalty, if levied. It must, however, be observed, that we are here speaking of laws that are simply and purely penal, where the thing forbidden or enjoined is wholly a matter of indifference, and where the penalty inflicted is an adequate compensation for the civil inconvenience supposed to arise from the offense. But where disobedience to the law involves in it also any degree of public mischief or private injury, there it falls within our former distinction, and is also an offense against conscience.<sup>m</sup>

§ 66. Interpretation of laws.—I have now gone through the definition laid down of a municipal law; and have shown that it

<sup>1</sup> See Book II, page \*420.

<sup>m</sup> *Lex pure pœnalis obligat tantum ad pœnam, non item ad culpam: lex pœnalis mixta et ad culpam obligat, et ad pœnam.* (The object of a law purely penal regards the punishment solely, not the crime also: a mixed penal law involves both the crime and punishment.) (Sanderson *de conscient. obligat. præl.* viii. § 17. 24.)

is "a rule—of civil conduct—prescribed—by the supreme power in a state— [59] commanding what is right, and prohibiting what is wrong": in the explication of which I have endeavored to interweave a few useful principles, concerning the nature of civil government, and the obligation of human laws. Before I conclude this section, it may not be amiss to add a few observations concerning the *interpretation* of laws.

§ 67. *Roman method of interpretation.*—When any doubt arose upon the construction of the Roman laws, the usage was to state the case to the emperor in writing, and take his opinion upon it. This was certainly a bad method of interpretation. To interrogate the legislature to decide particular disputes, is not only endless, but affords great room for partiality and oppression. The answers of the emperor were called his rescripts, and these had in succeeding cases the force of perpetual laws; though they ought to be carefully distinguished, by every rational civilian, from those general constitutions, which had only the nature of things for their guide. The Emperor Macrinus, as his historian, Capitolinus, informs us, had once resolved to abolish these rescripts, and retain only the general edicts: he could not bear that the hasty and crude answers of such princes as Commodus and Caracalla should be revered as laws. But Justinian thought otherwise,<sup>n</sup> and he has preserved them all. In like manner the canon laws, or decretal epistles of the popes, are all of them rescripts in the strictest sense. Contrary to all true forms of reasoning, they argue from particulars to generals.<sup>21</sup>

<sup>n</sup> Inst. 1. 2. 6.

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<sup>21</sup> *Authentic interpretation and declaratory laws.*—This judgment passed upon authentic interpretation is now a just one; and, as Judge Cooley has well remarked, such interpretation is inadmissible where the legislative and judicial powers are distinctly separate. But it certainly is no more so than to assign to the judiciary the work of legislation. It would be better to allow the judges to refer the solution of doubtful questions to the legislature, as is not only permitted but required by several of the European codes, where their interpretation must in effect constitute new law, than to allow the judge to make such new law in deciding the case already before him, the facts of which have occurred before the change. If the interpretation is meant only to explain what is ambiguous in the existing law, it would seem that the author of that



§ 68. 1. Interpretation by the usual meaning of words.—The fairest and most rational method to interpret the will of the legislator is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

Words are generally to be understood in their usual and most known signification; not so much regarding the <sup>[60]</sup> propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf,<sup>o</sup> which forbade a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with

o L. of N. and N. 5. 12. 3.

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law should be the one best qualified to give it. This was the mediæval doctrine, following Justinian (Code, 1, 14, 12), who had decided the doubts earlier existing in favor of the power. It is remarkable, however, that he puts the emperor's power to interpret the laws upon the same base with his power to form law by judicial decision. The entire constitution is translated and commented on by Savigny, System, vol. 1, § 47, pp. 301–304. The glossators adopted the doctrine and greatly enlarged it. The maxim, *ejus est interpretari legem cujus est condere* (Code, 1, 14, 9; Novel 143, pr.; Digest, 28, 6, 43, pr.) was regarded as fundamental, and based in the very nature of the case. The interpretation of the sovereign became law as fully as the text that called for it, and was therefore binding on all inferior tribunals and persons not only in its direct terms, but also in all the consequences and analogies that could be derived from it. The interpretation of the courts, on the other hand, was held to have no authority beyond the particular case to which it was applied. To this extent interpretation was unavoidable; for without it there could be no comprehension of the law and therefore no application of it. But its extension to other cases was strictly forbidden, except where the delegated authority from the sovereign to make law could be implied. If we are to hold still to their theory that all law was of necessity created by the sovereign, it is difficult to see why this doctrine was not logical, or to show any right of the inferior magistrate to make law by interpretation, or in any other method. The only just ground upon which the formation of new law by the judge can be put, is to regard it as strictly a scientific process, by which law already existing in principle, although not distinctly stated in terms, is deduced in the form of new rules or expressions of the same substance, applicable to novel conjunctions of fact; and this unquestionably is the doctrine of the common law.

The power of the English parliament to declare the meaning of their statutes or law of the kingdom in any form has never been disputed; nor could



a weapon. Again: terms of art, or technical terms, must be taken according to the acceptance of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the Princess Sophia, and the heirs of her body, being Protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "*heirs of her body*"; which in a legal sense comprise only certain of her lineal descendants. \*Lastly, where words are clearly *repugnant* in two laws, the later law takes place of the elder: *leges posteriores priores contrarias abrogant* (later laws repeal prior ones in conflict therewith) is a maxim of universal law, as well as of our own constitutions. And accordingly it was laid down by a law of the twelve tables at Rome, *quod populus postremum jussit, id jus ratum esto* (let that which the people have last decreed be considered law).\*

\* This passage, appearing in all editions from the first to the eighth, has been in the ninth and all subsequent editions transferred to page \*89, *post*.

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it well be, whether such declaratory statutes were intended to operate only for the future, or to act retrospectively by changing the law applicable to previous cases. But in this country the constitutional distinction between legislative and judicial power was alone sufficient, even without express restrictions, to prevent the exercise of authentic interpretation in any form. The power of the legislature is purely anticipatory; its rules can operate only after their enactment, or after the period when by the constitution of the state they take effect. The meaning of such laws in their application to individual cases, and consequently all questions as to what the law is or has been in the past, belong to the judiciary. (*Dash v. Van Kleeck*, 7 Johns. (N. Y.) 494, 5 Am. Dec. 291.) The legislature cannot say what the meaning of a law is, after it is once enacted; any such infringement upon the functions of the courts is unconstitutional and void. But as they have the right of making law for the future, alike by altering former expressions of it and by adopting new ones a declaratory act may be held valid in its future effect, provided that was included in the legislative intention, even though it may have intended also to change a former statute from the date of its original enactment; such an act will be void only so far as retrospective.

Another distinction must be made in cases where a legislative act is intended to cure omissions and informalities and errors in the acts of other departments of the state or of inferior bodies, or to give legal force and effect to private acts, such as conveyances, etc., previously ineffectual. Such statutes may assume the form of declaratory acts interpreting the previous law; and even though they do not, it is evident that the same principles govern the legislator's power to change the effect of contemporaneous law, whether by the method

§ 69. 2. **According to context.**—If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the *præm*, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is: and when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

§ 70. 3. **According to subject matter.**—As to the subject matter, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions <sup>[61]</sup> directed to that end. Thus, when a law of our Edward III forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

of formal interpretation or otherwise. The rule generally laid down in such cases, whereby the legislature may validate such acts whenever they could constitutionally have dispensed with them in advance, is certainly open to the same objection with retrospective interpretation. To say what the effect of a law shall be at a certain time is the same thing in substance as saying what the language of that law should be. But the courts have uniformly sustained such corrective statutes whenever substantial justice has been done by them, even at the expense of technical legality.

There must be in every civilized state some power to save men from the effects of their own errors, mistakes, and accidents; wherever it can be done without injury to others: and that power is perhaps more safely lodged in the legislative body than in any other; at all events it is least likely to harm or be improvidently used when it comes in the form of a general rule.—HAMMOND.

§ 71. 4. According to the effect.—As to the effects and consequence, the rule is, that where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf,<sup>p</sup> which enacted “that whoever drew blood in the streets should be punished with the utmost severity,” was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

§ 72. 5. According to the reason of the law.—But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the rhetorical treatise inscribed to Herennius.<sup>q</sup> There was a law, that those who in a storm forsook the ship should forfeit all property therein; and the ship and lading should belong entirely to those who stayed in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession, and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel; but this is a merit [62] which he could never pretend to, who neither stayed in the ship upon that account, nor contributed anything to its preservation.

§ 73. a. Equity.—From this method of interpreting laws, by the reason of them, arises what we call *equity*; which is thus defined by Grotius,<sup>r</sup> “the correction of that, wherein the law (by reason of its universality) is deficient.” For since in laws all cases can-

<sup>p</sup> L. 5. c. 12. § 8.

<sup>q</sup> L. 1. c. 11. [This case is also discussed by Puffendorf, lib. 5, c. 12, § 10, and by Wolf, *Jus Naturæ*, pars. 6, § 489. It has been a favorite illustration with all recent writers.—HAMMOND.]

<sup>r</sup> De æquitate. § 3.

not be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases, which according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit*" (the law does not define exactly, but leaves something to the discretion of a just and wise judge).<sup>22</sup>

<sup>22</sup> **Equitable interpretation.**—Equity in this sense is not to be confused with that equitable or extraordinary jurisdiction of the court of chancery, now exercised also by other courts in connection with jurisdiction at law, which is frequently designated by the same name. There is, indeed, a historical connection between the two meanings. The chancellor's extraordinary jurisdiction had existed for at least two centuries before the term "equity" was applied to it: but in the sixteenth century the analogy between that and the equitable or honorary jurisdiction of the Roman prætor attracted so much attention, that equity came to be regarded as the ground upon which the chancellor exercised his extraordinary power. Lord Bacon is largely responsible, if not for the first introduction, yet at least for the acceptance of this term; and his Orders in Chancery furnish a good illustration of its original use, and the connection between its two meanings. The chancellor is to act "upon the particular circumstances of each individual case" (p. 61); and Chief Justice Vaughan used to express his astonishment to hear precedents quoted in chancery. But soon after, this became an established habit; chancery had its own course of procedure and its own rules based upon the decisions of prior chancellors, which gradually became elaborated into one of the most exact and technical systems of judge-made law that has ever existed. This only illustrates Blackstone's remark that "there can be no established rule and fixed precepts of equity laid down without destroying its very essence and reducing it to positive law" (p. 62). Equity in this sense thus became a collateral system of positive law and rights, for the most part covering subjects and relations unknown to the earlier law, but in many instances modifying legal rights and duties by disregarding technicalities and by the use of more flexible and effective remedies; in particular by its power to act directly upon the conscience of the defendant, and to direct his actions under penalty of imprisonment: a power unknown to the common law, the remedies of which could be given only through the action of its officers. Of equity in this sense more will be said in the notes to Book III, chapter 27, where it is discussed by the commentator.

Equity in the sense here used of a method of interpretation was familiar to the civilians, alike of the classic period and of the middle ages; and is recognized by English law as early as the coronation oath of Ethelred the Second in 975, and in the preface to Glanvill;<sup>1</sup> but it was a **part of the law**

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And

administered by the ordinary courts of justice, which have always to the present day interpreted statutes as well as other writings equitably, without in any manner trenching upon the chancellor's jurisdiction. This is accurately described by Blackstone as depending upon the particular circumstances of each individual case: for law, by reason of its generality, must always be expressed in abstractions; the terms it employs do not describe precisely any act or event as it actually takes place. They disregard all the circumstances which give individuality and specific character to human affairs, as they disregard the name and personal identity of men and women, by framing their rules for classes of persons of greater or less extent. As a rule, the circumstances so disregarded are of no legal importance; but it is impossible to make such abstractions so perfectly that they will not in some cases leave out features that justly bear upon the results of the action and in other cases include in the general term features or marks that are not invariably found in the conception which the lawgiver had in mind. Thus, in the example given by Blackstone himself of a Bolognian law, drawing blood is used as the general mark of a class of assaults always violent and usually dangerous, which the law forbids: but when circumstances of a particular case are put in evidence, it may be found that such an assault has been committed, although no blood has been drawn; or, on the other hand, that blood is drawn for an entirely different purpose and without any assault. Such discrepancies are perhaps inevitable in the process of generalization by a finite mind: but they are made much more frequent and dangerous through the carelessness of legislators and the changes of meaning in human language.

Equity in this sense was correctly described long before Grotius by Aristotle, and substantially in the same way, as the correction of the deficiencies of the law *by reason of its generality*. It being the object of justice to reward every man according to his works, there must be in every system and form of law some method of noticing the individual peculiarities of a case, of recurring from the ultimate or legal facts to the evidential, in order to give these latter their due effect upon the judgment pronounced. In systems where the judge has to deal alike with fact and law, the rules of equitable interpretation form a system of great extent and complexity, as may be seen by looking into the civilians' books, especially such as Menochius de Presumptionibus and Mascardus, where the connection between this subject and the law of evidence is very fully illustrated. In the common law, its importance and field of action

law, without equity, though hard and disagreeable, is much more desirable for the public good, than equity without law: which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

are much diminished by the institution of the jury, who act upon equitable grounds very largely in finding their verdict, that is, in reducing the facts given them in evidence, which actually took place, to the general categories or ultimate facts in which the issue is expressed. Hence it has been said that the jury do always act equitably and play the chancellor's part.—HAMMOND.



## SECTION THE THIRD.

## OF THE LAWS OF ENGLAND.

§ 74. Divisions of the law of England.—<sup>[63]</sup> The municipal law of England, or the rule of civil conduct prescribed to the inhabitants of this kingdom, may with sufficient propriety be divided into two kinds; the *lex non scripta*, the unwritten or common law; and the *lex scripta*, the written or statute law.<sup>1</sup>

§ 75. 1. The unwritten, or common, law.—The *lex non scripta*, or unwritten law, includes not only *general customs*, or the common law properly so called; but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws*, that are by custom observed only in certain courts and jurisdictions.

When I call these parts of our law *leges non scriptæ*, I would not be understood as if all those laws were at present merely *oral*, or communicated from the former ages to the present solely by word of mouth. It is true, indeed, that, in the profound ignorance of letters which formerly overspread the whole western world, all laws were entirely traditional, for this plain reason, that the nations among which they prevailed had but little idea of writing. Thus the British as well as the Gallie druids committed all their laws as well as learning to memory;<sup>a</sup> and it is said of the primitive Saxons here, as well as their brethern on the Continent, that *leges sola memoria et usu retinebant* (they retained their laws solely by memory and custom).<sup>b</sup> But with us at present, the monuments

<sup>a</sup> Caes. de b. G. lib. 6. c. 13.

<sup>b</sup> Spelm. Gl. 362.

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<sup>1</sup> Written law and unwritten law.—Law that has its source in legislation may be most accurately termed *enacted law*, all other forms being distinguished as *unenacted*. The more familiar term, however, is *statute law* as opposed to the *common law*; but this, though sufficiently correct for most purposes, is defective inasmuch as the word statute does not extend to all modes of legislation, but is limited to acts of parliament. Blackstone and other writers use the expressions *written* and *unwritten* law to indicate the distinction in question. Much law, however, is reduced to writing, even in its inception, besides that which originates in legislation. The terms are derived from the Romans, who meant by *jus non scriptum* customary law, all other, whether

and evidences of our legal customs are contained in the records of the several courts of justice, in books of [64] reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptæ*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom. In like manner as Aulus Gellius defines the *jus non scriptum* (unwritten law) to be that, which is “*tacito et illiterato hominum consensu et moribus expressum*” (expressed or sanctioned by the tacit and unwritten customs and consent of men).

§ 76. a. **Ancient customs.**—Our ancient lawyers, and particularly Fortescue,<sup>c</sup> insist with abundance of warmth, that these customs are as old as the primitive Britons, and continued down, through the several mutations of government and inhabitants, to the present time, unchanged and unadulterated. This may be the case as to some: but in general, as Mr. Selden in his notes observes, this assertion must be understood with many grains of allowance; and ought only to signify, as the truth seems to be, that there never was any formal exchange of one system of laws for another: though doubtless by the intermixture of adventitious nations, the Romans, the Picts, the Saxons, the Danes, and the Normans, they must have insensibly introduced and incorporated many of their own customs with those that were before established: thereby in all probability improving the texture and wisdom of the whole, by the accumulated wisdom of divers particular countries. Our laws, saith Lord Bacon,<sup>d</sup> are mixed as our language: and as our language is so much the richer, the laws are the more complete.

<sup>c</sup> C. 17.

<sup>d</sup> See his proposals for a digest.

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enacted or unenacted, being *jus scriptum*. We shall see later, that according to the older theory, as we find it in Blackstone and his predecessors, all English law proceeds either from legislation or from custom. The common law was customary, and therefore, adopting the Roman usage, unwritten law. All the residue was enacted, and therefore written law.—SALMOND, *Jurisprudence*, 115.

§ 77. *b. Alfred's laws.*—And indeed our antiquaries and first historians do all positively assure us that our body of laws is of this compounded nature. For they tell us that in the time of Alfred the local customs of the several provinces of the kingdom were grown so various, that he found it expedient to compile his *dome-book* or *liber judicialis*, for the general use of the whole king-<sup>[65]</sup>dom.<sup>2</sup> This book is said to have been extant so late as the reign of King Edward the Fourth, but is now unfortunately lost. It contained, we may probably suppose, the principal maxims of the common law, the penalties for misdemeanors, and the forms of judicial proceedings. Thus much may at least be collected from

**2 Origin of the common law.**—These assertions of Blackstone as to the *Dom-boc* of Alfred, in their literal meaning, can no longer be accepted, yet the fragments of the early English customals which still survive, among them being several attributed to the reign of Alfred, are sufficient to substantiate the general truth of the view, that the old English customary law was derived from very various sources.

Under the first princes of the Norman line, our ancestors were engaged in a frequent struggle to maintain certain institutions known by the appellation of the "Laws of Edward the Confessor"; and, inasmuch as the document which for long passed by that name has been decisively shown to be spurious, it seems probable that the phrase simply stood for those ancient English customs to which we have just referred, and with which, as representing the national aspirations of the conquered English, the name of the last legitimate English monarch was naturally connected. The Norman princes made frequent engagements to restore and maintain these laws, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. And it is not unreasonable to believe that these, or some other remains of the law established in this country before the Conquest, gave rise (in part at least) to that collection of maxims and customs which is now known by the name of the *common law*, a name either given to it in contradistinction to other laws—as the statute law, the civil law, the law-merchant, and the like—or, more probably, as the law common to all the realm.

To assign, however, to the common law no other original than this, would be to take an imperfect and erroneous view of the subject. For our system of tenures was chiefly constructed, if not first founded, by the Norman conqueror and his followers; and our ancient judicial forms and pleadings have little in common with the Anglo-Saxon style, and are in striking conformity with the Norman. Moreover, the general language of our law, and the terms of art familiarly used therein, are exclusively of French extraction. So that we are bound to recognize in the ancient law of Normandy another parent of the common law, and one from which it has inherited some of its most remarkable features.—STEPHEN, 1 Comm. (16th ed.), 19.

that injunction to observe it, which we find in the laws of King Edward the Elder, the son of Alfred.\* “*Omnibus qui reipublicæ præsumt etiam atque etiam mando, ut omnibus æquos se præbeant iudices, perinde ac in judiciali libro (Saxonice, dôm-bee) scriptum habetur: nec quicquam formident quin jus commune (Saxonice, folerihthe) audacter libereque dicant*” (to all who preside over the republic, my positive and repeated injunction is, that they conduct themselves toward all as just judges, as it is written in the dome-book, and without fear boldly and freely declare the common law).

§ 78. c. **Danish and Saxon laws.**—But the irruption and establishment of the Danes in England, which followed soon after, introduced new customs, and caused this Code of Alfred in many provinces to fall into disuse: or at least to be mixed and debased with other laws of a coarser alloy. So that about the beginning of the eleventh century there were three principal systems of laws prevailing in different districts. 1. The *Mercen-Lage*, or Mercian laws, which were observed in many of the midland counties, and those bordering on the principality of Wales, the retreat of the ancient Britons: and therefore very probably intermixed with the British or Druidical customs. 2. The *West-Saxon Lage*, or laws of the West Saxons, which obtained in the counties to the south and west of the island, from Kent to Devonshire. These were probably much the same with the laws of Alfred above mentioned, being the municipal law of the far most considerable part of his dominions, and particularly including Berkshire, the seat of his peculiar residence. 3. The *Dane-Lage*, or Danish law, the very name of which speaks its original and composition. This was principally maintained in the rest of the midland counties, and also on the eastern coast, the part most exposed to the visits of that piratical people. As for the very northern provinces, they were at that time under a distinct government.†

§ 79. d. **Laws of Edward the Confessor.**—[66] Out of these three laws, Roger Hoveden<sup>‡</sup> and Ranulphus Cestrensis<sup>§</sup> inform us,

\* C. 1.

§ In Hen. II. (1154–1189).

† Hal. Hist. 55.

§ In Edw. Confessor (1042–1066).

King Edward the Confessor extracted one uniform law or digest of laws, to be observed throughout the whole kingdom; though Hoveden and the author of an old manuscript chronicle<sup>†</sup> assure us likewise, that this work was projected and begun by his grandfather, King Edgar. And indeed a general digest of the same nature has been constantly found expedient, and therefore put in practice by other great nations, which were formed from an assemblage of little provinces, governed by peculiar customs, as in Portugal, under King Edward, about the beginning of the fifteenth century.<sup>κ</sup> In Spain under Alonzo X, who about the year 1250 executed the plan of his father, St. Ferdinand, and collected all the provincial customs into one uniform law, in the celebrated code entitled *las partidas*.<sup>‡</sup> And in Sweden, about the same era, a universal body of common law was compiled out of the particular customs established by the laghman of every province, and entitled the *land's lagh*, being analogous to the *common law* of England.<sup>μ</sup>

Both these undertakings, of King Edgar and Edward the Confessor, seem to have been no more than a new edition, or fresh promulgation, of Alfred's code or dome-book, with such additions and improvements as the experience of a century and an half had suggested. For Alfred is generally styled by the same historians the *legum Anglicanarum conditor* (the founder of the English laws), as Edward the Confessor is the *restitutor* (restorer). These, however, are the laws which our histories so often mention under the name of the laws of Edward the Confessor; which our ancestors struggled so hardly to maintain, under the first princes of the Norman line; and which subsequent princes so frequently promised to keep and restore, as the most popular act they could do, when pressed by foreign emergencies or domestic discontents. These are the laws, that so vigorously with-<sup>[67]</sup>stood the repeated attacks of the civil law; which established in the twelfth century a new Roman empire over most of the states of the Continent: states that have lost, and perhaps upon that account, their political liberties; while the free constitution of England, perhaps upon the same

† In Seld. ad Eadmer. 6.

κ Mod. Un. Hist. xxii. 135.

‡ Ibid. xx. 211. [*Las siete partidas*, the seven parts, from the number of its principal divisions.]

μ Ibid. xxxiii. 21. 58.



account, has been rather improved than debased.<sup>3</sup> These, in short, are the laws which gave rise and original to that collection of maxims and customs, which is now known by the name of the common law. A name either given to it, in contradistinction to other laws, as the statute law, the civil law, the law-merchant, and the like; or, more probably, as a law common to all the realm, the *jus commune* (common law) or *folcright* mentioned by King Edward the Elder, after the abolition of the several provincial customs and particular laws before mentioned.

§ 80. e. **Source of validity of a custom.**—But though this is the most likely foundation of this collection of maxims and customs, yet the maxims and customs, so collected, are of higher antiquity than memory or history can reach:<sup>4</sup> nothing being more

<sup>3</sup> I do not concur in the opinion of Blackstone that our present common law rests entirely upon these ancient customs, but I cite the passages to show that, in the opinion of a profound student of the history of our law, these customs were the only law administered or known by the courts at the time of their establishment.—CARTER, *Law: Its Origin, Growth and Function*, 62.

<sup>4</sup> **Antiquity of the common law.**—Much wit and some serious argument have been spent upon this doctrine of the immemorial antiquity of the common law. “Our English lawyers, prone to magnify the antiquity like the other merits of their system, are apt to carry up the date of the common law until, like the pedigree of an illustrious family, it loses itself in the obscurity of ancient times.” (Hallam.) The observation is not intended to be a complimentary one: yet it may be accepted as perfectly just. The common law and the family are alike abstractions, existing apart from the concrete members of which each is composed. The actual rules and customs of the common law may change almost with every generation. We may trace with the greatest ease the dying out of a large part of the institutions and usages and legal conceptions of the Year-Books, or the introduction at a much later period of most of those which fill our reports to-day. We may prove from history that the particular rules of law have their birth and continuance and decay as truly as the generations of men; and yet the system of common law as a whole may as truly be styled of immemorial antiquity as the succession of ancestors to whom the present representatives of a family owe their existence. The common law is common reason, and like that has an existence quite independent of its teachings to each successive generation.

There is, however, a sense in which this immemorial existence may justly be asserted of each common-law doctrine. The particular custom or maxim or rule which we now call a part of the common law cannot show the precise date of its birth, or its individual progenitors as every member of the family



difficult than to ascertain the precise beginning and first spring of an ancient and long-established custom. Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind; or, in the solemnity of our legal phrase, time whereof the memory of man runneth not to the contrary. This it is that gives it its weight and authority: and of this nature are the maxims and customs which compose the common law, or *lex non scripta*, of this kingdom.

§ 81. f. Divisions of the common law.—This unwritten, or common, law is properly distinguishable into three kinds: 1. General customs; which are the universal rule of the whole kingdom, and form the common law, in its stricter and more usual signification. 2. Particular customs; which for the most part affect only the inhabitants of particular districts. 3. Certain particular laws; which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

can do. It has come "without observation" as a mere development or growth from what existed before it. It has not like a statute or a decision its fixed date of beginning, prior to which we can say that it was not. When it makes its first appearance, it is not as something new in principle, but only a new application of familiar and settled principles; and even this new application is to something of the same species or class with those previously governed by it. The common law changes only as the persons and things which are its objects change. It is easy to see that all the rules which govern the vast subject of railway communication—the relations of carriers to their passengers and the owners of their freight—must be very modern: for no such questions could have arisen sixty years ago. Yet by far the largest part of those new rules have been formed of the principles which regulated the stage-coach and the carrier's wagon, modified only to fit the novel qualities possessed by a powerful, rapid, and dangerous means of communication. Tracing any one rule back from decision to decision, we cannot find at any step a place where the court has consciously made a new law. If each of these steps has differed a little from the one by which it was reached, still each rests upon its predecessor for all the authority which can be said to be purely legal. The mental operation of the judge in taking each step forward is of precisely the same nature with that taken in cases of no apparent novelty, where a law proved by the decision of A's case against B is extended to the new case of C against D. The judge who finds a decision made in favor of a man against a woman, applies the same principle to the case of a woman against a man; he who reads a decision respecting the liability of a man who has kept a chained tiger

§ 82. (1) **General customs.**—<sup>[68]</sup> As to general customs, or the common law, properly so called; this is that law, by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. This, for the most part, settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offenses, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse themselves as extensively as the ordinary distribution of common justice requires. Thus, for example, that there shall be four superior courts of record, the chancery, the king's bench, the common pleas, and the exchequer;—that the eldest son alone is heir to his ancestor;—that property may be acquired and transferred by writing;—that a deed is of no validity unless sealed and delivered;—that wills shall be construed more favorably, and deeds more strictly;—that money lent upon bond is recoverable by action of debt;—that breaking the public peace is an offense, and punishable by fine and imprisonment;—all these are doctrines that are not set down in any written statute or ordinance, but depend merely upon immemorial usage, that is, upon common law, for their support.

Some have divided the common law into two principal grounds or foundations: 1. Established customs; such as that, where there

applies it to the case of one who has built a reservoir stored with water (*Rylands v. Fletcher*, L. R. 3 H. L. 341), without thinking in either case that the law he applies is affected. So the judge who decides that a clerk employed by the railroad company in Boston is a fellow-servant with the switchman who neglects his duty at Albany, is conscious of making no change in the law, though the decision from which he derives it related to an injury caused by one servant to another working in the same room. The law does not change; but the world it governs does. The immemorial quality of the common law is not affected by any novelty in its applications; and each of its rules is entitled to be considered immemorial also, if it is necessarily implied in the system, and if in tracing it back we can find no definite beginning, no point at which an act of legislation intervened.

It need scarcely be mentioned how intimately this doctrine is connected with that as to the true nature of judicial power. The two are merely different statements of the same truth; and each proves the other. If the judges made law instead of declaring it, every rule of the common law would have its fixed date of origin, and probably, also, its fixed date of repeal.—HAMMOND.

are three brothers, the eldest brother shall be heir to the second, in exclusion of the youngest: and 2. Established rules and maxims; as, "that the king can do no wrong, that no man shall be bound to accuse himself," and the like. But I take these to be one and the same thing. For the authority of these maxims rests entirely upon general reception and usage: and the only method of proving, that this or that maxim is a rule of the common law, is by showing that it hath been always the custom to observe it.<sup>5</sup>

**5 Customary law.**—Blackstone has been followed almost or quite uniformly by later writers in rejecting the distinction between customs and maxims as parts of the common law, and reducing that law altogether to customary law, so called. In this he departs from the common usage of our earlier writers, all of whom recognize the distinction, when they discuss the subject at all, and attach more importance to the maxims than to custom itself: for instance, St. Germain, in the Doctor and Student, and Hale, in his History of the Common Law. Nor was it peculiar to English writers. Although the civilians did not in all cases recognize it, yet Ulpian points out very clearly the distinction between custom (*consuetudo*) and the consensus of opinion (*mores*) which is inferred from custom and gives it force: *mores sunt consensus populi longa consuetudine inveteratus*. (Ulpian, Frag. tit. 1, § 4.) So, also, Julian: Ancient custom (*consuetudo*) is not improperly kept for law; and this is the law which is said to be derived from usage (*moribus*). Also described by him as unwritten law—*ea quæ sine ullo scripto populus probavit*. (Dig. lib. 1, tit. 3, 132.)

In saying that the authority of these maxims rests entirely upon general reception and usage, and the only method of proving that this or that maxim is a rule of the common law is by showing that it hath been always the custom to observe it, Blackstone seems not sufficiently to distinguish the particular customs of which he is about to treat in the same connection, and those general customs which constitute the common law. The former must be proved by showing that it has always been the custom to observe them: for it is by their observance that the existence of the exception to the general custom is known. But certainly it is not true that a rule of the common law must or can be shown to exist by evidence of usage under it. On the other hand, as Blackstone himself immediately points out, "the principal and most authoritative evidence that can be given of the existence of such a custom as shall form a part of the common law," is found in judicial decisions: and when these judicial decisions are examined, it is plain that the legal part of them, as distinct from findings of fact, rests not upon proof of general usage, but upon appeals to the common sense and convictions of the community. It is evident that the binding force of a custom is found in the rule or maxim deduced from it rather than the binding force of the maxim found in the usage from which it is deduced. No custom is obligatory in itself, because there is no reason why from the mere repetition of acts there should spring an obligation to continue

§ 83. (a) **Precedents.**—<sup>[69]</sup> But here a very natural, and very material, question arises: how are these customs or maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the laws; the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study; from the “*viginti annorum lucubrationes*” (the lucubrations of twenty years), which Fortescue<sup>n</sup> mentions; and from being long personally accustomed to the judicial decisions of their predecessors. And indeed these judicial decisions are the principal and most authoritative evidence, that can be given, of the existence of such a custom as shall form a part of the common law. The judgment itself, and all the proceedings previous thereto, are carefully registered and preserved, under the name of *records*, in public repositories set apart for that particular purpose; and

<sup>n</sup> Cap. 8.

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further the acts so repeated. (Hellfeld, *Jurispr. Forensis*, § 84.) Thomasius appears to be the first who saw the full force of this difficulty. Previous writers had been in the habit of assuming that custom made law directly and without any intermediate step. To avoid the difficulty he proposed the distinction since formulated as that between *principium essendi* and *principium cognoscendi*, or the source of the law's existence and the source of our knowledge of the law: and he allowed custom to be a source of law only in the latter sense. He said: “It is not the custom itself that we respect as law, but it is the rule or contract or other obligation, the existence of which is presumed from the usage.” Since his time many efforts have been made to explain the origin of law in custom; but no one has been able to show how an obligation to do a thing, still less a command to do it, may be deduced from the habit of doing it. There must be a conviction of right or duty formed from the custom before we can deduce a law. Thus, to take Hale's and Blackstone's illustration. (Hale's *History of the Common Law*, p. 221.) The custom of *primogeniture* binds no one to yield to an older brother until it produces a common conviction that the oldest has a right to take all the inheritance. How does it produce this conviction? Not directly in the form of a law: we can trace no necessary connection of thought between the usage and the rule; but there seems to be a natural connection between the usage and the right. What a man has usually received from others or at others' expense, he naturally expects to have continued; and the precedents are, not only to him but to others, strong arguments for his right so to do. What men in certain circumstances have uniformly obtained, a new man in the same circumstances may

to them frequent recourse is had, when any critical question arises, in the determination of which former precedents may give light or assistance. And therefore, even so early as the Conquest, we find the "*præteritorum memoria eventorum*" (the remembrance of past events) reckoned up as one of the chief qualifications of those, who were held to be "*legibus patriæ optime instituti*" (best instructed in the laws of their country).<sup>o</sup> For it is an established rule to abide by former precedents, where the same points come again in litigation: as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to

<sup>o</sup> Seld. Review of Tith. c. 8.

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reasonably claim on the ground of his equality with the rest. Even a person who has habitually done a thing disadvantageous to himself will recognize the custom as presumptive evidence of a duty to continue it in another's interest, if that other demands it. If he would deny this, he will deny, not that the custom exists, but that it constitutes a duty; and even then he will admit the presumption drawn from the usage as throwing upon himself the burden of showing that the payment or other thing done was not obligatory. The holder of a right will assume that the custom operating for his benefit is an obligatory one, without having any motive to distinguish between the custom and the right founded on it. It is thus by the extension of rights that custom, for the most part, operates: and usage converting even voluntary concessions into enforceable rights, the law, or the rule, only makes its appearance afterwards, when for any purpose it is desirable to state the contents of the right and its corresponding duties in an abstract form.

Again, it is plain that custom alone does not sufficiently account for the existence of law, if we reflect that there are numberless customs in every nation which the state does not enforce. There must, then, be some distinction, some element combined with the custom, which is wanting in the latter cases, and which gives to the enforceable custom the character of law. Mr. Austin has noticed this, and asked why such laws as those of fashion and others not enforceable are to be excluded from the definition of law. He answers in effect by saying that they are excluded because the state does not enforce them. This is consistent with his assumption that the arbitrary will



maintain and expound the old one.<sup>6</sup> Yet this rule admits of exception, where the former determination is most evidently contrary to reason; [70] much more if it be clearly contrary to the divine law. But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law*, but that it was *not law*; that is, that it is not the established

of the state is all that constitutes law; but when we notice the fact, not merely that it does not supply any criterion for determining in advance what laws shall be enforced and what not, but also that it gives no reason upon which the judge himself can determine whether to enforce a law or not, except his own judgment, it will seem that this is hardly more than saying that these laws and others grouped by him under the name of positive morality are not enforceable because they are not enforced. (Austin, *Lectures upon Jurisprudence*, Lecture 5, vol. 1, pp. 187-189, etc.; E. C. Clark, *Practical Jurisprudence*, pp. 276-280.)

We must look, then, for some other element than the mere custom to constitute law: it is that common conviction of right, often vaguely termed natural reason, right reason, etc., which converts certain customs into the form of legal rights and duties or of maxims and rules. The connection of this with custom and customary law was long clouded by the belief that all the rules of nature and of reason were innate, immutable, independent of all changing circumstance. Human custom often changing and visibly subject to varying influences could not constitute, it was thought, laws of such dignity as this. But we can now see that this conviction of right may operate upon any facts presented to it and formulate a rule without necessarily making it eternal. If new customs arise under changing circumstances of a community, and are of such a nature that the public weal requires them to be enforced, this conviction operates at once upon them, and converts the mere custom into law. Thus, by a marked example, the common law, which till recently recognized no right of property in running water, and still adheres to that rule in England and most of the older states, has lately in California and elsewhere evolved a law of irrigation, etc., based upon the changed customs of agriculture in those states. (*Lux v. Haggin*, 69 Cal. 255, 4 Pac. 919, 10 Pac. 674, and cases cited.) Still more frequently a change of customs forms new law by bringing new subjects under rules formerly not applicable to them; as when the same water, forming ice, is brought within the conception of property by the increased use of that substance and its consequent commercial value.—HAMMOND.

<sup>6</sup> **Doctrine of precedents.**—Ever since the reign of Edward I there have been lawyers who have made it their business to report the discussions in court and the judgments given in cases which seemed of legal interest. Thus we have the Year-Books, which are reports of cases made by anonymous



custom of the realm, as has been erroneously determined. And hence it is that our lawyers are with justice so copious in their encomiums on the reason of the common law; that they tell us, that the law is the perfection of reason, that it always intends to conform thereto, and that what is not reason is not law. Not that the particular reason of every rule in the law can at this distance of time be always precisely assigned; but it is sufficient that there be nothing in the rule flatly contradictory to reason. and then the

reporters from the time of Edward I to that of Henry VIII. These are followed by reports produced by lawyers reporting under their own names, reaching down to our own time, and receiving fresh additions every year. At the beginning these reports seem to have served mainly the purpose of instruction and information. The fact that a judge had stated that such and such was the law was evidence, but not more than evidence, that such was the law. He might have been mistaken; another judge might perhaps decide differently. But in course of time we find a change in the attitude of judges and lawyers towards reported decisions. The citation of decided cases becomes more frequent; greater and greater weight is attached to them as authorities. From the sixteenth century onwards, if not earlier, we may say that decided cases are regarded as a definite authority, which, at least in the absence of special reasons to the contrary, must be followed for the future. For the last three hundred years, at any rate, the decisions of judges of the higher courts have had a binding force for all similar cases which may arise in the future. This binding force is not, however, in all cases an irresistible one. The highest court of appeal in the country for the overwhelming majority of English cases—the house of lords—has held more than once during the last hundred years that it will not allow a previous decision given by it to be called in question. It seems unlikely that in the future it will depart from this view of the absolutely binding nature of its own decisions. All English courts which rank below the house of lords are absolutely bound by its decisions. So, too, the judgments of the court of appeal, which stands next below the house of lords, are binding declarations of the law for all lower courts, and even for itself. There have, however, been one or two cases in which a decision of the court of appeal, when given in obvious forgetfulness of what had been previously decided, has not been followed, even by a lower court.

A decision given by a court lower than the court of appeal is binding on courts of equal rank, except where it is clearly inconsistent with established principles of law, or where there is no previously settled rule which is clearly more reasonable. On the other hand, a decision of a lower court is not, in the first instance, binding on any court ranking above it. But in the course of time it may acquire an authority which even a higher court will not disregard. It may happen that a question has never been carried up to the court of appeal or to the house of lords, but that the lower courts have repeat-

law will presume it to be well founded.<sup>p</sup> And it hath been an ancient observation in the laws of England, that whenever a standing rule of law, of which the reason perhaps could not be remembered or discerned, hath been wantonly broken in upon by statutes or new resolutions, the wisdom of the rule hath in the end appeared from the inconveniences that have followed the innovation.

§ 84. (b) **Judicial decisions evidence of the common law.**—The doctrine of the law then is this: that precedents and rules must be followed, unless flatly absurd or unjust: for though their

<sup>p</sup> Herein agreeing with the civil law, Ff. 1. 3. 20. 21. "*Non omnium, quæ a majoribus nostris constituta sunt, ratio reddi potest. Et ideo rationes eorum, quæ constituuntur, inquiri non oportet: alioquin multa ex his, quæ certa sunt, subvertuntur*" (reasons cannot be given for all the laws which our ancestors have established; therefore we should not seek them; otherwise many of the laws which are established would be subverted).

edly decided it in the same way; or it may be that even a single decision of a lower court has remained for a long time unquestioned. In such a case the necessary result will be that lawyers and the public have come to regard such a decision as law, and have acted as if it was law. People will have made contracts, carried on business, disposed of their property, on the faith of such a decision, and the reversal of the rule would involve enormous hardship. It is often more important that the law should be certain, than that it should be perfect. The consequence is that even a higher court, though it may think a decision of a lower court wrong in principle, will refuse to overrule it, holding that the evil of upsetting what everyone has treated as established is greater than the evil of allowing a mistaken rule to stand. The cure in such a case is an alteration of the law by statute, for an alteration by statute does not work the same hardship as a reversal by a higher court of what was supposed to be the law. A statute need not, and as a rule does not, affect anything done before it was passed. Previous transactions remain governed by the law in force at the time they were made. But the theory or fiction of our case law is that the judge does not make new law, but only declares what was already law; so that if a higher court overrules the decision of a lower court, it declares that what was supposed to be law never really was law, and consequently past transactions will be governed by a rule contrary to what the parties believed to be law. A curious case occurred recently with regard to the Earldom of Norfolk, where the house of lords held that the rule that a peerage cannot be surrendered, though it was first established in the seventeenth century, must be treated as having been in force at the beginning of the fourteenth century. "Whenever," said Lord Davey, "a court or this house acting judicially declares the law, it is presumed to lay down what the

reason be not obvious at first view, yet we owe such a deference to former times as not to suppose they acted wholly without consideration. To illustrate this doctrine by examples: It has been determined, time out of mind, that a brother of the half blood shall never succeed as heir to the estate of his half-brother, but it shall rather escheat to the king, or other superior lord. Now, this is a positive law, fixed and established by custom, which custom is evidenced by judicial decisions; and therefore can never be departed from by any modern judge without a breach of his oath and

law is and was, although it may have been misunderstood in former days.”—GELDART, *Elements of English Law*, 13.

For further references on the law of judicial precedents, see Pollock, *First Book of Jurisprudence*, pt. II, c. VI; Vinogradoff, *Common-Sense in Law*, c. VII; Holland, *Jurisprudence* (11th ed.), 69; Gray, *Nature and Sources of Law*, c. IX; Dillon, *Laws and Jurisprudence*, 229 ff; Pound, *Readings in the Com. Law*, 97 ff.

**Ratio decidendi and obiter dictum.**—If you open a volume of the Law Reports and read the report of a case, how will you discover the law which the decision lays down? How will you find what is called the *ratio decidendi*—the principle on which the decision is based? Remember that the judge is not a legislator. It is not his business—in form at any rate—to make rules of law; his first duty is to decide the dispute between the parties. The dispute may be largely a question of fact. In some cases the questions of fact will have been already answered by a jury; in others the judge himself will have to decide questions of fact. At any rate, the judgment will involve the application of principles of law to concrete facts. The reader of a Law Report must therefore first disentangle the law stated in a judgment from the facts to which it is applied. That may be a difficult matter. No form is prescribed in which judgments must be delivered, and it may often be a matter of doubt how far a decision turns on the view which the judge took of the facts, and how far on a rule of law which he considered applicable. The headnote which is put at the beginning of a report of a case generally contains a statement of the rule supposed to be involved. But this headnote is not part of the report; it is merely the reporter's own view of the effect of the judgment. In using a Law Report, therefore, everyone is free, where there is room for doubt, to hold his own view of what was the law laid down in any particular case, unless and until the doubt has been settled by a subsequent decision.

From the *ratio decidendi* we must carefully distinguish what are called *dicta* or *obiter dicta*—“things said by the way.” An *obiter dictum*, strictly speaking, is a statement of the law made in the course of a judgment, not professing to be applicable to the actual question between the parties, but made by way of explanation or illustration or general exposition of the law. Such *dicta* have no binding force, though they have an authority which is

[71] the law. For herein there is nothing repugnant to natural justice; though the artificial reason of it, drawn from the feudal law, may not be quite obvious to everybody. And therefore, on account of a supposed hardship upon the half-brother, a modern judge might wish it had been otherwise settled, yet it is not in his power to alter it. But if any court were now to determine, that an elder brother of the half blood might enter upon and seize any lands that were purchased by his younger brother, no subsequent judges would scruple to declare that such prior determination was unjust, was unreasonable, and therefore was *not law*. So that *the law*, and the *opinion of the judge*, are not always convertible terms, or one and the same thing; since it sometimes may happen that the judge may *mistake* the law. Upon the whole, however, we may take it as a general rule, "that the decisions of courts of justice are the evidence of what is common law"; in the same manner as, in the civil law, what the emperor had once determined was to serve for a guide for the future.<sup>a</sup>

§ 85. (c) Reports.—The decisions, therefore, of courts are held in the highest regard, and are not only preserved as authentic

<sup>a</sup> "*Si imperialis majestas causam cognitionaliter examinaverit, et partibus, cominus constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hanc esse legem, non solum illi causæ pro qua producta est, sed et in omnibus similibus*" (if the emperor shall have examined the cause, and shall immediately declare his opinion, let all the judges of the land know that this is law, not only with respect to that cause which first produced the opinion, but to every other of the like nature). C. 1. 14. 12.

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entitled to respect and which will vary according to the reputation of the particular judge.

We sometimes find that a judge in deciding a case will profess to decide it on a principle really wider than is necessary for the purpose, when it might have been decided on some already recognized but much narrower ground. In such a case the supposed principle is in effect equivalent to an *obiter dictum*; it will not be treated as the true *ratio decidendi* of the case. But of course it may be a difficult problem to determine how far the rule is really wider than necessary.

Another difficulty sometimes occurs where the judges of a court agree in the result, but give different reasons. In such cases the matter is left open for a judge in a subsequent case to decide which reason is the right one.—GELDART, *Elements of English Law*, 17.

records in the treasuries of the several courts, but are handed out to public view in the numerous volumes of *reports* which furnish the lawyer's library.<sup>7</sup> These reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record; the arguments on both sides and the reasons the court gave for its judgment; taken down in short notes by persons present at the determination. And these serve as indexes to, and also to explain the records; which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second, inclusive; and from his time to that of Henry the Eighth <sup>[72]</sup> were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually*, whence they are known under the denomination of the *Year-Books*. And it is much to be wished that this beneficial custom had, under proper regulations, been continued to this day: for,

<sup>7</sup> **Law reporters.**—"Till quite recent years it was believed that the Year-Books, at all events the Year-Books from Edward III's reign down to Henry VII's reign, were compiled by official reporters paid by the crown. This belief, which was shared by Coke, Bacon, and Blackstone (Blackstone adds or invents the information that the reports were made by the prothonotaries), ultimately rests upon some words used by Plowden in the preface to his reports. 'As I have been credibly informed,' he says, 'there were anciently four reporters of cases in our law who were chosen and appointed for that purpose, and had a yearly stipend from the king for their trouble therein; which persons used to confer together at the making and collecting of a report, and their report being made and settled by so many, and by men of such approved learning, carried great credit with it.' It is clear that Plowden's statement rested merely upon report; and the statements of later authorities are merely amplifications of his words."—HOLDSWORTH, 2 Hist. Eng. Law, 451.

A view of the origin of the Year-Books, upholding Blackstone in the main, will be found in 27 Law Quart. Rev. 279.

"The Year-Books are not elementary reading, and are not very often referred to in court nowadays, though oftener than they were fifty or sixty years ago. Many lawyers in good business have never read a word of them, and would barely know how to refer to them. Yet some knowledge of them is needful for everyone who wishes to know the law as a scholar and not merely as a practitioner; and those who pay special attention to the law of real property not unfrequently find such knowledge useful in practice. Kent's opinion, expressed less than seventy years ago (his Preface to the first volume of *Commentaries on American Law* is dated 23d November, 1826), that the Year-Books 'are not worth the labor and expense either of a new edition or a translation,'



though King James the First, at the instance of Lord Bacon, appointed two reporters<sup>r</sup> with a handsome stipend for this purpose, yet that wise institution was soon neglected, and from the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands; who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination. Some of the most valuable of the ancient reports are those published by Lord Chief Justice Coke, a man of infinite learning in his profession,

<sup>r</sup> Pat. 15 Jac. I. (1617) p. 18. 17 Raym. 26.

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has been refuted, instead of being confirmed, by subsequent experience on both sides of the Atlantic. . . .

"When unofficial reports were first printed, it was with apologies and professed reluctance. The learned reporter assures us that he took notes in court only for his own use, but his friends must needs borrow and copy them; then he was entreated to publish; and while he was hesitating, he learned that some bookseller would bring out a piratical and probably corrupt edition if he did not without more loss of time bring out an authentic one. Such is Plowden's story in the Preface to his Reports, dated 1578, which served as a model for many others. Doubtless MS. notes of cases were freely handed about among barristers and students, as lecture-notes are to this day in the universities; Coke alludes to this practice when he says in the Preface to the First Part of his own Reports—'I like not of those that stuff their studies with wandering and masterless reports.' As late as 1765 Sir James Burrow wrote in the Preface to his Reports, 'I found myself reduced to the necessity of either destroying or publishing these papers (which were originally intended for my own private uses and not for public inspection).' Later still, in 1789, Kirby of Connecticut, the father of American reporters, declared that he 'had entered upon this business in a partial manner, for private use.' Dyer's Reports, first published in 1585, fifteen years before the earliest of Coke's, are the leading example of posthumous collections made up from materials not published by the reporter in his lifetime. Such collections have been of the most various degrees of merit. Wallace on the Reporters is the best guide to a critical appreciation of the earlier books of reports. . . .

"Sir James Burrow's Reports, dating from 1756 and first published in 1765 (which was also the year of publication of Blackstone's Commentaries), may be considered the earliest of the modern type. From that time the court of king's bench and its successors have never wanted a reporter; we can go back year by year without a break from the current queen's bench division [this was written in 1896] part of the law reports to the first volume of Burrow. In the court of common pleas and in chancery the succession was established



though not a little infected with the pedantry and quaintness of the times he lived in, which appear strongly in all his works. However, his writings are so highly esteemed, that they are generally cited without the author's name.<sup>a</sup>

§ 86. (d) Writings of the sages of the law.—Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law.<sup>b</sup> Such are

<sup>a</sup> His reports, for instance, are styled, *κατ' ἐξοχην* (by way of pre-eminence), *the reports*; and in quoting them we usually say, 1 or 2 Rep. not 1 or 2 Coke's Rep. as in citing other authors. The reports of Judge Croke are also cited in a peculiar manner, by the name of those princes, in whose reigns the cases reported in his three volumes were determined; viz., Queen Elizabeth, King James, and King Charles the First; as well as by the number of each volume. For sometimes we call them 1, 2, and 3 Cro. but more commonly Cro. Eliz., Cro. Jac., and Cro. Car.

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a score of years later, and in the court of exchequer (then much below the others in dignity and repute) only many years later still. . . .

"The reports issued by disconnected private enterprise were, with few exceptions, good enough in substance, and some were very good indeed; but they were costly, bulky, and dilatory, and, as Lord Justice Lindley has said, 'the waste of labor, time, and money was prodigious.' (Law Quart. Rev., i. 138. More detail will be found there, and in the late Mr. Daniel's History and Origin of the Law Reports, London, 1884, of which the Lord Justice's article was a review.) In 1863 the English bar took the matter into their own hands, and the labors of a committee appointed to consider what could be done resulted in the establishment of the Council of Law Reporting, a directing body which represents the inns of court, and now also the General Council of the Bar.

"From 1865 onwards the Law Reports have been carried on by the council in the interest of the profession as a co-operative and self-supporting enterprise. The example set by the English Law Reports was in course of time followed in Ireland, and to a certain extent in British India. Arrangements analogous, in varying degrees, to those of the English 'authorized' reports exist in the federal and state jurisdictions of the United States, and in the larger self-governing British colonies. In America 'the reporters of the supreme court of the United States and of most, perhaps of all, the state courts of last resort, are public officials duly elected or appointed' (Wambaugh, *The Study of Cases*, 2d ed., 1894, p. 109), and accordingly the reports are constantly described as official, a term which English lawyers have avoided."—POLLOCK, *First Book of Jurisprudence*, 285 ff.

<sup>b</sup> Legal treatises.—The leading authorities, in the way of legal writers and the treatises they composed, prior to Blackstone, will be briefly discussed

Glanvill and Bracton, Britton and Fleta, *Hengham* and Littleton, *Statham*, *Brooke*, Fitzherbert, and *Staundforde*,\* with some others of ancient date, whose treatises are cited as authority; and are evidence that cases have formerly happened in which such and such points were determined, which are now become settled and first principles. One of the last of these methodical writers in point of time, whose works are of any intrinsic authority in the courts of justice, and do not entirely depend on the strength of their

\* The names in italics were first added in the ninth edition.

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in this note. What is here said is based in considerable part upon Professor Heinrich Brunner's Sources of English Law, 2 Select Essays in Anglo-American Legal History, 7-52.

*Dialogus de Scaccario*.—The *Dialogus de Scaccario*, a treatise in the form of a dialogue on the constitution and administration of the Royal Exchequer. It is also valuable for private law and procedure. "It bears witness to the early maturity of administrative processes in the Norman constitution, a remarkable evidence of the spirit of centralization and the bureaucratic conception of the state, without a parallel in the Middle Ages." 1 Gneist, *Verwaltungsrecht*, 201. The *Dialogus* was written in 1178 or 1179 by Richard Fitz Nigel or Neal, Archdeacon of Ely, and later Bishop of London. A reprint with somewhat amended text is found in Stubbs, *Select Charters*, 199. A later critical edition, by Hughes, Crump and Johnson, with introduction and copious commentary, was published in 1902. A careful study of the author and his work is found in Liebermann, *Einleitung in den Dialogus de Scaccario*, 1875. See 1 Pollock & Maitland, *Hist. Eng. Law* (2d ed.), 161.

*Glanvill*.—Glanvill's Treatise, the first classical law book of England, and at the same time "the first attempt at a scientific exposition of native law in modern Europe." Gundermann, *Englisches Privatrecht*, 61. The work was written between 1187 and 1189. The author was Ranulf Glanvill, who "held the helm of justice" from 1180-1189, and was not without some share in the reforms of Henry II. (Doubt is cast upon Glanvill's authorship of this celebrated book in 1 Pollock & Maitland, *Hist. Eng. Law* (2d ed.), 163.) The writer knew something of Roman and canon law, and the beginning of the prologue is modeled after that of the *Institutes of Justinian*. The treatise is an accurate and luminous exposition of the practice of the king's court, as it had been settled on the basis of Henry's reforms. Glanvill's book became popular. Many manuscripts are yet extant. Seventy years after it was written lawyers were still using it and endeavoring to bring it up to date. It was translated into French. A version of it under the name of *Regiam Maiestatem* (the opening words) became current in Scotland. "It is the earliest text-book of feudal jurisprudence." The modern English translation with notes by J. Beames, and introduction by Professor Joseph H. Beale was

quotations from older authors, is the [73] same learned judge we have just mentioned, Sir Edward Coke; who hath written four volumes of Institutes, as he is pleased to call them, though they have little of the institutional method to warrant such a title. The first volume is a very extensive comment upon a little excellent treatise of tenures, compiled by Judge Littleton in the reign of Edward the Fourth. This comment is a rich mine of valuable common-law learning, collected and heaped together from the

published in 1900. A new and critical edition is in course of preparation for the publications of the Selden Society. See 1 Pollock & Maitland, *Hist. Eng. Law* (2d ed.), 162-166. Chapter VI of Book I of this scholarly work is entitled, "The Age of Glanvill."

*Bracton*.—"Bracton's book is the crown and flower of English mediæval jurisprudence. What we know of its author has been written elsewhere, and may here be summed up very briefly. His name was Henry Bracton; he was a Devonshire man, and in all likelihood he began his career as William Raleigh's clerk. In 1245 he was already a justice in eyre and was holding a dispensation granted by Raleigh and confirmed by Innocent IV for the tenure of three benefices. From 1248 until his death in 1268 he steadily took assizes in the southwestern counties. From 1248 to 1257 or thereabouts he was among the justices who held pleas *coram ipso rege*: in other words, he was a justice of the nascent court of king's bench, and the very highest places in church and state must have seemed to be open to him. We may see him witnessing the king's charters along with the great folk of the realm. Shortly after this, however, he appears to have retired or been dismissed from his position in the central court, though to his dying day he acted as a justice of assize. In 1259 he became rector of the Devonshire parish of Combe-in-Teignhead, in 1261 rector of Bideford, in 1264 archdeacon of Barnstaple, and in the same year chancellor of Exeter cathedral. Thus he seems to have left the king's court just at the time when the revolutionary movement that preceded the barons' war came to its first crisis; and just about the same time he was told to restore to the treasury the large store of plea rolls, those of Martin Pateshull and William Raleigh, which had been in his possession. Whether he was disgraced, and, if so, whether he had offended the king or the barons, we cannot as yet decide. In the last year of his life, in 1267, he appeared once more in a prominent place; he was a member of a commission of prelates, magnates and justices appointed to hear the complaints of 'the disinherited': that is, of those who had sided with Simon de Montfort.

"His is an unfinished book; we do not know that it was published in his lifetime. The main part of it seems to have been written between 1250 and 1258, the time when he had to surrender the plea rolls; apparently he was still glossing and annotating it at a later time; but at present we cannot always distinguish his own *addiciones* from those of later commentators. A 'note-

ancient reports and Year-Books, but greatly defective in method.<sup>t</sup> The second volume is a comment upon many old acts of parliament, without any systematical order; the third a more methodical treatise of the pleas of the crown; and the fourth an account of the several species of courts.<sup>u</sup>

And thus much for the first ground and chief corner-stone of the laws of England, which is general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice; which decisions are preserved among our public records, explained in our reports, and digested for general use in the authoritative writings of the venerable sages of the law.

<sup>t</sup> It is usually cited either by the name of Co. Litt. or as 1 Inst.

<sup>u</sup> These are cited as 2, 3, or 4 Inst. without any author's name. An honorary distinction, which, we observed, is paid to the works of no other writer; the generality of reports and other tracts being quoted in the name of the compiler, as 2 Ventris, 4 Leonard, 1 Siderfin, and the like.

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book' has come down to us which seems to have been his. It contains some two thousand cases copied from the rolls of Pateshull and Raleigh, over against some of which marginal notes have been written; to all appearance they came from Bracton's hand or from Bracton's head. . . . Bracton's debt—and therefore our debt—to the civilians is inestimably great. But for them, his book would have been impossible; but for them, as the fourteenth century will show us, some beggarly collection of annotated writs would have been the best that we should have had from him; we should have missed not only the splendid plan, the orderly arrangement, the keen dilemmas, but also the sacerdotal spirit of the work.

"On the other hand, the main matter of his treatise is genuine English law laboriously collected out of the plea rolls of the king's court. He expressly cites some five hundred decisions, and whenever we compare his treatise with the records—and this can now be done at innumerable points—he seems to be fairly stating the practice of the king's court." Pollock & Maitland, 1 Hist. Eng. Law (2d ed.), 206.

An edition of Bracton's Treatise on the Laws and Customs of England was published in 1569 and reprinted in 1640. Sir Travers Twiss issued a new edition with an English translation, in six volumes, in 1878 ff. Shortly after its publication, Professor Vinogradoff discovered in the British Museum a manuscript covering some 2,000 cases of the time of Henry III, which Bracton had used in writing his treatise, and to which he had made marginal annotations. This was edited as Bracton's Note-Book, 1887, by Maitland.

*Fleta*.—The so-called "Fleta" is the work of an unknown jurist, getting its name from the fact that it was written in the Fleet Prison. It dates from

§ 87. (e) **Regard of the Roman law for custom.**—The Roman law, as practiced in the times of its liberty, paid also a great regard to custom; but not so much as our law: it only then adopting it, when the written law was deficient. Though the reasons alleged in the digest<sup>v</sup> will fully justify our practice, in making it of equal

▼ Ff. 1. 3. 32.

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about 1290. The book was printed in 1647 and 1685. Both editions have as an appendix the valuable *Dissertatio ad Fletam* by Selden.

*Thornton*.—Gilbert Thornton made an epitome of Bracton's treatise about 1292. The work is lost, unless it be represented by some of the manuscripts of Bracton's work. Pollock & Maitland, 1 *Hist. Eng. Law* (2d ed.), 210.

*Britton*.—The treatise going by the name of Britton has more claims to originality than the two last. It was probably written shortly after 1290. It is thought by its latest editor to owe its origin to a project of Edward I to cause a compilation of the English law to be made after the manner of Justinian's Institutes. It must have been useful, judging from the number of manuscripts. It is the oldest English law book written in French. The earlier editions have been superseded by the careful edition by Nichols, 1865, 2 vols., with English translation, and references to Bracton, Fleta, and the statutes.

*Hengham*.—A small treatise, containing little tracts on procedure, is the *Summa Magna et Parva* of Ralph Hengham, one of Edward I's chief justices. It is reprinted as an appendix to the edition of Fortescue of 1737.

*The Mirror*.—The *Mirror of Justices* was probably written between 1285 and 1290. "Once for all we may say that of the *Mirror of Justices* we shall take no notice. Its account of criminal law is so full of fables and falsehoods that as an authority it is worthless." (Pollock & Maitland, 2 *Hist. Eng. Law* (2d ed.), 478 n.) "Being taken seriously in its entire content by English jurists from Edward Coke down to the late editor of Reeves' *History of the English Law*, it has done a good deal of mischief in the study of English legal history." (Brunner, *op. cit.*) The *Mirror* was printed in 1642, and an English translation in 1646, reprinted in 1768 and 1840. The latest edition is that by W. I. Whittaker, 1895, in the *Publications of the Selden Society*, vol. VII, together with a critical introduction by Maitland.

*Fortescue*.—"After a long pause English legal science received a new lease of life with the work of Fortescue, *De Laudibus Legum Angliæ*, and with Littleton's *Tenures*.

"John Fortescue had first been attorney, and in 1442, under Henry VI, had become chief justice of the king's bench. Adhering to the House of Lancaster in the struggle between the Roses, he was convicted of high treason after the victory of Edward IV of York, in 1461, and fled from England. About 1463 he was with the Queen and Prince Edward in Barrois in Lorraine. Probably in this exile, from which he returned to England only in 1471, he wrote for



authority with, when it is not contradicted by, the written law. "For since," says Julianus, "the written law binds us for no other reason but because it is approved by the judgment of the people, therefore laws which the people have approved without writing ought also to bind everybody. For where is the difference, whether the people declare their <sup>[74]</sup> assent to a law by suffrage, or by a

the education of the successor to the crown his famous work, 'De Laudibus Legum Angliæ,' to which he gave the form of a dialogue between prince and chancellor. (Fortescue had been nominally appointed chancellor by Henry VI. Edward IV pardoned him in 1473 and made him privy councillor.)

"The book, which is written in popular style, pursues the double purpose of showing the peculiarities and advantages of the English law as compared with the Roman law, and to point out the good features of a constitutionally limited monarchy in contrast to a despotic government. Not a few of the propositions first enunciated by him later on became political axioms. For the Continent Fortescue is important as the precursor of those modern authors who by pointing out the advantages of English law prepared the way for the reception of English institutions by Continental Europe." (Brunner, *op. cit.*) The most valued edition of Fortescue is that of 1737 in folio. An edition was published in 1825, with notes by Amos, and republished in 1874 with an English translation by Francis Gregor. A careful edition is that by Plummer, 1885. Lord Clermont published all the works of Fortescue, with his biography, in 1869. See further 2 Holdsworth, *Eng. Law*, 477, and 4 Foss, *Judges of England*, 308.

*Littleton*.—"Five books stand out pre-eminently in the history of English law—Glanvill, Bracton, Littleton, Coke and Blackstone, and of these Littleton's book is the first great book upon English law not written in Latin and wholly uninfluenced by Roman law. Coke called it 'the ornament of the common law, and the most perfect and absolute work that was ever written in any humane science'; and he touched upon the real reason for its author's fame when he said that 'his greatest commendation . . . is that by this excellent work which he had studiously learned of others, he faithfully taught all the professors of law in succeeding ages.'" Holdsworth, 2 *Hist. Eng. Law*, 484. Thomas Littleton, the author, was a contemporary of Fortescue, dying in 1481. The book, of uncertain date, was designed to assist the author's son in his study of law. To an anonymous tract entitled *The Old Tenures*, Littleton was indebted for the suggestion of the title by which his work was first known—*The New Tenures*. It was printed in 1481 or 1482. A second edition appeared in 1483, and before 1628 (the year when Coke's edition and commentary was published) it had run to more than seventy editions. It was translated early in the sixteenth century. "These few facts speak more strongly for the intrinsic merits of Littleton's book than pages of elaborate eulogy. Here one would call attention to the characteristic which gives it a unique value from the historical point of view. It describes the land law as it existed at the end of a period



uniform course of acting accordingly?" Thus did they reason while Rome had some remains of her freedom; but, when the imperial tyranny came to be fully established, the civil laws speak a very different language. "*Quod principi placuit legis habet vigorem, cum populus ei et in eum omne suum imperium et potestatem conferat*" (the constitution of the prince has the force of law,

of continuous and purely logical development, and just before a period when its doctrines were to be profoundly modified. . . . In fact, the historical interest of Littleton's book is closely parallel to that of Blackstone's Commentaries. It summed up and passed on to future generations the land law as developed by the common lawyers of the middle ages, just as Blackstone's Commentaries summed up and passed on the common law, as developed mainly by the work of the legal profession, before it was remodeled by the direct legislation inspired by the teaching of Bentham." Holdsworth, 2 Hist. Eng. Law, 485.

The oldest edition of Littleton's Tenures dates from 1481, soon after the introduction of printing into England. Coke furnished an English translation of the old French text, and a commentary, and in this form the Tenures dominated down to Blackstone. The old French text with English translation was last edited by Tomlins in 1841. A new edition of the old English translation, with valuable introduction and bibliography, was prepared by Eugene Wambaugh, 1903.

*St. Germain.*—St. Germain's Dialogus de Fundamentis Legum Angliæ et de Conscientia is a much read treatise, written under Henry VIII. It contains a dialogue between a doctor of divinity and a student of English, aiming at a philosophical justification of English legal institutions. The earliest edition was in 1523. An English translation, under the title Doctor and Student, has gone through many editions. The eighteenth edition, by William Muchall, was issued in 1815.

*Abridgments.*—"The three abridgments of the Year-Books were written by Statham, Fitzherbert, and Broke. Statham's name does not appear in the Year-Books, but he was reader of Lincoln's Inn in the Lent term of 1471. His abridgment was printed by Pynson somewhere about the year 1495. Under the title, 'Epitome Annalium Librorum Tempore Henrici Sexti.' The title is misleading, seeing that the book includes extracts from the Year-Books of preceding reigns up to and including the reign of Henry VI. Later editions were published in 1585 and 1679. Its popularity doubtless suffered from the more complete work of Fitzherbert. His work—Le Graunde Abridgment—was first printed in 1514. It is remarkable not only for its accuracy but also for its research. It contains extracts from many still unprinted Year-Books, and also, as we have seen, from Bracton's Note-Book. It was a model to future writers of abridgments; and was extensively used by Staundforde for his treatise on the Prerogative, and by Bellew for his collection of reports of the years of

since the people place all their power and authority in his hands), says Ulpian,<sup>w</sup> "*Imperator solus et conditor et interpres legis existimatur*" (the emperor alone is considered both as the maker and interpreter of the law), says the code.<sup>x</sup> And again, "*sacrilegii instar est rescripto principis obviari*" (it is sacrilege to oppose the rescript of the prince).<sup>y</sup> And indeed it is one of the characteristic

<sup>w</sup> Ff. 1. 4. 1.

<sup>y</sup> C. 1. 23. 5.

<sup>x</sup> C. 1. 14. 12.

Richard II's reign. Its popularity is attested by the fact that it was reprinted in 1516, 1565, 1573, 1577, and 1586. The last of these abridgments of the Year-Books is that of Broke. Broke filled the offices of common serjeant and recorder of London. He was speaker of the house of commons in 1554, and was made chief justice of the common pleas in the same year. He died in 1558, and his work was published posthumously in 1568. It is based on Fitzherbert's abridgment, but it contains much new matter. In particular it abridges fully the Year-Books of Henry VII's and Henry VIII's reigns. 'He observes,' says Reeves, 'one method, which contributes in some degree to draw the cases to a point; he generally begins a title with some modern determination in the reign of Henry VIII, as a kind of rule to guide the reader in his progress through the heap of ancient cases which follow.' The book was republished in 1570, 1573, 1576, and 1586." Holdsworth, 2 Hist. Eng. Law, 458.

*Staundeforde*.—Sir William Staundeforde (died 1558), England's earliest scientific criminalist, wrote a highly valued work on criminal law and procedure, "The Pleas of the Crown." He was the first to edit Glanvill's treatise, and he wrote a treatise, *De Prerogativa Regis*, which is usually subjoined to the editions of the Pleas of the Crown.

*Coke*.—Sir Edward Coke became the most celebrated authority among English jurists. He was born in 1552, became attorney general in 1594, chief justice of the common pleas in 1606, chief justice of the king's bench in 1613, but lost the king's favor and his position in 1616, partly in consequence of the antagonism of his opponent, Sir Francis Bacon. His principal works are his Reports and the Institutes of the Laws of England. The latter appeared in 1628 and consist of four parts. The first contains a Commentary on Littleton's Tenures. Part II contains a copious commentary on Magna Carta and the older statutes. The third part gives an exposition of criminal law (*Placita Coronæ*). The fourth treats of jurisdictions. The Institutes were published in 1817, in six volumes; Part I (2 Vols.), with the valuable notes of Hargrave and Butler.

*Selden*.—John Selden (1584-1654) was a public man, jurist, legal antiquary, and oriental scholar. In 1603 he was admitted a member of Clifford's Inn; in 1604 he migrated to the Inner Temple, and in 1612 he was called to the bar.

marks of English liberty, that our common law depends upon custom; which carries this internal evidence of freedom along with it, that it probably was introduced by the voluntary consent of the people.

Later he was nominated reader in Lyon's Inn, an office he declined, was fined £20 by the benchers of Inner Temple, and disqualified from being one of their number. This disqualification was, however, removed and he became a master of the bench. He served in the parliaments of Charles I, and was connected, during the earlier years at least, on the popular side with the great movements of the day, and was twice imprisoned. In 1614 he published his *Titles of Honor*; in 1616 notes on Fortescue's *De Laudibus Legum Angliæ*, and Ralph Hengham's *Summæ Magna et Parva*. In 1618 he published his *History of Tithes*, which caused him to be summoned before the privy council and compelled to retract his opinions, or at least to disown them as his opinions. In 1635 he published the *Mare Clausum*, a book written seventeen or eighteen years earlier but prohibited from being published by James I. It appeared, consequently, a quarter of a century after Grotius' *Mare Liberum*, to which it was intended as a rejoinder. Its especial purpose was to explode the pretensions advanced by Grotius in behalf of the Dutch fishermen to poach in the waters off the British coasts. In 1647 his edition of *Fleta* appeared. Milton calls Selden "chief of learned men and glory of our nation."

On Selden and his works, see Aikin, *Lives of John Selden and Archbishop Usher* (London, 1812); Johnson, *Memoirs of John Selden*, etc. (London, 1835); Singer, *Table Talk of John Selden* (London, 1847); Wilkins, *Johannis Seldeni Opera Omnia*, etc. (London, 1725); sketch of John Selden, in *Great Jurists of the World*, 185 (The Continental Legal History Series, vol. II).

*Hale, Hawkins, and Comyns*.—Other jurists after Coke and before Blackstone are Matthew Hale, William Hawkins, and John Comyns. Sir Matthew Hale (died 1676), who, although Royalist, became under Cromwell judge in the court of common pleas on account of his eminence as a lawyer, wrote the *History of the Common Law*, and a work on criminal law: *History of the Pleas of the Crown*. The former was published from the author's posthumous papers by Runnington, 6th ed., 1820; as an appendix Hale's *Analysis of the civil part of the law* is published. The *Pleas of the Crown* was first edited in 1739, then in 1800 with notes by Dogherty, last in 1847 by Stokes and Ingersoll with a biography of the author (2 vols.). Hale's *Analysis of the Law* became the foundation of Blackstone's *Commentaries*. Hawkins published a *Treatise of the Pleas of the Crown* in 1716 (8th edition, 1824, revised by Curwood, with supplements by Leach). Sir John Comyns is noted for his *Reports* (1744), and still more for the *Digest of the Laws of England* (1762, 5th edition by Hammond, 8 vols., 1822). This work is said to be distinguished for method, thoroughness, and accuracy.

§ 88. (2) **Particular customs.**—The second branch of the unwritten law of England are particular customs, or laws which affect only the inhabitants of particular districts.<sup>9</sup>

These particular customs, or some of them, are without doubt the remains of that multitude of local customs before mentioned, out of which the common law, as it now stands, was collected at first by King Alfred, and afterwards by King Edgar and Edward the Confessor: each district mutually sacrificing some of its own special

<sup>9</sup> **Particular customs and usage.** The usages of particular trades, professions, or classes of men, sometimes also called customs, must be carefully distinguished from the particular customs here treated. There is just enough resemblance between the two to produce error if this is not done. The two have been treated together in the latest works on the subject, both English (Browne on Usages and Customs, 1875), and American (Lawson on Usages and Customs, with illustrative cases, 1881), without giving sufficient prominence to the distinction. In not a few American cases also, the rules of particular customs here given have been applied to questions of usage without any hint that the two things are not the same. (Taylor v. Carpenter, 2 Woodb. & M. 7, Fed. Cas. No. 13,785; Rindskoff v. Barrett, 14 Iowa, 101; Strong v. Grand Trunk R. R. Co., 15 Mich. 225, 93 Am. Dec. 184; Pilmer v. Branch of State Bank, 16 Iowa, 321; Hursh v. North, 40 Pa. St. 241; Hopkins v. Grimes, 14 Iowa, 73.) These customs, as the definitions show, are always local, or as Lord Ellenborough expresses it, “a custom in the strict legal signification of the word, must be taken with reference to some defined limit or space, which is essential to every custom so called.” (4 East, 159.) Usage, on the other hand, has no local limits; the usage of a particular place or neighborhood may be shown, but these limits have no legal significance; they merely mark the extent of the fact to be proved. Again, a particular custom is always an exception to the common law, or excludes it within its own limits. A usage must be consistent with the common law unless it is supported by some statute. Thirdly, a particular custom is the law of all persons within the assigned limits so far as they or their property may be affected by it: a usage affects only the persons or things among whom it is proved to exist. Fourthly, a particular custom is of the nature of law; it is indeed, as we shall show soon, the law of its own district: a usage is a matter of fact, and the law of the case can only be applied to it as to other facts. When a usage becomes so general that the courts will notice its existence without requiring it to be proved as a fact, it is not a particular custom, but a part of the common law. (Wilmot, J., in 2 Burr. 1228.) Of this B. gives a marked illustration in the present section in the case of the law-merchant.

Mr. Browne has said, and Mr. Lawson quotes with approval: “That customs have developed themselves progressively, and that law has passed from the central unity into a scattered and careless variety of customs, so that every place

usages, in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But, for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships, were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large: which privilege is confirmed to them by several acts of parliament.\*

Such is the custom of gavelkind in Kent and some other parts of the kingdom (though perhaps it was also general till the Norman Conquest) which ordains, among other things, [75] that not the

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\* Mag. Cart. 9 Hen. III. c. 9. (1225)—1 Edw. III. st. 2. c. 9. (Liberties of Cities, 1326)—14. Edw. III. st. 1. c. 1 (Confirmation of Liberties, 1340) — and 2 Hen. IV. c. 1 (Confirmation of Liberties, 1400).

has its particular law of custom." This is probably true when applied to business and trade usages, which have undoubtedly increased in number with the growing complexity of modern life, but it is clearly not true of local customs, the tendency of which is entirely in the other direction. B. has justly termed them the remains of a multitude of local customs which existed before the common law. The early books of that law show the immense variety of such customs; each county, almost each vill and manor having its own peculiar law upon many subjects now governed by a uniform common law. When Glanvill wrote on the practice of the king's court, he gave as his reason for confining himself to that court, the confused multitude of customs which prevailed in the others, and he more than once repeats the same excuse—as with respect to larceny, *de furtis*, and other pleas before the sheriff, because they have to be treated and decided according to the diverse customs of different counties. (Prologue, and lib. 14, c. 8.) Staundeforde, in his *Pleas of the Crown*, frequently refers to the same local diversities. There can be no doubt that the whole history of the common law has been one of unification, and the reduction of local diversities to uniform rules.

Are there any particular customs in the United States? In the strict sense of the word, probably not. The diversities in the common law of the different states cannot be considered as such, since there is no common law of the whole country with which they could be set in contrast. If, in any of our states, particular local customs have been recognized as exceptions to the common law, they have been so few and of such slight consequence as to have entirely escaped notice. We have in fact no *time out of mind* in which such local customs could originate, and no local divisions which could serve as basis for such particular customs. The subdivisions of our oldest states have very rarely any history which cannot be traced back to the formal action of the state or colonial legislature. If there were particular customs originating in such action they would not comply with the requirements of the customs described here, and



eldest son only of the father shall succeed to his inheritance, but all the sons alike: and that, though the ancestor be attainted and hanged, yet the heir shall succeed to his estate, without any escheat to the lord. Such is the custom that prevails in divers ancient boroughs, and therefore called borough-English, that the youngest son shall inherit the estate, in preference to all his elder brothers. Such is the custom in other boroughs that a widow shall be entitled, for her dower, to all her husband's lands; whereas, at the common law she shall be endowed of one-third part only. Such also are the special and particular customs of manors, of which everyone has more or less, and which bind all the copyhold and customary tenants that hold of the said manors. Such likewise is the custom of holding divers inferior courts, with power of trying causes, in cities and trading towns, the right of holding which, when no royal grant can be shown, depends entirely upon immemorial and established usage. Such, lastly, are many particular customs within the city of London, with regard to trade, apprentices, widows, orphans, and a variety of other matters. All these are contrary to the general law of the land, and are good only by special \*usage; though the customs\* of London are also confirmed by act of parliament.<sup>a</sup>

\* In the first this is quite different. "I have a right of way by custom over another's field, the custom is not destroyed, though I do not pass over,"

<sup>a</sup> 8 Rep. 126; Cro. Car. 347.

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usages not so particularly located would, as has been shown above, be of entirely different character. It is doubtful also how the existence of local customs could be proved in an American state, even if they could be supposed to exist there; certainly there are none of which a court could take judicial notice, as is done in England with reference to the customs of Kent and a few others. Such a custom would have to be proved in the first place as a fact. To do this, as has been well pointed out in *Bourke v. James*, 4 Mich. 338, you will call witnesses to prove what the usage is, and if there be any doubt on the point, it will be for the jury to determine what as a fact is the usage, and after the usage has been proved, it will be for the court to determine whether a custom is made out, i. e., whether the usage thus proved has the qualities of reasonableness, legality, etc., necessary to a custom. With this the jury has nothing to do. Upon what grounds could any American court say, as a matter of law, that a usage thus proved prevailed within the boundary lines of any particular township, county, or other subdivision of the state, in opposition to the common law prevailing on the other side of that boundary?—HAMMOND.



§ 89. (a) *Lex mercatoria*.—To this head may most properly be referred a particular system of customs used only among one set of the king's subjects, called the custom of merchants or *lex mercatoria*:<sup>10</sup> which, however different from the general rules of the common law, is yet engrafted into it, and made a part of it;<sup>b</sup>

<sup>b</sup> Winch. 24.

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<sup>10</sup> *Law-merchant*.—"The law-merchant includes many, but not all, of the usages subsisting between merchants. The term 'law-merchant' is an ambiguous one. The relationship which it bears to the common law of this country is particularly difficult to define. It is sometimes spoken of as 'ancient' and there is a tendency to attribute to it, in analogy to an immemorial local custom, the requisite of existence from time immemorial. It is sometimes said to form part of the common law. This statement, however, is somewhat misleading, for it veils the fact that the law-merchant is merely a collection of usages. It may be defined as a number of usages, each of which exist among merchants and persons engaged in mercantile transactions, not only in one particular country, but throughout the civilized world, and each of which has acquired such notoriety, not only amongst those persons, but also in the mercantile world at large, that the courts of this country will take judicial notice of it. A usage of the law-merchant has therefore two characteristics—it must, in the first place, amount to *jus gentium*, that is to say, it must be in vogue beyond the limits of this country and its notoriety must be cosmopolitan rather than national; and in the second place it must be of such a nature that it will receive judicial notice in our courts. It does not follow, however, that every mercantile usage of which the courts take judicial notice forms part of the law-merchant. It is composed of those usages of merchants and traders in the different departments of trade which have been ratified by the decisions of courts of law and adopted as settled law with a view to the interests of trade and the public convenience. The court proceeds on the well-known principle of law that, with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of any custom or usage prevailing generally in the particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon, or incorporated into, the common law, and may thus be said to form part of it (*Goodwin v. Robarts*, [1875] L. R. 10 Exch. 337). It is, therefore, wrong to speak of the law-merchant as a fixed body of law, forming part of the common law, and, as it were, coeval with it; for, as a matter of legal history, such a view is altogether incorrect."—HALSBURY, 10 *Laws of England*, 259.

For further authorities on the law-merchant, see Mitchell, *Essay on the Early History of the Law-Merchant*; Carter, *Early History of the Law-Merchant*, 17 *Law Quart. Rev.* 232; *Goodwin v. Robarts*, L. R. 10 Exch. 337; Pound, *Readings in Com. Law*, 181.

being allowed, for the benefit of trade, to be of the utmost validity in all commercial transactions: for it is a maxim of law, that "*cuiuslibet in sua arte credendum est*" (every man is to be credited in what concerns his own profession).

§ 90. (b) Rules relating to particular customs.—The rules relating to particular customs regard either the *proof* of their existence; their *legality* when proved; or their usual method of *allowance*. And first we will consider the rules of *proof*.

§ 91. (i) Proof of their existence.—<sup>[76]</sup> As to gavelkind, and borough-English, the law takes particular notice of them;<sup>c</sup> and there is no occasion to prove that such customs actually exist, but only that the lands in question are subject thereto. All other private customs must be particularly pleaded;<sup>d</sup> and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged. The trial in both cases (both to show the existence of the custom, as, "that in the manor of Dale lands shall descend only to the heirs male, and never to the heirs female"; and also to show "that the lands in question are within that manor") is by a jury of twelve men, and not by the judges; except the same particular custom has been before tried, determined, and recorded in the same court.<sup>e</sup>

The customs of London differ from all others in point of trial: for, if the existence of the custom be brought in question, it shall not be tried by a jury, but by certificate from the lord mayor and aldermen by the mouth of their recorder;<sup>f</sup> unless it be such a custom as the corporation is itself interested in, as a right of taking toll, etc., for then the law permits them not to certify on their own behalf.<sup>g</sup>

§ 92. (ii) Their legality: Requisites therefor.—When a custom is actually proved to exist, the next inquiry is into the *legality* of it; for, if it is not a good custom, it ought to be no longer used. "*Malus usus abolendus est*" (a bad custom should be abolished)

<sup>c</sup> Co. Litt. 175.

<sup>f</sup> Cro. Car. 516.

<sup>d</sup> Litt. § 265.

<sup>g</sup> Hqb. 85.

<sup>e</sup> Dr. & St. 1. 10.

is an established maxim of the law.<sup>b 11</sup> To make a particular custom good, the following are necessary requisites.

§ 93. (aa) That they be immemorial.—That it have been used so long, that the memory of man runneth not to the contrary. So that, if anyone can show the beginning of it, it is no good custom. For which reason no custom can prevail against an express act of parliament; since the statute itself is a proof of a time when such a custom did not exist.<sup>1</sup>

§ 94. (bb) That they be continued.—It must have been *continued*. Any interruption would cause a temporary ceasing: the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*; for an interruption of the *possession* only, for ten or twenty years, will not destroy the custom.<sup>1</sup> As if \*the inhabitants of a parish have a customary right of watering their cattle at a certain pool, the custom is not destroyed, though they do not use\* it for ten years; it only becomes more difficult to prove: but if the *right* be anyhow discontinued for a day, the custom is quite at an end.

§ 95. (cc) That they be peaceable.—It must have been *peaceable*, and acquiesced in; not subject to contention and dispute.\* For as customs owe their original to common consent, their being immemorially disputed, either at law or otherwise, is a proof that such consent was wanting.

\* In first edition "custom; though those."

<sup>b</sup> Litt. § 212; 4 Inst. 274.

<sup>1</sup> Co. Litt. 114.

<sup>1</sup> Co. Litt. 113.

\* Co. Litt. 114.

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<sup>11</sup> *Malus usus est abolendus*.—Blackstone's negative statement of the rule is, perhaps, preferable to the positive form. Anyhow, the true rule is that a custom, in order to be disregarded, must be so obviously repugnant to right that to enforce it as law would do more harm than would result by defeating or denying the expectations of those who relied on it as a custom. "The will of the people is the foundation of that custom, which subsequently becomes binding on them; but, if it be grounded, not upon reason, but error, it is not the will of the people, and to such a custom the established maxim of law applies, *malus usus est abolendus*—an invalid custom ought to be abolished."—BROOM, *Legal Maxims* (8th ed.), 718.

§ 96. (dd) **That they be reasonable.**—Customs must be *reasonable*;<sup>1</sup> or rather, taken negatively, they must not be unreasonable. Which is not always, as Sir Edward Coke says,<sup>m</sup> to be understood of every unlearned man's reason, but of artificial and legal reason, warranted by authority of law. Upon which account a custom may be good, though the particular reason of it cannot be assigned; for it sufficeth, if no good legal reason can be assigned against it. Thus a custom in a parish, that no man shall put his beasts into the common till the 3d of October, would be good; and yet it would be hard to show the reason why that day in particular is fixed upon, rather than the day before or after. But a custom, that no cattle shall be put in till the lord of the manor has first put in his, is unreasonable, and therefore bad: for peradventure the lord will never put in his; and then the tenants will lose all their profits.<sup>n</sup>

§ 97. (ee) **That they be certain.**—<sup>[78]</sup> Customs ought to be *certain*. A custom, that lands shall descend to the most worthy of the owner's blood, is void; for how shall this worth be determined? but a custom to descend to the next male of the blood, exclusive of females, is certain and therefore good.<sup>o</sup> A custom to pay two pence an acre in lieu of tithes, is good; but to pay sometimes two pence and sometimes three pence, as the occupier of the land pleases, is bad for its uncertainty. Yet a custom, to pay a year's improved value for a fine on a copyhold estate, is good; though the value is a thing uncertain: for the value may at any time be ascertained; and the maxim of the law is, *id certum est, quod certum reddi potest* (that is certain which can be made certain).

§ 98. (ff) **That they be compulsive.**—Customs, though established by consent, must be when established *compulsory*; and not left to the option of every man, whether he will use them or no. Therefore, a custom, that all the inhabitants shall be rated toward the maintenance of a bridge, will be good; but a custom, that every man is to contribute thereto at his own pleasure, is idle and absurd, and indeed no custom at all.

<sup>1</sup> Litt. § 212.

<sup>m</sup> 1 Inst. 62.

<sup>n</sup> Co. Cop. § 33.

<sup>o</sup> 1 Roll. Abr. 565.

§ 99. (gg) **That they be consistent.**—Lastly, customs must be *consistent* with each other: one custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity, and both established by mutual consent: which to say of contradictory customs is absurd. Therefore, if one man prescribes that by custom he has a right to have windows looking into another's garden, the other cannot claim a right by custom to stop up or obstruct those windows: for these two contradictory customs cannot both be good, nor both stand together. He ought rather to deny the existence of the former custom.<sup>p</sup>

§ 100. (iii) **Method of allowance.**—Next, as to the *allowance* of special customs. Customs, in derogation of the common law, must be construed strictly. Thus, by the custom of gavelkind, an infant of fifteen years [79] may by one species of conveyance (called a deed of feoffment) convey away his lands in fee simple, or forever. Yet this custom does not empower him to use any other conveyance, or even to lease them for seven years: for the custom must be strictly pursued.<sup>q</sup> And, moreover, all special customs must submit to the king's prerogative. Therefore, if the king purchases lands of the nature of gavelkind, where all the sons inherit equally; yet, upon the king's demise, his eldest son shall succeed to those lands alone.<sup>r</sup> And thus much for the second part of the *leges non scriptæ* (unwritten laws), or those particular customs which affect particular persons or districts only.

§ 101. (3) **Special kinds of law.**—The third branch of them are those peculiar laws, which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon law.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptæ*, or unwritten laws, seeing they are set forth by authority in their pandects, their codes, and their institutions; their councils, decrees, and decretals; and enforced by an immense number of expositions, decisions, and treatises of the learned in both branches of the law. But I do this, after the

<sup>p</sup> 9 Rep. 58.

<sup>r</sup> Co. Litt. 15.

<sup>q</sup> Co. Cop. § 33.



example of Sir Matthew Hale,<sup>s</sup> because it is most plain, that it is not on account of their being *written* laws, that either the canon law, or the civil law, have any obligation within this kingdom: neither do their force and efficacy depend upon their own intrinsic authority; which is the case of our written laws, or acts of parliament. They bind not the subjects of England, because their materials were collected from popes or emperors; were digested by Justinian, or declared to be authentic by Gregory. These considerations give them no authority here: for the legislature of England doth not, nor ever did, recognize any foreign power, as superior or equal to it in this kingdom; or as having the right to give law to any, the meanest of its subjects. But all the [80] strength that either the papal or imperial laws have obtained in this realm (or indeed in any other kingdom in Europe) is only because they have been admitted and received by immemorial usage and custom in some particular cases, and some particular courts; and then they form a branch of the *leges non scriptæ*, or customary law; or else, because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptæ*, or statute law. This is expressly declared in those remarkable words of the Statute 25 Hen. VIII, c. 21 (Peter-pence, 1534), addressed to the king's royal majesty.—“This your grace's realm, recognizing no superior under God but only your grace, hath been and is free from subjection to any man's laws, but only to such as have been devised, made, and ordained *within* this realm for the wealth of the same; or to such other as, by sufferance of your grace and your progenitors, the people of this your realm have taken at their free liberty, by their own consent, to be used among them; and have bound themselves by long use and custom to the observance of the same: not as to the observance of the laws of any foreign prince, potentate, or prelate; but as to the *customed* and ancient laws of this realm, originally established as laws of the same, by the said sufferance, consents, and custom; and none otherwise.”<sup>12</sup>

<sup>s</sup> Hist. C. L. c. 2.

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<sup>12</sup> The canon and civil law in England.—It may be doubted whether Blackstone in this long paragraph has improved upon the distinction laid down by Hale as a reason why the canon and civil law should be considered unwritten law in England. It is evident that if the distinguishing mark of the written



§ 102. (a) **Civil, or Roman, law.**—By the civil law, absolutely taken, is generally understood the civil or municipal law of the Roman empire, as comprised in the institutes, the code, and the digest of the Emperor Justinian, and the novel constitutions of himself and some of his successors. Of which, as there will frequently be occasion to cite them, by way of illustrating our own laws, it may not be amiss to give a short and general account.

§ 103. (i) **History of the Roman law.**—The Roman law (founded first upon the regal constitutions of their ancient kings, next upon the twelve tables of the *decemviri*, then upon the laws

law is an authoritative text, conclusive and final in all discussion as to what the law is, because their authoritative and original instructions are set down in writing by the lawgivers (see Hale's Hist. C. L., c. 2), that whenever this text loses its authority, so that the courts may apply it or not, as they think reasonable, or may apply one part of it and reject another, according to the circumstances, written law loses its peculiar character, and is undistinguishable from the unwritten. When the judge interprets a written rule, he cannot neglect any word or phrase of it in determining its meaning, nor can he give to any part preference over another part as having more authority or being more truly the law, except so far as the distinction may be made in the written words themselves. But neither the civil nor the canon law is so interpreted in any English court: the judge rejects large portions of them as entirely inapplicable, and those parts which are applicable are not binding on him in their terms. He may reject a word or phrase, or may give it effect in one sense and not in another, because the immemorial usage and custom which gives it its force has so ordained; in other words, he may treat these laws precisely as he does the written forms of the common law, in treatises or judicial opinions, taking from them whatever he believes truly to represent the law in force, and rejecting the remainder, though grammatically inseparable from it.

**English statutes in America.**—Another illustration of the same principle, of even more interest to American lawyers, may be found in the treatment of the early English statutes as a part of the common law of America. In England these statutes from 9 Henry III are clearly written law, binding upon the judge in the terms of their enactment, without reference to any opinion that he may entertain as to their reasonableness and policy. But in America this is quite different; it is the common law *as modified by statutes* that has been adopted here, and the statutes have no distinct authority as such, but only as they change, confirm, or abrogate the doctrines of the common law. It makes no difference in this respect whether the date of adoption is fixed at the first settlement of the country (4 Jac. 1, 1607), according to the Virginia

or statutes, enacted by the senate or people, the edicts of the prætor, and the *responsa prudentum* or opinions of learned lawyers, and lastly upon the <sup>[81]</sup> imperial decrees, or constitutions of successive emperors) had grown to so great a bulk, or as Livy expresses it<sup>t</sup> "*tam immensus aliarum super alias acervatarum legum cumulus*" (such a vast pile of laws heaped one upon the other), that they were computed to be many camels' load by an author who preceded Justinian.<sup>u</sup> This was in part remedied by the collections of three private lawyers, Gregorius, Hermogenes, and Papirius; and then by the Emperor Theodosius the younger, by whose orders a code was compiled, A. D. 438, being a methodical collection of all the imperial constitutions then in force: which Theodosian code was the only book of civil law received as authentic in the western part of Europe, till many centuries after; and to this it is probable that the Franks and Goths might frequently pay some regard in framing legal constitutions for their newly erected kingdoms. For Justinian commanded only in the eastern remains of the empire; and

<sup>t</sup> L. 3. c. 34.<sup>u</sup> Taylor's Elements of Civil Law, 17.

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rule, or at the Declaration of Independence (1776) as in New York. Of course where the legislature of a colony or a state has adopted specific English statutes as a part of their own written law, this general principle may not apply; but otherwise it is so founded in the very nature of the case that it must be regarded as the true doctrine. The statute of Merton, of Westminster, or of uses and trusts may still be read from the English statute-book for the information of an American court; but if they believe, as they frequently do, that many of its provisions are inapplicable in this country, and therefore have never been taken up into common usage, they will reject them and determine by their own judgment to what extent these statutes have become a part of the law in force with-us. There are no doubt opinions and even decisions to the contrary, giving the English statutes the force of written law here, but the doctrine as stated is not only that of the majority, but is the only one consistent with any practical use of these statutes.

We thus see why written law becomes unwritten or common law, whenever the text loses its peculiar authority as conclusive evidence of the legislative intention; so that whenever the court is at liberty to judge how far it can reasonably and justly give effect to the terms as written, it makes no difference whether these terms were originally employed by the legislature or not. They have ceased to be the source of the existence of the law, and have become merely a source from which, with others, the courts learn what the law really is. Blackstone's statement, that the civil and canon laws are unwritten because

it was under his auspices, that the present body of civil law was compiled and finished by Tribonian and other lawyers, about the year 533.

§ 104. (ii) Divisions of Justinian's *corpus juris civilis*.—This consists of, 1. The institutes; which contain the elements or first principles of the Roman law, in four books. 2. The digest, or pandects, in fifty books; containing the opinions and writings of eminent lawyers, digested in a systematical method. 3. A new code or collection of imperial constitutions in twelve books; the lapse of a whole century having rendered the former code of Theodosius imperfect. 4. The novels, or new constitutions, posterior in time to the other books, and amounting to a supplement to the code; containing new decrees of successive emperors, as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis* (the body of civil law), as published about the time of Justinian; which, however, fell soon into neglect and oblivion, till about the year 1130, when a copy of the digests was found at

not enacted by parliament, but received by immemorial usage and custom, has only this meaning. Mr. Austin indeed has given it a different one. "The division of Blackstone and Hale stands thus: Acts of the supreme legislator are *leges scriptæ*; whether as made immediately by the supreme legislator or as set down in writing by the authority of the makers, does not distinctly appear." (Nor, it may be added, can a reader guess what difference this would make if it did appear. A writing by the authority of the makers can hardly be anything but an enactment, since no legislator from the time of Moses has ever deemed it necessary to authenticate his work by an autograph. That it does not mean a delegated legislative power is clearly shown by what follows.) "But any law not created immediately by the supreme legislator is *non scriptum*, provided, that is, that its original instruction be not set down in writing." And after some very far-fetched doubts as to the supposed confusion in these distinctions, he concludes that the true distinction depends, not on a difference in the source from whence the law emanates, but on a difference in the modes in which it originates. "When the law or rule is established directly, the proper purpose of its immediate author or authors is the establishment of a law or rule. When the law or rule is introduced obliquely, the proper purpose of its immediate author or authors is the decision on a specific case or of a specific point or question; or, in other words, that written or unwritten law emanates in the way of direct or judicial legislation from a sovereign or subordinate source." (Lectures, Vol. 2, pp. 546-549, and compare pp. 528-533.) Austin also borrows from German writers a distinction between the grammatical

Amalfi,<sup>13</sup> in Italy, which accident, concurring with the policy of the Roman ecclesiastics,<sup>w</sup> suddenly gave new vogue and authority to the civil law, introduced it into several nations, and [82] occasioned that mighty inundation of voluminous comments, with which this system of law, more than any other, is now loaded.

§ 105. (b) Canon, or ecclesiastical, law—(i) Pontifical collections.—The canon law is a body of Roman ecclesiastical law, relative to such matters as that church either has, or pretends to have, the proper jurisdiction over. This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, the decretal epistles and bulls of the holy see. All which lay in the same disorder and confusion as the Roman civil law: till about the year 1151, one Gratian, an Italian monk, animated by the discovery of Justinian's pandects, reduced the ecclesiastical constitutions also into some method, in three books; which he entitled *concordia discordantium canonum* (the arrangement of the confused canons), but which are generally known by the name of *decretum*

<sup>w</sup> See § 1. p. \*18.

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and the judicial sense of these distinctions, supposing that the ancients meant by it no more than that the laws were actually written down or preserved in memory. I know of no ancient authority for this; the passage of the Pandects commonly quoted for it (Dig. 1, 1, 6), stating that the Athenians used written law, and the Spartans unwritten, is not conclusive; while the case of the responses of the Roman jurisconsults, properly understood, directly contradicts it. The *responsa* unquestionably were at one time regarded as unwritten law, and later as written law; but they were among the earliest parts of the Roman law which were collected into books, and therefore should always have been considered a written law in the merely grammatical sense of the term. There is no proof whatever that this determined the usage, but there is strong reason to believe that it was the official character given to these responses by Augustus, when he made the *prudentes* an official body, as differing from their former private position, and prescribed the form of their responses. The written text then became conclusive evidence of the sense of the responses, and, therefore, *jus scriptum*. According to Austin's own interpretation of the words, they should have remained *non scriptum*, even then, since they were written, not by the sovereign, but by a subordinate and delegated power; but the Roman jurists could hardly foresee the sense which Mr. Austin has given to these terms.—HAMMOND.

<sup>13</sup> See note 7, p. \*18, *ante*, on "Revival of Study of Roman Law."

*Gratiani* (the decree of Gratian). These reached as low as the time of Pope Alexander III. The subsequent papal decrees, to the pontificate of Gregory IX, were published in much the same method under the auspices of that pope, about the year 1230, in five books; entitled *decretalia Gregorii noni* (the decretals of Gregory the Ninth). A sixth book was added by Boniface VIII, about the year 1298, which is called *sextus decretalium* (a sixth decretal). The Clementine constitutions, or decrees of Clement V, were in like manner authenticated in 1317 by his successor, John XXII, who also published twenty constitutions of his own, called the *extravagantes Joannis* (the extravagants of John): all which in some measure answer to the novels of the civil law. To these have been since added some decrees of later popes in five books, called *extravagantes communes* (common extravagants). And all these together, Gratian's decree, Gregory's decretals, the sixth decretal, the Clementine constitutions, and the extravagants of John and his successors, form the *corpus juris canonici*, or body of the Roman canon law.

§ 106. (ii) *Legatine and provincial constitutions*.—Besides these pontifical collections, which during the times of popery were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of national canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church <sup>[83]</sup> and kingdom. The *legatine* constitutions were ecclesiastical laws, enacted in national synods, held under the Cardinals Otho and Othobon, legates from Pope Gregory IX and Pope Clement IV, in the reign of King Henry III, about the years 1220 and 1268. The *provincial* constitutions are principally the decrees of provincial synods, held under divers archbishops of Canterbury, from Stephen Langton in the reign of Henry III to Henry Chichele in the reign of Henry V, and adopted also by the province of York\* in the reign of Henry VI. At the dawn of the Reformation, in the reign of King Henry VIII, it was enacted in parliament† that a review should be had of the canon law; and till such review should be made, all canons, constitutions,

\* Burn's Eccl. Law, pref. viii.

† Statute 25 Hen. VIII, c. 19 (Submission of the Clergy to the King's Majesty, 1533); revived and confirmed by 1 Eliz. c. 1 (Act of Supremacy, 1558).



ordinances, and synodals provincial, being then already made, and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

§ 107. (iii) **Canons enacted under James I.**—As for the canons enacted by the clergy under James I, in the year 1603, and never confirmed in parliament, it has been solemnly adjudged upon the principles of law and the constitution, that where they are not merely declaratory of the ancient canon law, but are introductory of new regulations, they do not bind the laity;<sup>z</sup> whatever regard the clergy may think proper to pay them.

§ 108. (iv) **Courts in which the civil and canon laws are administered.**—There are four species of courts, in which the civil and canon laws are permitted under different restrictions to be used. 1. The courts of the archbishops and bishops and their derivative officers, usually called in our law courts Christian, *curie christianitatis*, or the ecclesiastical courts. 2. The military courts. 3. The courts of admiralty. 4. The courts of the two universities. In all, their reception in general, and the different degrees of that reception, are grounded entirely upon custom; corroborated in the latter instance by act of parlia-<sup>[84]</sup>ment, ratifying those charters which confirm the customary law of the universities. The more minute consideration of these will fall properly under that part of these Commentaries which treats of the jurisdiction of courts. It will suffice at present to remark a few particulars relative to them all, which may serve to inculcate more strongly the doctrine laid down concerning them.<sup>a</sup>

§ 109. (v) **Subordination of civil and canon law courts to (aa) Courts of common law.**—And, first, the courts of common law have the superintendency over these courts; to keep them within their jurisdictions, to determine wherein they exceed them, to restrain and prohibit such excess, and (in case of contumacy) to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

<sup>z</sup> Stra. 1057.

<sup>a</sup> Hale Hist. c. 2.



§ 110. (bb) **To acts of parliament.**—The common law has reserved to itself the exposition of all such acts of parliament, as concern either the extent of these courts or the matters depending before them. And therefore if these courts either refuse to allow these acts of parliament, or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

§ 111. (cc) **To an appeal to the king.**—An appeal lies from all these courts to the king, in the last resort; which proves that the jurisdiction exercised in them is derived from the crown of England, and not from any foreign potentate, or intrinsic authority of their own. And, from these three strong marks and ensigns of superiority, it appears beyond a doubt that the civil and canon laws, though admitted in some cases by custom in some courts, are only subordinate and *leges sub graviore lege* (laws subject to a more weighty law); and that, thus admitted, restrained, altered, new-modeled, and amended, they are by no means with us a distinct independent species of laws, but are inferior branches of the customary or unwritten laws of England, properly called the king's ecclesiastical, the king's military, the king's maritime, or the king's academical, laws.

§ 112. 2. **The written law, or statutes.**—<sup>[85]</sup> Let us next proceed to the *leges scriptæ*, the written laws of the kingdom; which are statutes, acts, or edicts, made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled.<sup>b</sup> The oldest of these now extant, and printed in our statute-books, is the famous *Magna Carta*; as confirmed in parliament 9 Henry III (1225): though doubtless there were many acts before that time, the records of which are now lost, and the determinations of them perhaps at present currently received for the maxims of the old common law.

§ 113. a. **Different kinds of statutes.**—The manner of making these statutes will be better considered hereafter, when we examine the constitution of parliaments. At present we will only take

<sup>b</sup> 8 Rep. 20.

notice of the different kinds of statutes; and some of general rules with regard to their construction.<sup>c</sup>

§ 114. (1) **Public acts**—(2) **Special or private acts**.—First, as to their several kinds. Statutes are either *general* or *special*, *public* or *private*.<sup>14</sup> A general or public act is an [86] universal rule, that regards the whole community: and of this the courts of law are bound to take notice judicially and *ex officio* (by virtue of

<sup>c</sup> The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge ["Marle-bridge," before fourth edition], of Westminster, Gloucester, Winchester. Others are denominated entirely from their subject; as the statutes of Wales and Ireland, the *articuli cleri* (the articles of the clergy), and the *prærogativa regis* (the King's prerogative). Some are distinguished by their initial words, a method of citing very ancient: being used by the Jews in denominating the books of the Pentateuch; by the Christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulls; and in short by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores* (because purchasers), and that of *circumspecte agatis* (that ye act circumspectly). But the most usual method of citing them, especially since the time of Edward the Second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to its numeral order, as, 9 Geo. II, c. 4. For all the acts of one session of parliament taken together make properly but one statute: and therefore, when two sessions have been held in one year, we usually mention stat. 1. or 2. Thus the Bill of Rights is cited, as 1 W. & M. St. 2. c. 2. signifying that it is the second chapter or act, of the second statute or the laws made in the second session of parliament, held in the first year of King William and Queen Mary.

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<sup>14</sup> **Distinction between public and private laws**.—It is frequently difficult to distinguish between a public and a private law. The definitions given by Blackstone are, that a public act is a universal rule that regards the whole community, and private acts are those that concern only a particular species, thing, or person; as, acts relating to any particular place, or to divers towns or counties, or to a college or university. Applying the above definitions to this charter, it would, no doubt, have to be regarded as a private act. But in this country the disposition has been to enlarge the limits of the class of public acts, and to treat all acts of a general character, or which in any way affect the community at large, although affecting only

office); without the statute being particularly pleaded, or formally set forth by the party who claims an advantage under it. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons, and private concerns; such as the Romans entitled *senatus-decreta* (decrees of the Senate), in contradistinction to the *senatus-consulta* (acts of the Senate), which regarded the whole community:<sup>d</sup> and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded. Thus, to show the distinction, the Statute 13 Eliz., c. 10 (Dilapidations, 1571), to prevent spiritual persons from making leases for longer terms than twenty-one years, or three lives, is a public act; it being a rule prescribed to the whole body of spiritual persons in the nation: but an act to enable the Bishop of Chester to make a lease to A B for sixty years, is an exception to this rule: it concerns only the parties and the bishop's successors; and is therefore a private act.

<sup>d</sup> Gravin, Orig. 1. § 24.

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a particular locality, if they apply to all persons, as public acts. (*Village of Winooski v. Gokey*, 49 Vt. 282, 285.)

It is not easy to define with precision the distinction between a general law and one that is special or local. In general language, a local statute may be said to be one that is operative only within a portion of a state, and a special statute is one that is applicable to particular individuals or things. Statutes are sometimes distinguished as general or local, according to whether they are intended to operate throughout the entire jurisdiction, or only within a single county or other division or place. A law which applies only to a limited part of the state, and the inhabitants of that part, is local. At common law, statutes were classified as public or general, and private or special. 1 Bl. Comm. 86. "A general or public act," says Blackstone, "is a universal rule that regards the whole community, and of this the courts of law are bound to take notice judicially and *ex officio*, without the statutes being particularly pleaded. Special or private acts are rather exceptions than rules, being those which only operate upon particular persons and private concerns." Under this classification, the words "public or general" and "private or special" are used synonymously. The classification of statutes as local is of later origin; for, under the common law, statutes restricted to particular localities were considered as private or special. But the distinction between public and private acts as defined by Blackstone is not quite the distinction recognized in this country, where the disposition has

§ 115. **b. Classes of statutes: (1) Declaratory.**—Statutes also are either *declaratory* of the common law, or *remedial* of some defects therein. Declaratory, where the old custom of the kingdom is almost fallen into disuse, or become disputable; in which case the parliament has thought proper, *in perpetuum rei testimonium* (as a lasting testimony of the thing), and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been. Thus the statute of treasons, 25 Edw. III, cap. 2 (1351), doth not make any new species of treasons; but only, for the benefit of the subject, declares and enumerates those several kinds of offense, which before were treason at the common law.

§ 116. **(2) Remedial: (a) Enlarging; (b) Restraining.**—Remedial statutes are those which are made to supply such defects, and abridge such superfluities, in the common law, as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it <sup>[87]</sup> where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes. To instance again in the case of treason. Clipping the current coin of the kingdom was an offense not sufficiently guarded against by the common law: therefore it was thought expedient by Statute 5 Eliz., c. 11 (Clipping of Coins, 1562), to make it high treason, which it was not at the common law: so that this was an *enlarging* statute. At common law also spiritual corporations might lease out their estates for

been, on the whole, to enlarge the limits of the class of public acts which in any way affect the community at large. (*Unity v. Burrage*, 103 U. S. 455, 26 L. Ed. 408; *Suth. St. Const.*, § 193.) Within this view, local acts may be public or private, and are treated as public when they concern the public generally, though restricted in their operation to a local community. The distinction is important, owing to the various restrictions in the constitutions of the several states, and the division made in some of them between public or general laws, in printing the acts of their legislatures, and to be kept in mind in the examination of the authorities. (*Maxwell v. Tillamook County*, 20 Or. 495, 26 Pac. 803, 804.)

any term of years, till prevented by the Statute 13 Eliz. before mentioned: this was therefore a *restraining* statute.

§ 117. *c. Construction of statutes.*—Secondly, the rules to be observed with regard to the construction of statutes are principally these which follow.

§ 118. (1) *Construction of remedial statutes.*—There are three points to be considered in the construction of all remedial statutes; the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy.<sup>e</sup> Let us instance again in the same restraining statute of 13 Eliz., c. 10 (*Dilapidations*, 1571). By the common law, ecclesiastical corporations might let as long leases as they thought proper: the mischief was, that they let long and unreasonable leases, to the impoverishment of their successors: the remedy applied by the statute was by making void all leases by ecclesiastical bodies for longer terms than three lives or twenty-one years. Now in the construction of this statute it is held, that leases, though for a longer term, if made by a bishop, are not void during the bishop's continuance in his see, or if made by a dean and chapter, they are not void during the continuance of the dean: for the act was made for the benefit and protection of the successor.<sup>f</sup> The mischief is therefore sufficiently suppressed by vacating them after the determination of the interest of the grantors; [88] but the leases, during their continuance, being not within the mischief, are not within the remedy.

§ 119. (2) *Statutes treating of inferior persons or things not to be extended to superior.*—A statute, which treats of things or persons of an inferior rank, cannot by any *general words* be extended to those of a superior. So a statute treating of “*deans, prebendaries, parsons, vicars, and others having spiritual promotion,*” is held not to extend to bishops, though they have spiritual

<sup>e</sup> 3 Rep. 7; Co. Litt. 11, 42.

<sup>f</sup> Co. Litt. 45; 3 Rep. 60; 10 Rep. 58.



promotion; deans being the highest persons named, and bishops being of a still higher order.<sup>ε</sup>

§ 120. (3) Construction of penal statutes.—Penal statutes must be construed strictly. Thus the statute 1 Edw. VI, c. 12 (Criminal Law, 1547), having enacted that those who are convicted of stealing *horses* should not have the benefit of clergy, the judges conceived that this did not extend to him that should steal but one *horse*, and therefore procured a new act for that purpose in the following year.<sup>η</sup> And, to come nearer our own times, by the statute 14 Geo. II, c. 6 (Cattle-stealing, 1740), stealing sheep, *or other cattle*, was made felony without benefit of clergy. But these general words, “or other cattle,” being looked upon as much too loose to create a capital offense, the act was held to extend to nothing but mere sheep. And therefore, in the next sessions, it was found necessary to make another statute, 15 Geo. II, c. 34 (Cattle-stealing, 1741), extending the former to bulls, cows, oxen, steers, bullocks, heifers, calves, and lambs by name.

§ 121. (4) Construction of statutes against frauds.—Statutes against frauds are to be liberally and beneficially expounded. This may seem a contradiction to the last rule; most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender, and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly: but when the statute acts upon the offense by setting aside the fraudulent transaction, here it is to be construed liberally. Upon this footing the statute of 13 Eliz., c. 5 (Fraudulent Conveyances, 1571), which avoids all gifts of goods, etc., made to defraud creditors *and others*, was [<sup>89</sup>] held to extend by the general words to a gift made to defraud the queen of a forfeiture.<sup>1</sup>

§ 122. (5) Construction by context.—One part of a statute must be so construed by another that the whole may (if possible) stand: *ut res magis valeat quam pereat* (that the whole subject

<sup>ε</sup> 2 Rep. 46.

<sup>η</sup> 2 & 3 Edw. VI, c. 33 (Horse-stealing, 1548); Bac. Elem. c. 12.

<sup>1</sup> 3 Rep. 82.



matter may rather operate than be annulled).<sup>15</sup> As if land be vested in the king and his heirs by act of parliament, saving the right of A; and A has at that time a lease of it for three years; here A shall hold it for his term of three years, and afterwards it shall go to the king. For this interpretation furnishes matter for every clause of the statute to work and operate upon. But

§ 123. (6) Repugnant clauses.—A saving, totally repugnant to the body of the act, is void. If, therefore, an act of parliament vests land in the king and his heirs, saving the right of all persons whatsoever: or vests the land of A in the king, saving the right of A: in either of these cases the saving is totally repugnant to the body of the statute, and (if good) would render the statute of no effect or operation; and therefore the saving is void, and the land vests absolutely in the king.<sup>k</sup>

§ 124. (7) A statute supersedes the common law.—Where the common law and a statute differ, the common law gives place to the statute; and an old statute gives place to a new one. And this upon \*the general principle laid down in the last section,\* that, "*leges posteriores priores contrarias abrogant* (later laws repeal

\* The ninth reads, "a general principle of universal law," and adds after the Latin quotation, "consonant to which it was laid down by a law of the twelve tables at Rome that *quod populus postremum jussit, id jus ratum esto*" (let that which the people have last decreed be considered as law). (This last passage is transferred from p. \*60, *ante*.)

<sup>k</sup> 1 Rep. 47.

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<sup>15</sup> After quoting from Blackstone (1 Comm. 89) and from Story (Const., § 400), Judge Denio said: "Here is the authority of two of the great commentators upon English and American law that effects and consequences are material elements in determining the sense of written instruments, and, if a particular construction involves a contradiction or an absurdity, it must be rejected. (Pages 567, 572 of 15 N. Y.) Similar judicial utterances come from every section of this country." (People v. Draper, 15 N. Y. 532.) Approved in Young v. Regents of Univ. of Kansas, 87 Kan. 239, Ann. Cas. 1913D, 701, 124 Pac. 150, in which it was held that "it is the duty of the court to interpret a statute designed to ameliorate social conditions and promote the general welfare of the people of the state in such a way that it may be upheld and not nullified, if it be possible to do so, and in such a way that the intention of the legislature may be carried out to the

prior ones in conflict therewith).” But this is to be understood, only when the latter statute is couched in negative terms, \*or by its matter\* necessarily implies a negative. As if a former act says, that a juror upon such a trial shall have twenty pounds a year; and a new statute afterwards enacts, that he shall have twenty marks: here the latter statute, though it does not express, yet necessarily implies a negative, and virtually repeals the former. For if twenty marks be made qualification sufficient, the former statute which requires twenty pounds is at an end.<sup>1</sup> But if both acts be merely affirmative, [90] and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offense be indictable at the quarter-sessions, and a latter law makes the same offense indictable at the assizes; here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either: unless the new statute subjoins express negative words, as, that the offense shall be indictable at the assizes, *and not elsewhere*.<sup>m</sup>

§ 125. (8) Effect of repeal of a repealing act.—If a statute, that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose. So when the statutes of 26 and 35 Hen. VIII (1534 and 1543), declaring the king to be the supreme head of the church, were repealed by a statute 1 & 2 Philip and Mary (1554), and this latter statute was afterwards repealed by an act of 1 Eliz. (1558), there needed not any express words of revival in Queen Elizabeth’s statute, but these acts of King Henry were impliedly and virtually revived.<sup>n 16</sup>

\* The ninth reads, “or where its matter is so clearly repugnant that it.”

<sup>1</sup> Jenk. Cent. 2. 73.

<sup>m</sup> 11 Rep. 63.

<sup>n</sup> 4 Inst. 325.

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fullest extent. A *casus omissus* should not be acknowledged if by any reasonable interpretation the statute may be read to avoid it.” (Young v. Regents of Univ. of Kansas, 87 Kan. 239, Ann. Cas. 1913D, 701, 124 Pac. 150, 157.)

<sup>16</sup> The rule that if a repealing statute is afterwards repealed the former statute revives was altered by Lord Brougham’s act of 1850 (13 & 14 Vict.,

§ 126. (9) Irrepealable legislation.—Acts of parliament derogatory from the power of subsequent parliaments bind not.<sup>17</sup> So the statute 11 Hen. VII, c. 1 (Treason, 1495), which directs, that no person for assisting a king *de facto* (in fact) shall be attainted of treason by act of parliament or otherwise, is held to be good only as to common prosecutions for high treason; but will not restrain or clog any parliamentary attainder.<sup>o</sup> Because the legislature, being in truth the sovereign power, is always of equal, always of absolute authority: it acknowledges no superior upon earth, which the prior legislature must have been, if its ordinances could bind a subsequent parliament. And upon the same principle Cicero, in his letters to Atticus, treats with a proper contempt these restraining clauses, which endeavor to tie up the hands of succeeding legislatures. “When you repeal the [91]

o 4 Inst. 43.

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c. 21). This act provided where any act repealing in whole or in part any former statute was itself repealed, such last repeal should not revive the act or provisions before repealed unless words were added for that purpose.

<sup>17</sup> Parliament cannot bind its successors.—This general principle of legislative power, recognized by Lord Bacon in a remarkable passage of the history of King Henry VII, p. 241, vol. xi, Sped. E. & H., and often since, as limiting even the “omnipotent” parliament of England, is not affected by the constitutional limitations of that power in American states. The constitution rather confirms than modifies it. Each successive legislature, deriving its authority directly from the constitution, cannot recognize limits imposed upon it by a previous body of equally limited power. (Thorpe v. Rutland etc. R. R. Co., 27 Vt. 149, 62 Am. Dec. 625.) But it is now the established doctrine of American courts that an act of the legislature, being itself within their constitutional power, may form a contract between the state and the persons for whose benefit it is passed, provided they accept that and do some act which may be regarded as a consideration for such a contract. Thus the grant of a charter to a private corporation (though not to a municipal corporation) when accepted and acted on, becomes a contract between the state and the corporation, that the franchise so granted shall not be arbitrarily revoked or diminished. This was settled in the Dartmouth College Case. (Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. Ed. 629, and followed by many others; Chenango Bridge Co. v. Binghamton Bridge Co., 3 Wall. 51, 18 L. Ed. 137.) But a grant of power or franchise to a corporation already existing must have some distinct consideration to form such a contract, beside its mere acceptance.—HAMMOND.

law itself, says he, you at the same time repeal the prohibitory clause, which guards against such repeal.”<sup>p</sup>

§ 127. (10) Impossible and unreasonable acts.—Lastly, acts of parliament that are impossible to be performed are of no validity:<sup>18</sup> and if there arise out of them collaterally any absurd consequences, manifestly contradictory to common reason, they are, with regard to those collateral consequences, void.<sup>19</sup> I lay down the rule with these restrictions; though I know it is generally laid down more largely, that acts of parliament contrary to reason are void. But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power\* that can control it: and the examples usually alleged in support of this sense of the rule do none of them prove, that, where the

\* The ninth edition adds here, “in the ordinary forms of the constitution, that is vested with authority to,” in place of “that can.”

<sup>p</sup> *Cum lex abrogatur, illud ipsum abrogatur, quo non eam abrogari oportet.* l. 3. ep. 23.

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<sup>18</sup> Quoted and criticised, 5 Ga. 194; 48 Am. Dec. 253, by Lumpkin, J.; 3 Dall. 266, 399, by Iredell, J.; 1 Cold. 347; 4 Conn. 209, 223, 10 Am. Dec. 128; 4 Conn. 479; 13 N. Y. 431. Professor Hammond has a learned note on this subject. (1 Hammond’s Black. 91.)

<sup>19</sup> We are told commonly that three classes of statutes are to be construed strictly: penal statutes; statutes in derogation of common right; and statutes in derogation of the common law. An eminent authority has objected to all of these categories and has pointed out that all classes of statutes ought to be construed with a sole view of ascertaining and giving effect to the will of the lawmaker. (Sedgwick, Construction of Const. and Stat. Law, c. viii, *fin.*) But there is more justification for some of these categories than for others. For the rule that penal statutes are to be construed strictly something may be said. When acts are to be made penal and are to be visited with loss or impairment of life, liberty, or property, it may well be argued that political liberty requires clear and exact definition of the offense. So also the rule that statutes in derogation of common right are to be construed strictly has some excuse in England, where there are no constitutional restrictions. There it is really another form of stating Blackstone’s tenth rule, that interpretations which produce collaterally absurd or mischievous consequences, are to be avoided. In the United States it means that interpretations which would make an act unconstitutional are to be avoided, or else it is equivalent to Blackstone’s tenth rule. Whenever it is applied beyond these limits, it is without excuse, and is merely an incident of the general attitude of courts toward legislation.—POUND, Common Law and Legislation, 21 Harv. Law Rev. 383, 386.

main object of a statute is unreasonable, the judges are at liberty to reject it; for that were to set the judicial power above that of the legislature, which would be subversive of all government.<sup>20</sup> But where some collateral matter arises out of the general words, and happens to be unreasonable, there the judges are in decency to conclude that this consequence was not foreseen by the parliament, and therefore they are at liberty to expound the statute by equity, and only *quoad hoc* (as to this) disregard it. Thus if an act of parliament gives a man power to try all causes, that arise within his manor of Dale; yet, if a cause should arise in which he himself is party, the act is construed not to extend to that, because it is unreasonable that any man should determine his own quarrel.<sup>a</sup> But, if we could conceive it possible for the parliament to enact, that he should try as well his own causes as those of other persons, there is no court that has power to defeat the intent of the legislature, when couched in such evident and express words, as leave no doubt whether it was the intent of the legislature or no.

§ 128. d. Courts of equity.—These are the several grounds of the laws of England: over and above which, equity is also frequently called in to <sup>[92]</sup> assist, to moderate, and to explain them. What equity is, and how impossible in its very essence to be

<sup>a</sup> 8 Rep. 118.

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<sup>20</sup> Lord Holt (1701) in *City of London v. Wood* approves the *dicta* in *Bonham's Case* and puts as an illustration that "an act of parliament may not make adultery lawful." Finally, Blackstone (1765) begins by laying down the theory of natural law emphatically. He says: "This law of nature, being coeval with mankind, and dictated by God Himself, is of course superior in obligation to any other. . . . No human laws are of any validity if contrary to this." But when he comes to apply it to legislation, he retracts. He cannot accept the *dicta* of *Bonham's Case* nor Lord Holt's approval thereof, but admits that "if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution to control it." It has been shown that this change of view was a result of the revolution of 1688. (Coxe, *Judicial Power and Unconst. Legislation*, 179.) Since that event, courts "have no authority to act as regents over parliament or to refuse to obey a statute because of its rigor. (Willes, J., in *Lee v. Bude & T. J. R. Co.*, L. R. 6 C. P. 576, 582)."—POUND, *Common Law and Legislation*, 21 *Harv. Law Rev.* 392.



reduced to stated rules, hath been shown in the preceding section. I shall therefore only add, that (besides the liberality of sentiment with which our common-law judges interpret acts of parliament, and such rules of the unwritten law as are not of a positive kind) there are also peculiar courts of equity established for the benefit of the subject, to detect latent frauds and concealments, which the process of the courts of law is not adapted to reach; to enforce the execution of such matters of trust and confidence, as are binding in conscience, though not cognizable in a court of law; to deliver from such dangers as are owing to misfortune or oversight; and to give a more specific relief, and more adapted to the circumstances of the case, than can always be obtained by the generality of the rules of the positive or common law.<sup>21</sup> This is the business of our courts of equity, which, however, are only conversant in matters of property. For the freedom of our constitution will not permit, that in criminal cases a power should be lodged in any judge, to construe the law otherwise than according to the letter. This caution, while it admirably protects the public liberty, can never bear hard upon individuals. A man cannot suffer *more* punishment than the law assigns, but he may suffer *less*. The laws cannot be strained by partiality to inflict a penalty beyond what the letter will warrant; but, in cases where the letter induces any apparent hardship, the crown has the power to pardon.<sup>22</sup>

<sup>21</sup> In the first three editions, this passage read as follows: "That there are courts of this kind established for the benefit of the subject, to correct and soften the rigor of the law, when through its generality it bears too hard in particular cases; to detect and punish latent frauds, which the law is not minute enough to reach; to enforce the execution of such matters of trust and confidence as are binding in conscience, though perhaps not strictly legal; to deliver from such dangers as are owing to misfortune or oversight; and in short to relieve in all such cases as are *bona fide* objects of relief." (The change made here by the commentator is significant. He had at first treated the chancellor's jurisdiction as identical with the equitable interpretation explained in the second section, page \*62.) He now shows that the peculiar courts of equity have a jurisdiction quite *beside* that interpretation and distinct from it: and thus anticipates in part the change made in Serjt Stephen's New Commentaries, page 84, as a substitute for this account of equity.—HAMMOND.

<sup>22</sup> **Origin and history of equity jurisdiction.**—The origin of the body of maxims and rules of procedure known as "Equity" may be stated as follows:



The ancient structure of our law (whatever might be its merits in other particulars) was singularly defective in compass, and, for a long time, too rigid in its character to satisfy the wants of a rapidly developing community. It took no account of divers subjects for which it is the duty of the law to provide; and to others it applied maxims too strict and unbending to satisfy the notions of justice in an advanced state of society. Its remedies also were in some cases inconvenient or limited. For these evils, a successive or progressive amendment of the law by statute would seem to have been the natural remedy. But that was not the course in fact adopted; the law administered between subject and subject, in the ancient courts of the realm, being allowed to remain for a long period of our history with very little alteration of a fundamental kind. But new courts were gradually established, with a collateral, and, in some sense, an usurped jurisdiction, in which cognizance was taken of those subjects which the common law of England had overlooked or insufficiently regulated. Relief was given, in some cases, from the consequences of the harsher doctrines of that law; and the defects of its judicial methods were in some respects supplied. Thus it happened that the chief of these younger tribunals, the high court of chancery, or court of the chancellor, gradually acquired a large proportion of the judicial business of the country. Into its jurisdiction fell, among other subjects, the rapidly growing matters of mortgages, trusts, and partnerships. That court became also the proper and regular tribunal to which recourse was had, when the object was either to compel a man to perform specifically a contract into which he had entered, or to cause him to abstain from the commission of some apprehended injury; the common-law courts interfering in general only so far as to award damages where the breach of contract or the wrong had been already committed. Thus, for some four centuries, there existed in the country, not without occasional friction, two perfectly independent systems of unwritten law, neither owning submission to the other, and administered by distinct tribunals, yet frequently dealing with the same persons and the same subject matter. In spite of various minor attempts of the legislature to mitigate the inconveniences of this anomaly, it remained in force until the year 1875, when, by the Judicature Acts, 1873 and 1875, the two systems came to be administered in the appropriate divisions of a single tribunal, constituted out of the superior courts of justice existing at the date of these acts, and styled the supreme court of judicature. By the former of these acts, which came into force on the 1st November, 1875, it was provided, that in all matters in which there was any conflict or variance between the rules of equity and the rules of the common law, with reference to the same matter, the rules of equity should prevail; and thus, though the distinctive features of the two systems are still clearly traceable, and survive in the popular classifications of the judicial bench and the legal profession, possibilities of conflict are now at an end.—STEPHEN, 1 Comm. (16th ed.), 45.

## OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

§ 129. **The king's dominions, outside England.**—The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only. And yet the civil laws and local customs of this territory do now obtain, in part or in all, with more or less restrictions, in these and many other adjacent countries; of which it will be proper first to take a review, before we consider the kingdom of England itself, the original and proper subject of these laws.

§ 130. **1. Wales.**—Wales had continued independent of England, unconquered and uncultivated, in the primitive pastoral state which Cæsar and Tacitus ascribe to Britain in general, for many centuries; even from the time of the hostile invasions of the Saxons, when the ancient and Christian inhabitants of the island retired to those natural entrenchments, for protection from their pagan visitants. But when these invaders themselves were converted to Christianity, and settled into regular and potent governments, this retreat of the ancient Britons grew every day narrower; they were overrun by little and little, gradually driven from one fastness to another, and by repeated losses abridged of their wild independence. Very early in our history we find their princes doing homage to the crown of England; till at length in the reign of Edward the First, who may justly be styled the conqueror of [94] Wales, the line of their ancient princes was abolished, and the king of England's eldest son became, as a matter of course, their titular prince; the territory of Wales being then entirely reannexed (by a kind of feudal resumption) to the dominion of the crown of England;<sup>a</sup> or, as the statute of \*Rhudhlan\*<sup>b</sup> expresses it, "*terra Walliæ cum incolis suis, prius regi jure feodali subiecta*

\* Previous to fourth edition, "Rutland."

<sup>a</sup> Vaugh. 400.

<sup>b</sup> 10 Edw. I. (1282).

(of which homage was the sign), *jam in proprietas dominium totaliter et cum integritate conversa est, et coronæ regni Angliæ tanquam pars corporis ejusdem annexa et unita*" (the country of Wales, together with its inhabitants, was formerly held under the king by the feudal law; it is now completely converted into a principality, and annexed to, and united with, the crown of England, as forming a part of the same kingdom).<sup>1</sup> By the statute also of Wales<sup>c</sup> very material alterations were made in divers parts of their laws, so as to reduce them nearer to the English standard, especially in the forms of their judicial proceedings: but they still retained very much of their original polity, particularly their rule of inheritance, viz., that their lands were divided equally among all the issue male, and did not descend to the eldest son alone. By other subsequent statutes their provincial immunities were still further abridged: but the finishing stroke to their independency was given by the statute 27 Hen. VIII, c. 26 (Justice in Wales, 1536), which at the same time gave the utmost advancement to their civil prosperity, by admitting them to a thorough communication of laws with the subjects of England. Thus were this brave people gradually conquered into the enjoyment of true liberty; being insensibly put upon the same footing, and made fellow-citizens with their conquerors. A generous method of triumph, which the republic of Rome practiced with great success; till she reduced all Italy to her obedience, by admitting the vanquished states to partake of the Roman privileges.

§ 131. a. Legislation under Henry VIII.—It is enacted by this statute, 27 Hen. VIII (Justice in Wales, 1536): 1. That the

<sup>c</sup> 12 Edw. I. (Statute of Wales, 1284).

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<sup>1</sup> There is a curious oversight here. The statute of Rhuddlan and the statute of Wales are the same, and the true date is that given in note c, viz., 12 Edw. I. The mistake seems to have originated in Ruffhead's edition of the statutes, which gives 10 Edw. I as the date of the statute of Rothlan (as to provisions for the exchequer), also passed in 12 Edw. I, and the title of this last led to a confusion with the statute of Rhuddlan. (See Barrington's Observations on Anc. Statutes, pp. 120–126, and Reeves' Hist. of Eng. Law, II. 95, or Finlason's edition, II, 13.) No statutes were passed in 10 Edw. I. (1282).—HAMMOND.

dominion of Wales shall be forever united to the kingdom of England. 2. That all Welshmen born shall have the same liberties as other the king's subjects. 3. That lands in Wales shall be inheritable according to the English tenures and rules of descent. 4. That the laws of England and no other, shall [95] be used in Wales: besides many other regulations of the police of this principality. And the statute 34 & 35 Hen. VIII, c. 26 (Wales (Government), 1543), confirms the same, adds further regulations, divides it into twelve shires, and, in short, reduces it into the same order in which it stands at this day; differing from the kingdom of England in only a few particulars, and those too of the nature of privileges (such as having courts within itself, independent of the process of Westminster Hall), and some other immaterial peculiarities, hardly more than are to be found in many counties of England itself.

§ 132. 2. **Scotland.**—The kingdom of Scotland, notwithstanding the union of the crowns on the accession of their King James VI, to that of England, continued an entirely separate and distinct kingdom for above a century more, though an union had been long projected: which was judged to be the more easy to be done, as both kingdoms were anciently under the same government, and still retained a very great resemblance, though far from an identity in their laws. By an act of parliament, 1 Jac. I, c. 1 (Succession to the Crown, 1603), it is declared, that these two mighty, famous, and ancient kingdoms were formerly one. And Sir Edward Coke observes,<sup>d</sup> how marvelous a conformity there was, not only in the religion and language of the two nations, but also in their ancient laws, the descent of the crown, their parliaments, their titles of nobility, their officers of state and of justice, their writs, their customs, and even the language of their laws. Upon which account he supposes the common law of each to have been originally the same; especially as their most ancient and authentic book, called *regiam majestatem*, and containing the rules of their ancient common law, is extremely similar to that of Glauvill, which

<sup>d</sup> 4 Inst. 345.

contains the principles of *ours*, as it stood in the reign of Henry II.<sup>2</sup> And the many diversities, subsisting between the two laws at present, may be well enough accounted for, from a diversity of practice in two large and uncommunicating jurisdictions, and from the acts of two distinct and independent parliaments, which have in many points altered and abrogated the old common law of both kingdoms.

§ 133. a. **The Act of Union of 1707.**—[<sup>96</sup>] However, Sir Edward Coke, and the politicians of that time, conceived great difficulties in carrying on the projected union: but these were at length overcome, and the great work was happily effected in 1707, \*6 Anne;\* when twenty-five articles of union were agreed to by the parliaments of both nations: the purport of the most considerable being as follows:—

1. That on the first of May, 1707, and forever after, the kingdoms of England and Scotland shall be united into one kingdom, by the name of Great Britain.

2. The succession to the monarchy of Great Britain shall be the same as was before settled with regard to that of England.<sup>3</sup>

3. The united kingdom shall be represented by one parliament

4. There shall be a communication of all rights and privileges between the subjects of both kingdoms, except where it is otherwise agreed.

9. When England raises 2,000,000*l.* by a land tax, Scotland shall raise 48,000*l.*

\* Previous to fifth edition, “5 Anne.” [The act of Union: 5 & 6 Anne, c. 8 (1706).]

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<sup>2</sup> Local pride has led some Scotch writers to claim that the Reg. Maj. is the original work, and Glanvill a copy. But apart from historical evidence pointing the other way, a comparison of the two texts shows that the Scotch work must be the later. Questions which G. leaves undetermined are decided in it; process and pleading are more elaborate; and there are even passages which seem to show that the writer was acquainted with the text of Bracton. Of the “diversities subsisting between the two laws” in B.’s time, a more evident cause than any he has mentioned may be found in the continued use of the Roman law, and its technical language in the northern kingdom.—HAMMOND.

<sup>3</sup> The succession to the crown of England was arranged by the Act of Settlement of 1700.



16, 17. The standards of the coin, of weights, and of measures, shall be reduced to those of England, throughout the united kingdoms.<sup>4</sup>

18. The laws relating to trade, customs, and the excise, shall be the same in Scotland as in England. But all the other laws of Scotland shall remain in force; but alterable by the parliament of Great Britain.<sup>5</sup> Yet with this caution: that laws relating to public policy are alterable at the discretion of the parliament; laws relating to private right are not to be altered but for the evident utility of the people of Scotland.

[97] 22. Sixteen peers are to be chosen to represent the peerage of Scotland in parliament, and forty-five members to sit in the house of commons.<sup>6</sup>

23. The sixteen peers of Scotland shall have all privileges of parliament: and all peers of Scotland shall be peers of Great Britain, and rank next after those of the same degree at the time of the union, and shall have all privileges of peers, except sitting in the house of lords and voting on the trial of a peer.

These are the principal of the twenty-five articles of union, which are ratified and confirmed by statute 5 Anne, c. 8 (1706), in which statute there are also two acts of parliament recited; the one of Scotland, whereby the church of Scotland, and also the four universities of that kingdom, are established forever, and all succeeding sovereigns are to take an oath inviolably to maintain the same; the other of England, 5 Anne, c. 6 (Navy, 1705), whereby the acts of uniformity of 13 Eliz. (1571) and 13 Car. II. (1661) (except as the same had been altered by parliament at the time), and all other acts then in force for the preservation of the church of England, are declared perpetual; and it is stipulated, that every subse-

<sup>4</sup> Article 17 of the Act of Union was repealed by the Weights and Measures Act, 1878.

<sup>5</sup> There is an appellate jurisdiction in the house of lords over the Scotch courts in civil cases, as to which see the Exchequer Court (Scotland) Act, 1707; the Court of Session Act, 1808; the Appellate Jurisdiction Act, 1876, s. 3. But there is no appeal from the Scottish court of justiciary (the criminal tribunal). See *MacKintosh v. The Lord Advocate*, [1876] L. R. 2 App. Cas. 41.—STEPHEN, 1 Comm. (16th ed.), 51 n.

<sup>6</sup> The number of the Scotch members of the house of commons by the Redistribution of Seats Acts, 1885, was increased to 72.



quent king and queen shall take an oath inviolably to maintain the same within England, Ireland, Wales, and the town of Berwick upon Tweed. And it is enacted, that these two acts "shall forever be observed as fundamental and essential conditions of the union."

§ 134. b. **Essentials of the Act of Union.**—Upon these articles and act of union, it is to be observed: 1. That the two kingdoms are now so inseparably united, that nothing can ever disunite them again; except the mutual consent of both or the successful resistance of either, upon apprehending an infringement of those points which, when they were separate and independent nations, it was mutually stipulated should be "fundamental and essential conditions of the union."<sup>e</sup> 2. That whatever else may be deemed "fun-<sup>[98]</sup>damental and essential conditions," the preservation of

<sup>e</sup> It may justly be doubted, whether even such an infringement (though a manifest breach of good faith, unless done upon the most pressing necessity) would of itself dissolve the union; for the bare idea of a state, without a power somewhere vested to alter every part of its laws, is the height of political absurdity. The truth seems to be, that in such an *incorporate union* (which is well distinguished by a very learned prelate from a *federate alliance*, where such an infringement would certainly rescind the compact) the two contracting states are totally annihilated, without any power of revival; and a third arises from their conjunction, in which all the rights of sovereignty, and particularly that of legislation, must of necessity reside. (See Warburton's *Alliance*, 195.) But the wanton or imprudent exertion of this right would probably raise a very alarming ferment in the minds of individuals; and therefore it is hinted above that such an attempt might *endanger* (though by no means *destroy*) the union. To illustrate this matter a little further: an act of parliament to repeal or alter the act of uniformity in England, or to establish episcopacy in Scotland, would doubtless in point of authority be sufficiently valid and binding; and, notwithstanding such an act, the union would continue unbroken. Nay, each of these measures might be safely and honorably pursued, if respectively agreeable to the sentiments of the English church, or the kirk in Scotland. But it should seem neither prudent, nor perhaps consistent with good faith, to venture upon either of those steps, by a spontaneous exertion of the inherent power of parliament, or at the instance of mere individuals. [The ninth edition adds: "So sacred indeed are the laws above mentioned (for protecting each church and the English liturgy) esteemed, that in the regency acts both of 1751 and 1765, the regents are expressly disabled from assenting to the repeal or alteration of either these or the act of settlement."]

Note <sup>e</sup> was first added in the second addition to the word "union," at end of first paragraph.

the two churches, of England and Scotland, in the same state that they were in at the time of the union, and the maintenance of the acts of uniformity which establish our common prayer, are expressly declared so to be. 3. That therefore any alteration in the constitution of either of those churches, or in the liturgy of the church of England (unless with the consent of the respective churches, collectively or representatively given) would be any infringement of these "fundamental and essential conditions," and greatly endanger the union. 4. That the municipal laws of Scotland are ordained to be still observed in that part of the island, unless altered by parliament; and, as the parliament has not yet thought proper, except in a few instances, to alter them, they still (with regard to the particular unaltered) continue in full force. Wherefore the municipal or common laws of England are, generally speaking, of no force or validity in Scotland; and of consequence, in the ensuing Commentaries, we shall have very little occasion to mention, any further than sometimes by way of illustration, the municipal laws of that part of the united kingdoms.<sup>7</sup>

§ 135. c. **The town of Berwick.**—The town of Berwick-upon-Tweed\* was originally part of the kingdom of Scotland; and, as such, was for a time reduced [99] by King Edward I into the possession of the crown of England: and, during such its subjection, it received from that prince a charter, which (after its subsequent cession by Edward Balliol, to be forever united to the crown and realm of England) was confirmed by King Edward III with some additions; particularly that it should be governed by the laws and usages which it enjoyed during the time of King Alexander, that is, before its reduction by Edward I. Its constitution was new-modeled, and put upon an English footing by a charter of King

\* This account of Berwick-upon-Tweed appeared first in the second edition. In the *first* it was much briefer, and varied in some respects.

<sup>7</sup> It is, however, to be observed, that acts of parliament, passed since the union, extend in general to Scotland, though that country be not expressly mentioned; and if it is intended to except Scotland, there must be an express proviso to that effect, or the intention of the legislature to except it must be otherwise sufficiently indicated. (*Rex v. Cowle* (1759), 2 Burr. 853).—STEPHEN, 1 Comm. (16th ed.), 53.

James I: and all its liberties, franchises, and customs, were confirmed in parliament by the statutes 22 Edw. IV, c. 8 (1482), and 2 Jac. I, c. 28 (Berwick-upon-Tweed, 1605). Though, therefore, it hath some local peculiarities, derived from the ancient laws of Scotland,<sup>f</sup> yet it is clearly part of the realm of England, being represented by burgesses in the house of commons, and bound by all acts of the British parliament, whether specially named or otherwise. And therefore it was (perhaps superfluously) declared by statute 20 Geo. II, c. 42 (Taxation, 1746), that, where England only is mentioned in any act of parliament, the same notwithstanding hath and shall be deemed to comprehend the dominion of Wales and town of Berwick-upon-Tweed. And though certain of the king's writs or processes of the courts of Westminster do not usually run into Berwick, any more than the principality of Wales, yet it hath been solemnly adjudged<sup>g</sup> that all prerogative writs (as those of *mandamus* (we command), prohibition, *habeas corpus* (that you have the body), *certiorari* (to have notice given him), etc.) may issue to Berwick as well as to every other of the dominions of the crown of England, and that indictments and other local matters arising in the town of Berwick may be tried by a jury of the county of Northumberland.

§ 136. 3. Ireland.—As to Ireland, that is still a distinct kingdom; though a dependent subordinate kingdom. It was only entitled the dominion or lordship of Ireland,<sup>h</sup> and the king's style was no other than *Dominus Hiberniæ*, Lord of Ireland, till the thirty-third year of King Henry the Eighth; when he assumed the [100] title of king, which is recognized by act of parliament 35 Hen. VIII, c. 3 (Style of the King, 1543). But, as Scotland and England are now one and the same kingdom, and yet differ in their municipal laws; so England and Ireland are, on the other hand, distinct kingdoms and yet in general agree in their laws. The inhabitants of Ireland are, for the most part, descended from the English, who planted it as a kind of colony, after the conquest

<sup>f</sup> Hale Hist. C. L. 183; 1 Sid. 382, 462; 2 Show. 365.

<sup>g</sup> Cro. Jac. 543; 2 Roll. Abr. 292; Stat. 11 Geo. I. c. 4 (Municipal Elections, 1724); 4 Burr. 834.

<sup>h</sup> Stat. Hiberniæ, 14 Hen. III. (1229).

of it by King Henry the Second; and the laws of England were then received and sworn to by the Irish nation, assembled at the council of Lismore.<sup>1</sup> And as Ireland, thus conquered, planted, and governed, still continues in a state of dependence, it must necessarily conform to, and be obliged by, such laws as the superior state thinks proper to prescribe.

§ 137. a. **Brehon law.**—At the time of this conquest the Irish were governed by what they called the Brehon law, so styled from the Irish name of judges, who were denominated Brehons.<sup>k</sup> But King John in the twelfth year of his reign (1210) went into Ireland, and carried over with him many able sages of the law; and there by his letters patent, in right of the dominion of conquest, is said to have ordained and established that Ireland should be governed by the laws of England:<sup>l</sup> which letters patent Sir Edward Coke<sup>m</sup> apprehends to have been there confirmed in parliament. But to this ordinance many of the Irish were averse to conform, and still stuck to their Brehon law: so that both Henry the Third<sup>n</sup> and Edward the First<sup>o</sup> were obliged to renew the injunction; and at length in a parliament holden at Kilkenny, 40 Edw. III (1365), under Lionel Duke of Clarence, the then lieutenant of Ireland, the Brehon law was formally abolished, it being unanimously declared to be indeed no law, but a lewd custom crept in of later times. And yet, even in the reign of Queen Elizabeth, the [101] wild natives still kept and preserved their Brehon law; which is described<sup>p</sup> to have been “a rule of right unwritten, but delivered by tradition from one to another, in which oftentimes there appeared great show

<sup>1</sup> Pryn. on 4 Inst. 249.

<sup>k</sup> 4 Inst. 358; Edm. Spenser's State of Ireland, p. 1513, edit. Hughes.

<sup>l</sup> Vaugh. 294; 2 Pryn. Rec. 85; 7 Rep. 23.

<sup>m</sup> 1 Inst. 141.

<sup>n</sup> A. R. 30; 1 Rym. Feod. 442.

<sup>o</sup> A. R. 5.—*pro eo quod leges quibus utuntur Hybernici Deo detestabiles existunt, et omni juri dissonant, adeo quod leges censi non debeant;—nobis et consilio nostro satis videtur expediens, eisdem utendas concedere leges Anglicanas*, 3 Pryn. Rec. 1218. (Inasmuch as the laws by which the Irish are governed are hateful to God and incompatible with justice, and therefore ought not to be considered as laws—it seems highly expedient to us and to our council, to give them the laws of England for their government.)

<sup>p</sup> Edm. Spenser. *Ibid.*

of equity in determining the right between party and party, but in many things repugnant quite both to God's law and man's." The latter part of this character is alone ascribed to it, by the laws before cited of Edward the First and his grandson.

§ 138. *b. Irish parliament.*—But as Ireland was a distinct dominion, and had parliaments of its own, it is to be observed, that though the immemorial customs, or common law, of England were made the rule of justice in Ireland also, yet no acts of the English parliament, since the twelfth of King John (1210), extended into that kingdom; unless it were specially named, or included under general words, such as, "within any of the king's dominions." And this is particularly expressed, and the reason given in the Year-Books: "a tax granted by the parliament of England shall not bind those of Ireland, because they are not summoned to our parliament"; and again, "Ireland hath a parliament of its own, and maketh and altereth laws; and our statutes do not bind them, because they do not send \*knights\* to our parliament; but their persons are the king's subjects, like as the inhabitants of Calais, Gascoigny and Guienne, while they continued under the king's subjection." The general run of laws enacted by the superior state are supposed to be calculated for its own internal government, and do not extend to its distant dependent countries; which, bearing no part in the legislature, are not therefore in its ordinary and daily contemplation. But, when the sovereign legislative power sees it necessary to extend its care to any of its subordinate dominions, and mentions them expressly by name or includes them under general words, there can be no doubt but then they are bound by its laws.\*

§ 139. *c. Power of the Irish parliament: Poynings' laws.*—  
[102] †The original method of passing statutes in Ireland was

\* In first edition "representatives."

† This page is first found in the second edition, and differs considerably from the treatment of the same matter in the first edition (p. 100), which gives a brief account of Poynings' law and the process of legislature under it, from Coke, 4 Inst. 353.

‡ 20 Hen. VI. 8 (1442); 2 Rich. III. 12 (1484).

• Year-Book 1 Hen. VII. 3 (1485); 7 Rep. 22; Calvin's Case.



nearly the same as in England, the chief governor holding parliaments at his pleasure, which enacted such laws as they thought proper.<sup>a</sup> But an ill use being made of this liberty, particularly by Lord Gormanstown, deputy lieutenant in the reign of Edward IV,<sup>t</sup> a set of statutes were there enacted in the 10 Hen. VII (1494) (Sir Edward Poynings being then lord deputy, whence they are called Poynings' laws), one of which,<sup>u</sup> in order to restrain the power as well of the deputy as the Irish parliament, provides, 1. That, before any parliament be summoned or holden, the chief governor and council of Ireland shall certify to the king under the great seal of Ireland the considerations and causes thereof, and the articles of the acts proposed to be passed therein. 2. That after the king, in his council of England, shall have considered, approved, or altered the said acts or any of them, and certified them back under the great seal of England, and shall have given license to summon and hold a parliament, then the same shall be summoned and held; and therein the said acts so certified, and no other, shall be proposed, received, or rejected.<sup>w</sup> But as this precluded any law from being proposed, but such as were preconceived before the parliament was in being, which occasioned many inconveniences and made frequent dissolutions necessary, it was provided by the statute of Philip and Mary before cited, that any new propositions might be certified to England in the usual forms, even after the summons and during the session of parliament. By this means, however, there was nothing left to the parliament in Ireland, but a bare negative or power of rejecting, not of proposing or altering, any law. But the usage now is, that bills are often framed in either house, under the denomination "of heads for a bill or bills"; and in that shape they are offered to the consideration of the lord lieutenant and privy council who, upon such parliamentary intimation, or otherwise upon the application of private persons, receive and transmit such [103] heads, or reject them without any transmission to England. And, with regard to Poynings' law in particular, it cannot be repealed or suspended, unless the bill for that

<sup>a</sup> Irish Stat. 11 Eliz. st. 3, c. 8 (1569).

<sup>t</sup> *Ibid.* 10 Hen. VII. c. 23 (Irish Parliament, 1494).

<sup>u</sup> Cap. 4. expounded by 3 & 4 Ph. & M. c. 4 (Graces, 1556).

<sup>w</sup> 4 Inst. 353.



purpose, before it be certified to England, be approved by both the houses.<sup>x</sup>

But the Irish nation, being excluded from the benefit of the English statutes, were deprived of many good and profitable laws, made for the improvement of the common law: and the measure of justice in both kingdoms becoming thereby no longer uniform, therefore it was enacted by another of Poynings' laws,<sup>y</sup> that all acts of parliament, before made in England, should be of force within the realm of Ireland.<sup>z</sup> But, by the same rule, that no laws made in England, between King John's time and Poynings' law, were then binding in Ireland, it follows that no acts of the English parliament made since the 10 Hen. VII (1494) do now bind the people of Ireland, unless specially named or included under general words.<sup>a</sup> And, on the other hand, it is equally clear, that where Ireland is particularly named, or is included under general words, they are bound by such acts of parliament. For this follows from the very nature and constitution of a dependent state: dependence being very little else, but an obligation to conform to the will or law of that superior person or state, upon which the inferior depends. The original and true ground of this superiority, in the present case, is what we usually call, though somewhat improperly, the right of conquest: a right allowed by the law of nations, if not by that of nature; but which in reason and civil policy can mean nothing more, than that, in order to put an end to hostilities, a compact is either expressly or tacitly made between the conqueror and the conquered, that if they will acknowledge the victor for their master, he will treat them for the future as subjects, and not as enemies.<sup>b</sup>

§ 140. d. Dependence of Ireland.—<sup>[104]</sup> But this state of dependence being almost forgotten, and ready to be disputed by the Irish nation, it became necessary some years ago to declare how that matter really stood: and therefore by statute 6 Geo. I, c. 5 (Ireland, 1719), it is declared, that the kingdom of Ireland ought to be subordinate to, and dependent upon, the imperial crown of

<sup>x</sup> Irish Stat. 11 Eliz. st. 3. c. 38 (1569).

<sup>y</sup> Cap. 22.

<sup>z</sup> 4 Inst. 351.

<sup>a</sup> 12 Rep. 112.

<sup>b</sup> Puff. L. of N. viii. 6. 24.

Great Britain, as being inseparably united thereto; and that the king's majesty, with the consent of the lords and commons of Great Britain in parliament, hath power to make laws to bind the people of Ireland.<sup>8</sup>

Thus we see how extensively the laws of Ireland communicate with those of England: and indeed such communication is highly necessary, as the ultimate resort from the courts of justice in Ireland is, as in Wales, to those in England; a writ of error (in the nature of an appeal) lying from the king's bench in Ireland to the king's bench in England,<sup>c</sup> as the appeal from the chancery in

<sup>c</sup> This was law in the time of Henry VIII; as appears by the ancient book, entitled, *Diversity of Courts, c. bank le roy*.

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**8 Union of Ireland and question of home rule.**—"In 1782 the act of 1719 was repealed, and in 1783 the English parliament passed a statute declaring that the right of the people of Ireland to be bound only by laws enacted by the king and the Irish parliament is established, and shall at no time hereafter be questioned or questionable. No appeals were to be brought from the Irish to any English courts. Poynings' law also was repealed by the Irish parliament. For eighteen years Ireland was no more subject to England than was England to Ireland. . . . The union took effect on 1 Jan. 1801. There was no longer a kingdom of Great Britain and a kingdom of Ireland; there was a United Kingdom of Great Britain and Ireland. So again there was a parliament for the United Kingdom, in which the Irish peers were represented by twenty-eight of their number chosen by them for life, and by four bishops sitting according to a scheme of rotation, and the Irish commons by a hundred members. Every statute of this parliament applies to the whole of the United Kingdom unless some part of it is specially excepted. As on the occasion of the union with Scotland, articles were agreed on by the two parliaments; but these articles possess no particularly essential or irrepealable nature. This we may see from the fate of what was probably regarded as the most important of them—the churches of England and Ireland were united in one church, 'The United Church of England and Ireland,' and the continuance of this United Church was declared to be an essential and fundamental part of the union. In 1869 the union of the two churches was dissolved, and the Irish church was declared to be no longer an established church."—MAITLAND, *Const. Hist. England*, 335.

The question of home rule in Ireland has been agitating Great Britain from the last quarter of the nineteenth century. In 1886 Gladstone introduced the first home rule bill, which was rejected by the house of commons. In 1893 Gladstone presented the second bill, which was passed by the commons and rejected by the house of lords. The agitation was revived in the first decade

Ireland lies immediately to the house of lords here: it being expressly declared, by the same statute 6 Geo. I, c. 5 (1719), that the peers of Ireland have no jurisdiction to affirm or reverse any judgments or decrees whatsoever. The propriety, and even necessity, in all inferior dominions, of this constitution, "that though justice be in general administered by courts of their own, yet that the appeal in the last resort ought to be to the courts of the superior state," is founded upon these two reasons. 1. Because otherwise the law, appointed or permitted to such inferior dominion, might be insensibly changed within itself, without the assent of the superior. 2. Because otherwise judgments might be given to the disadvantage or diminution of the superiority; or to make the dependence to be only of the person of the king, and not of the crown of England.<sup>d</sup>

<sup>d</sup> Vaugh. 402.

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of the twentieth century. A third bill was introduced in parliament. The danger of opposition by the house of lords was obviated by the passage of the Parliament Act of 1911. (See note 20, p. \*170, *post*.) That act provides that, if a measure shall in its original form have passed the house of commons three times in three successive sessions, it shall automatically go to the monarch for royal assent, the house of lords notwithstanding. On May 25, 1914, the third home rule bill had passed its final stage in the house of commons according to the Parliament Act of 1911, and was thus fully matured.

This Home Rule Act of 1914 provides that there shall be an Irish parliament, which shall be composed of a senate and a house of commons. The senate shall consist of forty members, at first appointed, but their successors elected, and the house of commons shall consist of one hundred and sixty-four elected members. The Irish parliament is to be subordinate to the British house of commons, and is to have local powers only. Its acts may be vetoed by the crown. No act can be passed favoring or penalizing any religion. The Irish representation in the British parliament is to be reduced.

A most serious opposition to home rule arose in Protestant Ireland, particularly in Ulster. Civil war seemed imminent. Various projects for a compromise were discussed. But at the moment when the situation had become most alarming, at the end of July and first of August, 1914, the great European war burst forth. In this crisis, a truce was declared on the home rule question. It was decided on September 15th that the operation of the Home Rule Act should be suspended until after the end of the European war, the act receiving the royal assent on September 19th.

§ 141. 4. **Adjacent islands subject to the crown.**—With regard to the other adjacent islands which are subject to the crown of Great Britain, some of them (as the Isle of [105] Wight, of Portland, of Thanet, etc.) are comprised within some neighboring county, and are therefore to be looked upon as annexed to the mother island, and part of the kingdom of England. But there are others, which require a more particular consideration.

§ 142. a. **Isle of Man.**—And, first, the Isle of Man is a distinct territory from England, and is not governed by our laws:<sup>9</sup> neither doth any act of parliament extend to it, unless it be particularly named therein; and then an act of parliament is binding there.<sup>e</sup> It was formerly a subordinate feudatory kingdom, subject to the kings of Norway; then to King John and Henry III of England; afterwards to the kings of Scotland; and then again to the crown of England: and at length we find King Henry IV claiming the island by right of conquest, and disposing of it to the Earl of Northumberland; upon whose attainder it was granted (by the name of the lordship of Man) to Sir John de Stanley by letters patent 7 Hen. IV (1405).<sup>f</sup> In his lineal descendants it continued for eight generations, till the death of Ferdinando, Earl of Derby, A. D. 1594: when a controversy arose concerning the inheritance thereof, between his daughters and William, his surviving brother: upon which, and a doubt that was started concerning the validity of the original patent,<sup>g</sup> the island was seized into the queen's hands, and afterwards various grants were made of it by King James the First; all which being expired or surrendered, it was granted afresh in 7 Jac. I (1609) to William, Earl of Derby, and the heirs male of his body, with remainder to his heirs general; which grant was the next year confirmed by act of parliament, with a restraint of the power of alienation by the said earl and his issue male. On

<sup>e</sup> 4 Inst. 284; 2 And. 116.

<sup>g</sup> Camden, Eliz. A. D. 1594.

<sup>f</sup> Selden, Tit. Hon. 1. 3.

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<sup>9</sup> The Isle of Man is governed in general not by the laws of England but by acts of its own local legislature, called the Court of Tynwald, which consists of two houses, governor and council, and the elected House of Keys. It has a separate system of courts of justice, from which, however, there lies an ultimate appeal to the Judicial Committee of the Privy Council.

the death of James, Earl of Derby, A. D. 1735, the male line of Earl William failing, the Duke of Atholl succeeded to the island as heir general by a female branch. In the meantime, though the title of king had long been disused, the earls of Derby, as lords of Man, had maintained a sort of royal authority therein; by assenting or <sup>[106]</sup> dissenting to laws, and exercising an appellate jurisdiction. Yet, though no English writ or process from the courts of Westminster was of any authority in Man, an appeal lay from a decree of the lord of the island to the king of Great Britain in council.<sup>h</sup> But the distinct jurisdiction of this little subordinate royalty being found inconvenient for the purposes of public justice, and for the revenue (it affording a commodious asylum for debtors, outlaws, and smugglers), authority was given to the treasury by statute 12 Geo. I, c. 28 (Revenue, 1725), to purchase the interest of the then proprietors for the use of the crown: which purchase was at length completed in the year 1765, and confirmed by statutes 5 Geo. III, c. 26 and 39 (Isle of Man, 1765), whereby the whole island and all its dependencies, so granted as aforesaid (except the landed property of the Atholl family, their manorial rights and emoluments, and the patronage of the bishopric<sup>i</sup> and other ecclesiastical benefices), are unalienably vested in the crown, and subjected to the regulations of the British excise and customs.

§ 143. **b. Jersey, Guernsey, Sark, and Alderney.**—The islands of Jersey, Guernsey, Sark, Alderney, and their appendages were parcel of the duchy of Normandy, and were united to the crown of England by the first princes of the Norman line. They are governed by their own laws, which are for the most part the ducal customs of Normandy, being collected in an ancient book of very great authority, entitled, *Le grand coustumier*. The king's writ, or process from the courts of Westminster, is there of no force; but his commission is. They are not bound by common acts of our parliaments, unless particularly named.<sup>k</sup> All causes are originally

<sup>h</sup> 1 P. Wms. 329.

<sup>i</sup> The bishopric of Man, or Sodor, or Sodor and Man was formerly within the province of Canterbury, but annexed to that of York by statute 33 Hen. VIII. c. 31 (1542).

<sup>k</sup> 4 Inst. 286.



determined by their own officers, the bailiffs and jurats of the islands; but an appeal lies from them to the king in council, in the last resort.<sup>10</sup>

§ 144. *c. English colonies in America.*—Besides these adjacent islands, our more distant plantations in America, and elsewhere, are also in some respect subject to the English laws. Plantations or colonies in distant [<sup>107</sup>] countries are either such where the lands are claimed by right of occupancy only, by finding them desert and uncultivated, and peopling them from the mother country; or where, when already cultivated, they have been either gained by conquest or ceded to us by treaties. And both these rights are founded upon the law of nature, or at least upon that of nations. But there is a difference between these two species of colonies, with respect to the laws by which they are bound. For it hath been held,<sup>1</sup> that if an uninhabited country be discovered and planted by English subjects, all the English laws then in being, which are the birthright of every subject,<sup>m</sup> are immediately there in force. But this must be understood with very many and very great restrictions. Such colonists carry with them only so much of the English law as is applicable to their own situation and the condition of an infant colony; such, for instance, as the general rules of inheritance, and of protection from personal injuries. The artificial refinements and distinctions incident to the property of a great and commercial people, the laws of police and revenue (such especially as are enforced by penalties), the mode of maintenance for the established clergy, the jurisdiction of spiritual courts, and a multitude of other provisions, are neither necessary nor convenient for them, and therefore are not in force. What shall be admitted and what rejected, at what times, and under what restrictions, must, in case of dispute, be decided in the first instance by their own provincial judicature, subject to the revision and

<sup>1</sup> Salk. 411. 666.

<sup>m</sup> 2 P. Wms. 75.

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<sup>10</sup> The Isle of Man and the Channel Islands, though not included in the United Kingdom, are yet, by the provisions of the Interpretation Act, 1889, comprised in the expression "the British Islands," when it occurs in an act of parliament.—STEPHEN, 1 Comm. (16th ed.), 60.



control of the king in council: the whole of their constitution being also liable to be new-modeled and reformed by the general superintending power of the legislature in the mother country. But in conquered or ceded countries, that have already laws of their own, the king may indeed alter and change those laws; but, till he does actually change them, the ancient laws of the country remain, unless such as are against the law of God, as in the case of an infidel country.<sup>10</sup> Our American plantations are principally of this latter [108] sort, being obtained in the last century either by right of conquest and driving out the natives (with what natural justice I shall not at present inquire) or by treaties.<sup>11</sup> And therefore the

<sup>10</sup> 7 Rep. 17; Calvin's Case. Show. Parl. C. 31.

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<sup>11</sup> Rights of European governments on American Continent.—The rights acquired by European governments on the American Continent are correctly stated in the following quotation from C. J. Marshall in the case of *Johnson v. McIntosh*, 8 Wheat. 543, 572, 5 L. Ed. 681, 688:

"On the discovery of this immense Continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim an ascendancy. The potentates of the old world found no difficulty in convincing themselves, that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity, in exchange for unlimited independence. But as they were all in pursuit of nearly the same object, it was necessary, in order to avoid conflicting settlements, and consequent war with each other, to establish a principle, which all should acknowledge as the law by which the right of acquisition, which they all asserted, should be regulated, as between themselves. This principle was, that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession. The exclusion of all other Europeans necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. It was a right with which no Europeans could interfere. It was a right which all asserted for themselves, and to the assertion of which, by others, all assented. Those relations which were to exist between the discoverer and the natives, were to be regulated by themselves. The rights thus acquired being exclusive, no other power could interpose between them.

"In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to

common law of England as such has no allowance or authority there; they being no part of the mother country, but distinct (though dependent) dominions. They are subject, however, to the control of the parliament; though (like Ireland, Man, and the rest) not bound by any acts of parliament, unless particularly named.<sup>12</sup>

§ 145. (1) **Forms of government: (a) Provincial.**—With respect to their interior polity, our colonies are properly of three sorts. 1. Provincial establishments, the constitutions of which depend on the respective commissions issued by the crown to the governors, and the instructions which usually accompany those commissions; under the authority of which, provincial assemblies are constituted, with the power of making local ordinances, not repugnant to the laws of England.

a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil, at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all, to convey a title to the grantees, subject only to the Indian right of occupancy."

<sup>12</sup> **Authority of the common law in America.**—From a learned note by Professor Hammond on the "Authority of the Common Law in America" (1 Hammond's Black, 275), the following passages are here quoted:

"The colonists brought with them the common law of England, as it had existed at the time of their colonization, and as it had down to that time been modified by parliament. It was their birthright, in so far as that law was applicable to their circumstances here, and so far was it presumed to be in force here; and for the same reason were those recent English statutes presumed to be in force. (Per *Brayton, J., Potter v. Thornton*, 7 R. I. 252, 261, 1862.) This case contains a good account of the reception of English statutes in the colonies. In 1700 an act was passed in Rhode Island that the laws of England should be put in force 'where no colony statute applied.' The statutes prior to colonization were held to be in force till 1749, when the supreme court decided that no English statutes were in force. Hereupon in 1756, the legislature adopted a large number of them,

§ 146. (b) **Proprietary governments.**—2. Proprietary governments, granted out by the crown to individuals, in the nature of feudatory principalities, with all the inferior regalities, and subordinate powers of legislation, which formerly belonged to the owners of counties palatine: yet still with these express conditions, that the ends for which the grant was made be substantially pursued, and that nothing be attempted which may derogate from the sovereignty of the mother country.

including many passed after the colonization. (*Potter v. Thornton*, 7 R. I. 260.)

“There is no doubt that the common law is the basis of the law of those states which were originally colonies of England, or carved out of such colonies. It was imported by the colonists and established so far as it was applicable to their institutions and circumstances, and was claimed by the Congress of the United States in 1774 as a branch of those “indubitable rights and liberties to which the respective colonies” were entitled. In all the states thus having a common origin, formed from colonies which constituted a part of the same empire, and which recognized the common law as the source of their jurisprudence, it must be presumed that such common law exists, and it rests upon parties who assert a different rule to show that matter by proof. A similar presumption must prevail as to the existence of the common law in those states which have been established in territory acquired since the Revolution, when such territory was not at the time of its acquisition occupied by an organized and civilized community: where in fact the population of the new state upon the establishment of government was formed by emigration from the original states. As in British colonies, established in uncultivated regions by emigration from the parent country, the subjects are considered as carrying with them the common law, so far as it is applicable to their new situation; so when American citizens migrate into territory which is not occupied by civilized man, and commence the formation of a new government, they are equally considered as carrying with them so much of the same common law, in its modified and improved condition under the influence of modern civilization and republican principles, as is suited to their new condition and wants. But no such presumption can apply to states in which a government already existed at the time of their accession to this country, as Florida, Louisiana, and Texas.” (*Field, C. J., in Norris v. Harris*, 15 Cal. 252.)”

The reader is referred to the two papers in *Select Essays in Anglo-American Legal History*, vol. I, one on “The English Common Law in the Early American Colonies,” by Paul Samuel Reinsch (pp. 367–415), and the other on “The Theory of the Extension of English Statutes to the Plantations” by St. George Leakin Sioussat (pp. 416–430).

§ 147. (c) **Charter governments.**—3. Charter governments, in the nature of civil corporations, with the power of making by-laws for their own interior regulation, not contrary to the laws of England; and with such rights and authorities as are specially given them in their several charters of incorporation.<sup>13</sup> The form of government in most of them is borrowed from that of England. They have a governor named by the king (or in some proprietary colonies by the proprietor), who is his representative or deputy. They have courts of justice of their own, from whose decisions an appeal lies to the king in council here in England.<sup>14</sup> Their general assemblies which are their house of commons, together with their council of state being their upper house, with the concurrence of the king or his representative, the [109] governor, make laws suited to their own emergencies.

<sup>13</sup> Of the thirteen English colonies in America, New Hampshire, New York, New Jersey, Virginia, North Carolina, South Carolina, and Georgia were provincial establishments at the time of the Revolution; Maryland, Pennsylvania, and Delaware were proprietary governments; and Massachusetts, Rhode Island, and Connecticut were charter governments.

<sup>14</sup> **Appeals to the king in council.**—In Chalmers' *Opinions*, a well-known work of great authority upon points of colonial and foreign law (p. 687 of 1st Am. ed., Burlington, 1858), is a severe remark on this passage of Blackstone, who is quoted as saying that "an appeal lies from the colonies to the king *and* council." Mr. Chalmers then adds: "The commentator seems to have borrowed this form of words from Sir Matthew Hale's *History of the Common Law*; but great names and high authority cannot justify such inaccuracy of language and of law. The appeal is to the king *in* his council." The reader will see by reference to the text above that Blackstone did not commit the inaccuracy he is charged with. Every one of the editions collated for this text, from the first to the ninth, reads "to the king *in* council." The mistake crept into the work long after his death. Chalmers cites the twelfth edition for it. The thirteenth has the same reading, at least if we may judge from the Dublin reprint, dated 1796, while the second American edition of 1799 reads correctly "to the king in council here in England." But singularly enough, the error which Chalmers criticises is found in every later American edition that I have examined. (In Tucker's edition; in the New York editions of 1822, 1827; in Wendell's edition, N. Y. 1852; Judge Sharswood's Phila. 1866; and in the four of Judge Cooley, Chicago, 1870, 1872, 1883, 1899.) [It is corrected in Lewis' edition, Phila., 1902.] It is now a matter of merely historical importance, but justice to Blackstone demands that he should not be made responsible for "such inaccuracy" as he never committed.—HAMMOND.

§ 148. (d) Colonies and parliament.—But it is particularly declared by statute 7 & 8 Wm. III, c. 22 (Regulating Abuses in the Plantation Trade, 1696), that all laws, by-laws, usages, and customs, which shall be in practice in any of the plantations, repugnant to any law, made or to be made in this kingdom relative to the said plantations, shall be utterly void and of none effect. And, because several of the colonies had claimed the sole and exclusive right of imposing taxes upon themselves, the statute 6 Geo. III, c. 12 (America, 1765), expressly declares, that all his majesty's colonies and plantations in America have been, are, and of right ought to be, subordinate to and dependent upon the imperial crown and parliament of Great Britain; who have full power and authority to make laws and statutes of sufficient validity to bind the colonies and people of America, subjects of the crown of Great Britain, in all cases whatsoever.\* And, this authority has been since very forcibly exemplified and carried into act, by the statute 7 Geo. III, c. 59 (Rebellion in America, 1766), for suspending the legislation of New York; and by several subsequent statutes.<sup>15</sup>

\* Added in second edition. In the fourth, fifth, and sixth, it was followed by this passage: "And the province of New York having refused to comply with the directions of an act of parliament for supplying the king's troops with necessaries, the subordinate legislative authority of the council and assembly of the province was suspended by statute 7 Geo. III, c. 59 (1766), till the directions of the act were complied with." In the seventh and eighth, this was omitted, and the concluding period, "And . . . statutes" substituted for it, as it now stands. The seventh had a more specific reference to the acts for suspending the harbor of Boston, etc. (14 Geo. III, c. 19, 39, 45, 54, 83, 88, passed in 1774, but omitted in the eighth edition 1778). In the very year in which this edition appeared, when, in the midst of the Revolutionary War efforts at conciliation were making, it was declared by 18 Geo. III, c. 12 (Taxation of Colonies, 1778), that no power of taxation as regarded America would for the future be exercised for the benefit of the mother country. And the course of legislation on this subject terminated with 22 Geo. III, c. 46 (Peace with America, 1782), empowering the king to conclude a truce or peace with these colonies, in pursuance of which the treaty of Paris, signed September 3, 1783, recognized the United States of America as free, sovereign, and independent.

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15 Relation of American colonies to parliament.—In regard to the authority of parliament to enact laws which should be binding upon them, there was quite as much obscurity and still more jealousy spreading over the



These are the several parts of the dominions of the crown of Great Britain, in which the municipal laws of England are not of force or authority, merely *as the municipal laws of England*. Most of them have probably copied the spirit of their own law from this original; but then it receives its obligation, and authoritative force, from being the law of the country.

§ 149. **Foreign possessions of the crown.**—As to any foreign dominions which may belong to the person of the king by hereditary descent, by purchase, or other acquisition, as the territory of

whole subject. The government of Great Britain always maintained the doctrine that the parliament had authority to bind the colonies in all cases whatsoever. No acts of parliament, however, were understood to bind the colonies, unless expressly named therein. But in America, at different times and in different colonies, different opinions were entertained on the subject. In fact, it seemed to be the policy of the colonies as much as possible to withdraw themselves from any acknowledgment of such authority, except so far as their necessities, from time to time, compelled them to acquiesce in the parliamentary measures expressly extending to them. We have already seen that they resisted the imposition of taxes upon them without the consent of their local legislatures, from a very early period.

But it was by no means an uncommon opinion in some of the colonies, especially in the proprietary and charter governments, that no act of parliament whatsoever could bind them without their own consent. An extreme reluctance was shown by Massachusetts to any parliamentary interference as early as 1640; and the famous Navigation Acts of 1651 and 1660 were perpetually evaded, even when their authority was no longer denied, throughout the whole of New England. Massachusetts, in 1679, in an address to the crown, declared that she “apprehended them to be an invasion of the rights, liberties, and properties of the subjects of his majesty in the colony, they not being represented in parliament; and, according to the usual sayings of the learned in the law, the laws of England were bounded within the four seas, and did not reach America.” However, Massachusetts, as well as the other New England colonies, finally acquiesced in the authority of parliament to regulate trade and commerce, but denied it in regard to taxation and internal regulation of the colonies. As late as 1757 the general court of Massachusetts admitted the constitutional authority of parliament in the following words: “The authority of all acts of parliament, which concern the colonies and extend to them, is ever acknowledged in all the courts of law, and made the rule of all judicial proceedings in the province. There is not a member of the general court, and we know no inhabitant within the bounds of the government, that ever questioned this authority.” And in another address in 1761, they declared that “every act



Hanover, and his majesty's other property in Germany; as these do not in any wise appertain to the crown of these kingdoms, they are entirely unconnected with the laws of England, and do not communicate with this nation in any respect whatsoever. The English legislature had wisely remarked the inconveniences that had formerly resulted from dominions on the continent of Europe; from the Norman territory which William the Con-<sup>[110]</sup>queror brought with him, and held in conjunction with the English throne; and from Anjou, and its appendages, which fell to Henry the Second by hereditary descent. They had seen the nation engaged for near four hundred years together in ruinous wars for defense of these foreign dominions; till, happily for this country, they

we make, repugnant to an act of parliament extending to the plantations, is *ipso facto* null and void." And at a later period, in 1768, in a circular address to the other colonies, they admitted "that his majesty's high court of parliament is the supreme legislative power over the whole empire"; contending, however, that as British subjects they could not be taxed without their own consent.

"In the middle and southern provinces" (we are informed by a most respectable historian) [Marshall's Colonies, c. 13, p. 354], "no question respecting the supremacy of parliament in matters of general legislation existed. The authority of such acts of internal regulation as were made for America, as well as those for the regulation of commerce, even by the imposition of duties, provided these duties were imposed for the purpose of regulation, had been at all times admitted. But these colonies, however they might acknowledge the supremacy of parliament in other respects, denied the right of that body to tax them internally." If there were any exceptions to the general accuracy of this statement, they seem to have been too few and fugitive to impair the general result. In the charter of Pennsylvania, an express reservation was made of the power of taxation by an act of parliament, though this was argued not to be a sufficient foundation for the exercise of it.—STORY, 1 Comm. on Const. (4th ed.), 131.

By 22 Geo. III, c. 46 (1782), his majesty was empowered to conclude a truce or peace with the colonies or plantations in America; and, by his letters patent, to suspend or repeal any acts of parliament which related to those colonies. And by the first article of the definitive treaty of peace and friendship between his Britannic majesty and the United States of America, signed at Paris, the 3d day of September, 1783, his Britannic majesty acknowledges the United States of America to be free, sovereign, and independent states. And 23 Geo. III, c. 39 (1783), gives his majesty certain powers for the better carrying on trade and commerce between England and the United States.—CHRISTIAN.

were lost under the reign of Henry the Sixth. They observed that, from that time, the maritime interests of England were better understood and more closely pursued: that, in consequence of this attention, the nation, as soon as she had rested from her civil wars, began at this period to flourish all at once; and became much more considerable in Europe than when her princes were possessed of a larger territory and her councils distracted by foreign interests. This experience and these considerations gave birth to a conditional clause in the act<sup>o</sup> of settlement, which vested the crown in his present majesty's illustrious house, "that in case the crown and imperial dignity of this realm shall hereafter come to any person not being a native of this kingdom of England, this nation shall not be obliged to engage in any war for the defense of any dominions or territories which do not belong to the crown of England, without consent of parliament."

§ 150. **The high sea.**—We come now to consider the kingdom of England in particular, the direct and immediate subject of those laws concerning which we are to treat in the ensuing Commentaries. And this comprehends not only Wales and Berwick, of which enough has been already said, but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty have jurisdiction, as will be shown hereafter; but they are not subject to the common law.<sup>p</sup><sup>16</sup> This main sea

<sup>o</sup> Stat. 12 & 13 Will. III, c. 3 (Privilege of Parliament, 1700). Act of Settlement is really c. 2, c. 3 being as above.

<sup>p</sup> Co. Litt. 260.

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<sup>16</sup> **Jurisdiction over the high seas.**—Both the public and private vessels of every nation, on the high seas, and out of the territorial limits of any other state, are subject to the jurisdiction of the state to which they belong. Vattel says that the domain of a nation extends to all its just possessions; and by its possessions we are not to understand its territory only, but all the rights (*droits*) it enjoys. And he also considers the vessels of a nation on the high seas as portions of its territory. Grotius holds that sovereignty may be acquired over a portion of the sea. . . . But, as one of his commentators, Rutherford, has observed, though there can be no doubt about the jurisdiction of a nation over the persons who compose its fleets when they are out at sea, it does not follow that the nation has jurisdiction over any portion of the ocean itself. It is not a permanent prop-

begins at the low-water mark. But between the high-water mark and the low-water mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium* (a divided authority), an alternate jurisdiction; one upon the water, when it is full sea; the other upon the land, when it is an ebb.<sup>a</sup>

§ 151. Divisions of England.—<sup>[111]</sup> The territory of England is liable to two divisions; the one ecclesiastical, the other civil.

§ 152. 1. The ecclesiastical division: a. Provinces of Canterbury and York; subdivisions.—The ecclesiastical division is primarily, into two provinces, those of Canterbury and York. A province is the circuit of an archbishop's jurisdiction. Each province contains divers dioceses, or sees of suffragan bishops; whereof Canterbury includes twenty-one, and York three: besides the bishopric of the Isle of Man, which was annexed to the province of York by King Henry VIII. Every diocese is divided into archdeaconries, whereof there are sixty in all; each archdeaconry into rural deaneries, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter; and every deanery is divided into parishes.<sup>f</sup>

§ 153. b. Parishes.—A parish is that circuit of ground which is committed to the charge of one parson, or vicar, or other minister, having cure of souls therein. These districts are computed to be near ten thousand in number.<sup>g</sup> How ancient the division of parishes is, may at present be difficult to ascertain; for it seems to

<sup>a</sup> Finch, L. 78.

<sup>g</sup> Gibson's Britan.

<sup>f</sup> Co. Litt. 94.

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erty which it acquires, but a mere temporary right of occupancy in a place which is common to all mankind, to be successively used by all as they have occasion. This jurisdiction which the nation has over its public and private vessels on the high seas is exclusive only so far as respects offenses against its own municipal laws. Piracy and other offenses against the law of nations, being crimes not against any particular state, but against all mankind, may be punished in the competent tribunal of any country where the offender may be found, or into which he may be carried, although committed on board a foreign vessel on the high seas.—WHEATON, International Law (Boyd's ed.), 166.

be agreed on all hands that in the early ages of Christianity in this island, parishes were unknown, or at least signified the same that a diocese does now. There was then no appropriation of ecclesiastical dues to any particular church: but every man was at liberty to contribute his tithes to whatever priest or church he pleased, provided only that he did it to some: or, if he made no special appointment or appropriation thereof, they were paid into the hands of the bishop, whose duty it was to distribute them among the clergy, and for other pious purposes, according to his own discretion.<sup>t</sup>

Mr. Camden<sup>u</sup> says, England was divided into parishes by Archbishop Honorius about the year 630. Sir Henry Hobart<sup>w</sup> lays it down, that parishes were first erected by the council of Lateran, which was held A. D. 1179. Each widely differing [112] from the other, and both of them perhaps from the truth; which will probably be found in the medium between the two extremes. For Mr. Selden has clearly shown,<sup>x</sup> that the clergy lived in common without any division of parishes, long after the time mentioned by Camden. And it appears from the Saxon laws that parishes were in being long before the date of that council of Lateran to which they are ascribed by Hobart.<sup>17</sup>

We find the distinction of parishes, nay even of mother churches, so early as in the laws of King Edgar, about the year 970. Before that time the consecration of tithes was in general *arbitrary*; that is, every man paid his own (as was before observed) to what church or parish he pleased. But this being liable to be attended with either fraud, or at least caprice, in the persons paying; and with either jealousies or mean compliances in such as were competitors for receiving them, it was now ordered by the law of King Edgar,<sup>y</sup> that “*dentur omnes decimæ primariæ ecclesiæ ad quam parochia*

<sup>t</sup> Seld. of Tith. 9. 4; 2 Inst. 646; Hob. 296.

<sup>u</sup> In his *Britannia*.

<sup>w</sup> Hob. 29.

<sup>x</sup> Of Tithes. c. 9.

<sup>y</sup> C. 1.

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<sup>17</sup> According to Stubbs' Constitutional History, I, 227, the division of the land into parishes was due to Theodore of Tarsus, who was Archbishop of Canterbury from 668 to 693, A. D.

*pertinet*”<sup>18</sup> (that all tithes be given to the mother church to which the parish belongs). However, if any thane, or great lord, had a church within his own demesnes, distinct from the mother church, in the nature of a private chapel; then, provided such church had a cemetery or consecrated place of burial belonging to it, he might allot one-third of his tithes for the maintenance of the officiating minister: but, if it had no cemetery, the thane must himself have maintained his chaplain by some other means; for in such case *all* his tithes were ordained to be paid to the *primariæ ecclesiæ* or mother church.<sup>2</sup>

This proves that the kingdom was then universally divided into parishes; which division happened probably not all at once, but by degrees. For it seems pretty clear and certain, that the boundaries of parishes were originally ascertained by those of a manor or manors: since it very seldom happens that a manor extends itself over more parishes than one, though there are often many manors in one parish. [113] The lords, as Christianity spread itself, began to build churches upon their own demesnes or wastes, to accommodate their tenants in one or two adjoining lordships; and, in order to have divine service regularly performed therein, obliged all their tenants to appropriate their tithes to the maintenance of the one officiating minister, instead of leaving them at liberty to distribute them among the clergy of the diocese in general: and this tract of land, the tithes whereof were so appropriated, formed a distinct parish. Which will well enough account for the frequent intermixture of parishes one with another. For if a lord had a parcel of land detached from the main of his estate, but not sufficient to form a parish of itself, it was natural for him to endow his newly erected church with the tithes of those disjointed lands; especially if no church was then built in any lordship adjoining to those outlying parcels.

Thus parishes were gradually formed, and parish churches endowed with the tithes that arose within the circuit assigned. But

<sup>2</sup> *Ibid.* c. 2. See also the laws of King Canute, c. 11, about the year 1030.

<sup>18</sup> Laws of Edgar II, 1 (1), in Liebermann, *Gesetze der Angelsachsen*, p. 197. It is, however, very doubtful whether the term “parish” is here anything more than a late version of an old Saxon word, meaning simply “district.”—STEPHEN, 1 Comm. (16th ed.), 71 n.



some lands, either because they were in the hands of irreligious and careless owners, or were situated in forests and desert places, or for other now unsearchable reasons, were never united to any parish, and therefore continue to this day extraparochial; and there tithes are now by immemorial custom payable to the king instead of the bishop, in trust and confidence that he will distribute them for the general good of the church;<sup>a</sup> yet extraparochial wastes and marsh-lands, when improved and drained, are by the statute 17 Geo. II, c. 37 (1743), to be assessed to all parochial rates in the parish next adjoining. And thus much for the ecclesiastical division of this kingdom.

§ 154. 2. **The civil division.**—The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns. Which division, as it now stands, seems to owe its original to King Alfred: who, to prevent [114] the rapines and disorders which formerly prevailed in the realm, instituted tithings; so called, from the Saxon, because *ten* freeholders with their families composed one. These all dwelt together, and were sureties or free pledges to the king for the good behavior of each other; and, if any offense was committed in their district, they were bound to have the offender forthcoming.<sup>b</sup> And therefore anciently no man was suffered to abide in England above forty days, unless he were enrolled in some tithing or decennary.<sup>c</sup> One of the principal inhabitants of the tithing is annually appointed to preside over the rest, being called the tithing man, the head-borough (words which speak their own etymology), and in some countries the borsholder, or borough's-ealder, being supposed the discreetest man in the borough, town, or tithing.<sup>d</sup>

<sup>a</sup> 2 Inst. 647; 2 Rep. 44; Cro. Eliz. 512.

<sup>b</sup> Flet. 1. 47. This the laws of King Edward the Confessor, c. 20, very justly entitle "*summa et maxima securitas, per quam omnes statu firmissimo sustententur; quæ hoc modo fiebat, quod sub decennali fidejussione debebant esse universi, etc.*" (the best and greatest security by which all persons are kept in the safest state; which was effected in this manner, that every ten should be sureties for each other).

<sup>c</sup> Mirr. c. 1. § 3.

<sup>d</sup> Finch. L. 8.



§ 155. a. **Tithings, towns or vill.**—Tithings, towns, or vills are of the same signification in law; and are said to have had, each of them, originally a church and celebration of divine service, sacraments, and burials;\* though that seems to be rather an ecclesiastical, than a civil distinction. The word “town” or “vill” is indeed, by the alteration of times and language, now become a generical term, comprehending under it the several species of cities, boroughs, and common towns.<sup>19</sup> A city is a town incorporated, which is or hath been the see of a bishop: and though the bishopric be dissolved, as at Westminster, yet still it remaineth a city.<sup>†</sup> A borough is now understood to be a town, either corporate or not, that sendeth burgesses to parliament.<sup>‡</sup><sup>20</sup> Other towns there are to the number, Sir Edward Coke says,<sup>§</sup> of 8,803, which are neither cities nor boroughs; some of which have the privileges of markets, and others not; but both are equally towns in law. To several of these towns there are small appendages belonging, called [115] hamlets; which are taken notice of in the statute of Exeter,<sup>1</sup> which makes frequent mention of entire vills, demi-vills, and hamlets. Entire vills Sir Henry Spelman<sup>2</sup> conjectures to have consisted of ten freemen, or frank-pledges, demi-vills of five, and hamlets of less than five. These little collections of houses are sometimes under the same administration as the town itself, sometimes governed by separate officers; in which last case they are, to some purposes in law, looked upon as distinct townships. These towns, as was before hinted, contained each originally but one parish and one tithing; though many of them now, by the increase of inhabitants, are divided into several parishes and tithings; and

• 1 Inst. 115.

† Co. Litt. 109.

§ Litt. § 164.

h 1 Inst. 116.

‡ 14 Edw. I (1286).

\* Gloss. 274.

<sup>19</sup> Taken in this wide sense, towns are distinguished from each other as being either corporate or not corporate. In the former, the rate-paying inhabitants are created by royal charter a legal personality commonly designated a *municipal corporation*.—STEPHEN, 1 Comm. (16th ed.), 74.

<sup>20</sup> A borough was anciently a fortified place, then a town which exercised certain privileges or franchises, e. g., the right to manage its own affairs, or to send members to parliament. At the present day, a true borough is a town which is incorporated by charter for purposes of self-government. But an urban constituency which sends members to parliament is frequently called a “parliamentary borough.”—STEPHEN, 1 Comm. (16th ed.), 74.

sometimes, where there is but one parish there are two or more villis or tithings.<sup>21</sup>

§ 156. **b. Hundreds.**—As ten families of freeholders make up a town or tithing, so ten tithings composed a superior division, called a hundred, as consisting of ten times ten families. The hundred is governed by an high constable or bailiff, and formerly there was regularly held in it the hundred court for the trial of causes, though now fallen into disuse. In some of the more northern counties these hundreds are called wapentakes.<sup>1</sup>

The subdivision of hundreds into tithings seems to be most peculiarly the invention of Alfred: the institution of hundreds themselves he rather introduced than invented. For they seem to have obtained in Denmark:<sup>m</sup> and we find that in France a regulation of this sort was made above two hundred years before; set on foot by Clotharius and Childebert, with a view of obliging each district to answer for the robberies committed in its own division. These

<sup>1</sup> Seld. in Fortesc. c. 24.

<sup>m</sup> Seld. Tit. of Honor. 2. 5. 3.

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<sup>21</sup> **Modern legislation on local government.**—Apart, however, from these privileged cases, there has existed, from ancient times, the ordinary township or vill, which is, even now, despite recent changes, the basis of the English system of local government. For a long period, during the middle ages, its very existence was obscured by the ecclesiastical organization of the parish, which had obtained such a powerful hold upon it, and absorbed so many of its functions. But, with the growth of the Poor Law system in the seventeenth and eighteenth centuries, the township, with its overseers and relieving officers, began once more to reappear under the names of "Poor Law parish," or "civil parish." And, although the tradition of the middle ages was still strong enough to enable the ecclesiastical officers (the incumbent and churchwardens) and the ecclesiastical assembly (the vestry) to claim much of the control, even in secular affairs; yet the increasing difficulties resulting from the vast growth of population, at the end of the eighteenth and the beginning of the nineteenth centuries, gradually led to a complete severance of the ecclesiastical and secular parishes, which are now, in many cases, totally different in area. The three great steps by which this result was achieved were: (1) the Public Health Act, 1875, which, virtually, constituted each urban civil parish (outside the metropolitan area) a separate "urban district"; (2) the Local Government Act, 1894, which conferred certain powers of self-government upon rural civil parishes; and (3) the London Government Act, 1899, which converted the London civil parishes into municipal boroughs.—STEPHEN, 1 Comm. (16th ed.), 74.

divisions were, in that country, as well military as civil: and each contained a hundred freemen, who were subject to an officer called the *centenarius* (head of a hundred); a number of which *centenarii* were themselves subject to a superior officer called the count or *comes*.<sup>n</sup> And [116] indeed something like this institution of hundreds may be traced back as far as the ancient Germans, from whom were derived both the Franks, who became masters of Gaul, and the Saxons, who settled in England: for both the thing and the name, as a territorial assemblage of persons, from which afterwards the territory itself might probably receive its denomination, were well known to that warlike people. "*Centeni ex singulis pagis sunt, idque ipsum inter suos vocantur; et quod primo numerus fuit, jam nomen et honor est*" (each village is divided into hundreds, and the designation hundreds is used by the inhabitants; and that which first was a mere number has now become both a name and an honor).<sup>o</sup>

§ 157. c. Counties or shires.—An indefinite number of these hundreds make up a county or shire. Shire is a Saxon word signifying a division; but a county, *comitatus*, is plainly derived from *comes*, the count of the Franks; that is, the earl, or alderman (as the Saxons called him) of the shire, to whom the government of it was entrusted. This he usually exercised by his deputy, still called in Latin *vice-comes*, and in English, the sheriff, shrieve, or shire-reeve, signifying the officer of the shire; upon whom by process of time the civil administration of it is now totally devolved. In some counties there is an intermediate division, between the shire and the hundreds, as lathes in Kent, and rapes in Sussex, each of them containing about three or four hundred apiece. These had formerly their lathe-reeves and rape-reeves, acting in subordination to the shire-reeve. Where a county is divided into *three* of these intermediate jurisdictions, they are called trithings,<sup>p</sup> which were anciently governed by a trithing-reeve. These trithings still subsist in the large county of York, where by an easy corruption they are denominated ridings; the north, the east, and the west riding. The number of counties in England and Wales have been different

<sup>n</sup> Montesq. Sp. L. 30. 17.

<sup>p</sup> LL. Edw. c. 34.

<sup>o</sup> Tacit, de Morib. German. 6.

at different times: at present there are forty in England and twelve in Wales.<sup>22</sup>

§ 158. (1) **Counties palatine.**—Three of these counties, Chester, Durham, and Lancaster, are called counties palatine. The two former are such by prescription, or immemorial custom; or, at least as old as [117] the Norman Conquest;<sup>a</sup> the latter was created by King Edward III in favor of Henry Plantagenet, first earl and then duke of Lancaster;<sup>r</sup> whose heiress being married to John of Gant, the king's son, the franchise was greatly enlarged

<sup>a</sup> Seld. Tit. Hon. 2. 5. 8.

<sup>r</sup> Pat. 25 Edw. III. p. 1 m. 18 (1350); Seld. *Ibid.*; Sandford's Gen. Hist. 112; 4 Inst. 204.

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22 **Importance of the division into counties.**—It seems probable that the realm was originally divided into counties, with a view to the more convenient administration of justice; for the judicial business of the kingdom was in early times chiefly dispatched in local courts, held in each different county, before the sheriff, as its principal officer. And as regards crime, the trial is, as a general rule, still conducted in the county wherein the offense is alleged to have been committed; the trial taking place either before the judges and commissioners of assize, on their periodical circuits, or else before the justices of the peace for the county at their quarter sessions. But, under the provisions of modern acts of parliament, counties may be united together for the trial of prisoners.

Another important object, connected with the distribution into counties, is that of parliamentary representation. Every county used to send to the house of commons its own members, called knights of the shire, who represented their respective counties, as the borough members their respective towns. Latterly, the larger counties have been subdivided, each portion forming (so far as this purpose is concerned) a separate county, and sending its separate representative. And this subdivision of counties has been recently carried to a great length; while even boroughs also have been subdivided, for parliamentary purposes, by the Redistribution of Seats Act, 1885.

For the object of local taxation, too, the division into counties is of practical effect and importance. For, as each parish is subject to a rate for the relief of the poor, so is every county subject to a county rate, which is directed to be levied on the occupiers of land within the county, and is applicable for many miscellaneous purposes, such as the maintenance of the rural police, lunatic asylums, bridges, and the like. And, finally, new elective county councils have been provided, by the Local Government Act, 1888, for the administration of local affairs.—STEPHEN, 1 Comm. (16th ed.), 77.

and confirmed in parliament,<sup>a</sup> to honor John of Gant himself, whom on the death of his father-in-law, the king had also created Duke of Lancaster.<sup>b</sup> Counties palatine are so called *a palatio* (from a royal court); because the owners thereof, the Earl of Chester, the Bishop of Durham, and the Duke of Lancaster, had in those counties *jura regalia* (regal rights), as fully as the king hath in his palace; *regalem potestatem in omnibus* (regal power in all things), as Bracton expresses it.<sup>c</sup> They might pardon treasons, murders, and felonies; they appointed all judges and justices of the peace; all writs and indictments ran in their names, as in other counties in the king's; and all offenses were said to be done against their peace, and not, as in other places, *contra pacem domini regis* (against the peace of our lord the king).<sup>w</sup> And indeed by the ancient law, in all peculiar jurisdictions, offenses were said to be done against his peace in whose court they were tried; in a court-leet, *contra pacem domini* (against the peace of the king); in the court of a corporation, *contra pacem ballivorum* (against the peace of the bailiffs); in the sheriff's court or tourn, *contra pacem vice-comitis* (against the peace of the sheriff).<sup>x</sup> These palatine privileges (so similar to the regal independent jurisdictions usurped by the great barons on the continent, during the weak and infant state of the first feudal kingdoms in Europe<sup>y</sup>) were in all probability originally granted to the counties of Chester and Durham, because they bordered upon enemies' countries, Wales and Scotland; in order that the owners, being encouraged by so large an authority, might be the more watchful in its defense; and that the inhabitants having justice administered at home, might not be obliged to go out of the county and leave it open to the enemies' incursions. And upon this account also there were formerly two other counties palatine, [118] Pembrokeshire and Hexhamshire, the latter now united with Northumberland: but these were abolished by parliament, the former in 27 Hen. VIII (1536), the latter in 14 Eliz. (1572). And in 27 Hen. VIII likewise, the powers before mentioned of owners

<sup>a</sup> Cart. 36 Edw. III. n. 9 (1362).

<sup>b</sup> Pat. 51 Edw. III. m. 33 (1377); Plowd. 215; 7 Rym. 138.

<sup>c</sup> L. 3. c. 8. § 4.

<sup>w</sup> 4 Inst. 204.

<sup>x</sup> Seld. in Heng. Magn. c. 2.

<sup>y</sup> Robertson. Chap. V. i. 60.



of counties palatine were abridged: the reason for their continuance in a manner ceasing; though still all writs are witnessed in their names, and all forfeitures for treason by the common law accrue to them.<sup>z</sup> <sup>23</sup>

Of these three, the county of Durham is now the only one remaining in the hands of a subject.<sup>24</sup> For the earldom of Chester, as Camden testifies, was united to the crown by Henry III and has ever since given title to the king's eldest son. And the county palatine, or duchy, of Lancaster was the property of Henry of Bolingbroke, the son of John of Gant, at the time when he wrested the crown from King Richard II, and assumed the title of Henry IV. But he was too prudent to suffer this to be united to the crown; lest, if he lost one, he should lose the other also. For, as Plowden<sup>a</sup> and Sir Edward Coke<sup>b</sup> observe, "he knew he had the duchy of Lancaster by sure and indefeasible title, but that his title to the crown was not so assured: for that after the decease of Richard II the right of the crown was in the heir of Lionel, Duke of Clarence, *second* son of Edward III; John of Gant, father to this Henry IV, being but the *fourth* son." And therefore he procured an act of parliament, in the first year of his reign, ordaining that the duchy of Lancaster, and all other his hereditary estates, with all their royalties and franchises, should remain to him and his heirs forever; and should remain, descend, be administered, and governed, in like manner as if he never had attained the regal dignity; and thus they descended to his son and grandson, Henry V and Henry VI, many new territories and privileges being annexed to the duchy by the former.<sup>c</sup> Henry VI being attainted in 1 Edw. IV (1461), this duchy was declared in parliament [<sup>119</sup>] to have become forfeited to the crown,<sup>d</sup> and at the same time an act was

<sup>z</sup> 4 Inst. 205.

<sup>a</sup> 215.

<sup>b</sup> 4 Inst. 205.

<sup>c</sup> Parl. 2 Hen. V. n. 30 (1414); 3 Hen. V. n. 15 (1415).

<sup>d</sup> 1 Vent. 155.

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<sup>23</sup> During the nineteenth century the administration of justice in the counties palatine has been brought into harmony with that of the rest of England.

<sup>24</sup> The jurisdiction of the county of Durham was vested by parliamentary acts in 1836 and 1858 in the crown as a separate franchise and royalty.



made to incorporate the duchy of Lancaster, to continue the county palatine (which might otherwise have determined by the attainder<sup>e</sup>) and to make the same parcel of the duchy: and, further, to vest the whole in King Edward IV and his heirs, *kings of England*, forever; but under a separate guiding and governance from the other inheritances of the crown. And in 1 Hen. VII (1485) another act was made, \*to resume such part of the duchy lands as had been dismembered from it in the reign of Edward IV and to vest the inheritance of the whole in the king and his heirs forever, as amply and largely, and in like manner, form, and condition, separate from the crown of England and possession of the same, as the three Henrys and Edward IV, or any of them, had and held the same.<sup>f</sup>\*

\* The editions previous to the fifth read, "to vest the inheritance thereof in Henry VII and his heirs: and in this state, say Sir Edward Coke and Lambard, viz., in the natural heirs or posterity of Henry VII, did the right of the duchy remain to their day; a separate and distinct inheritance from that of the crown of England." Note † also reads differently in the first four editions.

<sup>e</sup> 1 Vent. 157.

† Some have entertained an opinion (Plowd. 220, 1, 2; Lamb. Archeion. 233; 4 Inst. 206) that by this act the right of the duchy vested only in the *natural*, and not in the *political* person of King Henry VII, as formerly in that of Henry IV; and was descendible to his natural heirs, independent of the succession to the crown. And, if this notion were well founded, it might have become a very curious question at the time of the revolution in 1688, in whom the right of the duchy remained after King James' abdication, and previous to the attainder of the pretended Prince of Wales. But it is observable, that in the same act the duchy of Cornwall is also vested in King Henry VII and his heirs; which could never be intended in any event to be separated from the inheritance of the crown. And indeed it seems to have been understood very early after the statute of Henry VII that the duchy of Lancaster was by no means thereby made a separate inheritance from the rest of the royal patrimony; since it descended, with the crown, to the half blood in the instances of Queen Mary and Queen Elizabeth: which it could not have done, as the estate of a mere Duke of Lancaster, in the common course of legal descent. The better opinion therefore seems to be that of those judges, who held (Plowd. 221) that notwithstanding the statute of Henry VII (which was only an act of resumption), the duchy still remained as established by the acts of Edward IV; separate from the other possessions of the crown in order and government, but united in point of inheritance.

The Isle of Ely is not a county palatine, though sometimes erroneously called so, but only a royal franchise: the bishop having, by grant of King Henry the First, *jura regalia* (regal rights), within the Isle of Ely; whereby he exercises a jurisdiction over all causes, as well criminal as civil.<sup>§ 25</sup>

§ 159. d. **Counties corporate.**—<sup>[120]</sup> There are also counties *corporate*: which are certain cities and towns, some with more, some with less territory annexed to them; to which out of special grace and favor the kings of England have granted the privilege to be counties of themselves, and not to be comprised in any other county; but to be governed by their own sheriffs and other magistrates, so that no officers of the county at large have any power to intermeddle therein. Such are London, York, Bristol, Norwich, Coventry, and many others. And thus much of the countries subject to the laws of England.

§ 4 Inst. 220.

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<sup>25</sup> The secular authority of the bishop in the Isle of Ely was taken from him by the Liberties Act, 1836, and vested in the crown.—STEPHEN, 1 Comm. (16th ed.), 80.

COMMENTARIES  
ON THE  
LAWS OF ENGLAND.

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BOOK THE FIRST.  
OF THE RIGHTS OF PERSONS.

[121] CHAPTER THE FIRST.  
OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

§ 160. Objects of the law: rights and wrongs.—The objects of the laws of England are so very numerous and extensive, that, in order to consider them with any tolerable ease and perspicuity, it will be necessary to distribute them methodically, under proper and distinct heads; avoiding as much as possible divisions too large and comprehensive on the one hand, and too trifling and minute on the other; both of which are equally productive of confusion.

[122] Now, as municipal law is a rule of civil conduct, commanding what is right, and prohibiting what is wrong; or as Cicero,<sup>a</sup> and after him our Bracton,<sup>b</sup> have expressed it, *sanctio justa, jubens honesta et prohibens contraria*; it follows, that the primary and principal objects of the law are RIGHTS and WRONGS.<sup>1</sup> In the prose-

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<sup>a</sup> 11 Phillip. 12.

<sup>b</sup> 1. 1. c. 3.

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<sup>1</sup> Meaning of "a right."—Jurisprudence is specifically concerned only with such rights as are recognized by law and enforced by the power of a state. We may therefore define a "legal right," in what we shall hereafter see is the strictest sense of that term, as a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others.

That which gives validity to a legal right is, in every case, the force which is lent to it by the state. Anything else may be the occasion, but is not the cause, of its obligatory character.

Sometimes it has reference to a tangible object. Sometimes it has no such reference. Thus, on the one hand, the ownership of land is a power residing in the land owner, as its subject, exercised over the land, as its object, and available against all other men. So a father has a certain power, residing in

cution, therefore, of these Commentaries, I shall follow this very simple and obvious division; and shall in the first place consider

himself as its subject and exercised over his child as its object, available against all the world besides. On the other hand, a servant has a power residing in himself as its subject, over no tangible object, and available only against his master to compel the payment of such wages as may be due to him.

This simple meaning of the term "a right" is for the purposes of the jurist entirely adequate. It has, however, been covered with endless confusion owing to its similarity to "Right"; an abstract term formed from the adjective "right," in the same way that "Justice" is formed from the adjective "just." Hence it is that Blackstone actually opposes "rights" in the sense of capacities, to "wrongs" in the sense of "unrighteous acts."

We in England are happily spared another ambiguity which in many languages besets the phrase expressing "a right." The Latin "*Ius*," the German "Recht," the Italian "Diritto," and the French "Droit" express not only "a right" but also "Law" in the abstract. To express the distinction between "Law" and "a right" the Germans are therefore obliged to resort to such phrases as "objectives" and "subjectives Recht," meaning by the former, law in the abstract, and by the latter, a concrete right. And Blackstone, paraphrasing the distinction drawn by Roman law between the "*ius quod ad res*" and the "*ius quod ad personas pertinet*," devotes the first and second volumes of his Commentaries to the "Rights of Persons" and the "Rights of Things," respectively.—HOLLAND, Jurisprudence (11th ed.), 82.

**Rights.**—A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong. All that is right or wrong, just or unjust, is so by reason of its effects upon the interests of mankind, that is to say, upon the various elements of human well-being, such as life, liberty, health, reputation, and the uses of material objects. If any act is right or just, it is so because and in so far as it promotes some form of human interest. If any act is wrong or unjust, it is because the interests of men are prejudicially affected by it. Conduct which has no influence upon the interests of anyone has no significance either in law or morals. Every wrong, therefore, involves some interest attacked by it, and every duty involves some interest to which it relates, and for whose protection it exists. The converse, however, is not true. Every attack upon an interest is not a wrong, either in fact or in law, nor is respect for every interest a duty, either legal or natural. Many interests exist *de facto* and not also *de jure*; they receive no recognition or protection from any rule of right. The violation of them is no wrong, and respect for them is no duty. For the interests of men conflict with each other, and it is impossible for all to receive rightful recognition. The rule of justice selects some for protection, and the others are rejected.

The interests which thus receive recognition and protection from the rules of right are called rights. Every man who has a right to anything has an

the *rights* that are commanded, and secondly the *wrongs* that are forbidden by the laws of England.

interest in it also, but he may have an interest without having a right. Whether his interest amounts to a right depends on whether there exists with respect to it a duty imposed upon any other person. In other words, a right is an interest the violation of which is a wrong.

Every right corresponds to a rule of right, from which it proceeds, and it is from this source that it derives its name. That I have a *right* to a thing means that it is *right* that I should have it. All right is *the* right of him for whose benefit it exists, just as all wrong is *the* wrong of him whose interests are affected by it. In the words of Windscheid, "*Das Recht ist sein Recht geworden.*"

Rights, like wrongs and duties, are either moral or legal. A moral or natural right is an interest recognized and protected by the rule of natural justice—an interest the violation of which would be a moral wrong, and respect for which is a moral duty. A legal right, on the other hand, is an interest recognized and protected by the rule of legal justice—an interest the violation of which would be a legal wrong done to him whose interest it is, and respect for which is a legal duty. "Rights," says Ihering, "are legally protected interests." Bentham set the fashion, still followed by many, of denying that there are any such things as natural rights at all. All rights are legal rights and the creation of the law. "Natural law, natural rights," he says, "are two kinds of fictions or metaphors, which play so great a part in books of legislation, that they deserve to be examined by themselves. . . . Rights properly so called are the creatures of law properly so called; real laws give rise to real rights. Natural rights are the creatures of natural law; they are a metaphor which derives its origin from another metaphor." In this matter Bentham is followed by Austin, who says: "Strictly speaking, there are no rights but those which are the creatures of law; and I speak of any other kind of rights only in order that I may conform to the received language." "In many of the cultivated," says Mr. Spencer, criticising this opinion, "there has been produced a confirmed and indeed contemptuous denial of rights. There are no such things, say they, except such as are conferred by law. Following Bentham, they affirm that the state is the originator of rights and that apart from it there are no rights."

A complete examination of this opinion would lead us far into the regions of ethical rather than juridical conceptions, and would here be out of place. It is sufficient to make two observations with respect to the matter. In the first place, he who denies the existence of natural *rights* must be prepared at the same time to reject natural or moral *duties* also. Rights and duties are essentially correlative, and if a creditor has no natural right to receive his debt, the debtor is under no moral duty to pay it to him. In the second place, he who rejects natural *rights* must at the same time be prepared to reject natural *right*. He must say with the Greek skeptics that the distinction between right

§ 161. **Division of rights and wrongs.**—Rights are, however, liable to another subdivision: being either, first, those which concern

and wrong, justice and injustice, is unknown in the nature of things, and a matter of human institution merely. 'If there are no rights save those which the state creates, it logically follows that nothing is right and nothing wrong save that which the state establishes and declares as such. If natural justice is a truth and not a delusion, the same must be admitted of natural rights.—SALMOND, *Jurisprudence*, sec. 72.

**Legal rights.**—Mr. Justice Holmes explains the nature of a legal right as follows: "A legal right is nothing but a permission to exercise certain natural powers, and upon certain conditions to obtain protection, restitution, or compensation by the aid of the public force. Just so far as the aid of the public force is given a man, he has a legal right, and this right is the same whether his claim is founded in righteousness or iniquity."—HOLMES, *Common Law*, 214.

Professor Holland gives a fuller conception of the idea of legal right by comparing it with the ideas of might and moral right. He says: "It may be as well to restate in a few words precisely what we mean by saying that any given individual has 'a right.' If a man by his own force or persuasion can carry out his wishes, either by his own acts, or by influencing the acts of others, he has the 'might' so to carry out his wishes. If, irrespectively of having or not having this might, public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his so doing; then he has a 'moral right' so to carry out his wishes. If, irrespectively of his having, or not having, either the might, or moral right on his side, the power of the state will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a 'legal right' so to carry out his wishes.

"If it is a question of might, all depends upon a man's own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of public opinion to express itself upon his side. If it is a question of legal right, all depends upon the readiness of the state to exert its force on his behalf. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the state. The whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, law exists, as was stated previously, for the definition and protection of rights."—HOLLAND, *Jurisprudence* (11th ed.), 85.

**Legal duties.**—Every right, whether moral or legal, implies the active or passive furtherance by others of the wishes of the party having the right. Wherever anyone is entitled to such furtherance on the part of others, such furtherance on their part is said to be their "duty." Where such furtherance is



and are annexed to the persons of men, and are then called *jura personarum* or the *rights of persons*; or they are, secondly, such merely expected by the public opinion of the society in which they live, it is their "moral duty." Where it will be enforced by the power of the state to which they are amenable, it is their "legal duty."

The correlative of might is necessity, or susceptibility to force; of moral right is moral duty; of legal right is legal duty. These pairs of correlative terms express, it will be observed, in each case, the same state of facts viewed from opposite sides. A state of facts in which a man has within himself the physical force to compel another to obey him, may be described either by saying that A has the might to control B, or that B is under a necessity of submitting to A. So when public opinion would approve of A commanding and of B obeying, the position may be described either by saying that A has a moral right to command, or that B is under a moral duty to obey. Similarly, when the state will compel B to carry out, either by act or forbearance, the wishes of A, we may indifferently say that A has a legal right, or that B is under a legal duty.—HOLLAND, *Jurisprudence* (11th ed.), 86.

**Rights in rem and rights in personam.**—Sometimes a legal right exists against one or more persons, specifically designated or capable of being ascertained; sometimes a legal right exists against all persons generally, that is to say, against all the members of the particular society or community to which the holder of the right belongs. Thus, in the case of a contract between A and B, the right of A to demand performance of the contract exists against B only; whereas, in the case of the ownership of a piece of land or of the right to personal freedom of motion, the right to hold and enjoy the land, or the right to move about freely, exists against persons generally. This distinction between different classes of legal rights is indicated by the use of technical Latin terms: the former being called rights *in personam*, the latter rights *in rem*. These expressions are in common use and must accordingly be understood. It is the part of wisdom not to attempt to translate, as a translation is likely to mislead, especially in case of the expression, right *in rem*. A right *in personam* means a right available against a determinate individual or determinative individuals. All contractual rights, as well as some others, fall thereunder. A right *in rem* means a right available against persons generally, or, as frequently expressed, against the world at large.

**Scheme of rights in Anglo-American law.**—Bringing under the two main heads of rights *in rem* and rights *in personam* the several classes of rights recognized by the law, Professor Roscoe Pound presents the following scheme:

"I. *In rem*.

- (1) Personal integrity. The right not to be injured in body or mind by the acts or negligence of others. This extends to (i) life; (ii) body; (iii) health; (a) bodily; (b) mental. Originally the taking of life did not give rise to any civil liability. But modern legislation has given an action to the successors or the estate of the person killed.

as a man may acquire over external objects, or things unconnected with his person, which are styled *jura rerum* or the *rights of things*.<sup>2</sup> Wrongs also are divisible into, first, *private wrongs*, which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and secondly, *public wrongs*, which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.<sup>3</sup>

- (2) Personal liberty. The right of free motion and locomotion except as restricted by law and restrained lawfully by the proper officers acting in the proper manner.
- (3) Society and control of family and dependents.
- (4) Private property.

## II. *In personam*.

- (1) Contractual. Rights arising independently of pre-existing rights out of the agreement of the parties.
- (2) *Quasi-contractual*. Rights to have restitution or compensation for a benefit conferred, imposed by law in order to prevent unjust enrichment of one party at the expense of another.
- (3) Fiduciary. Rights to have a trust or confidence executed *in specie* (specifically). These rights are recognized only in courts of equity or in proceedings in equity.
- (4) Delictual. Rights to compensation arising from violations of pre-existing rights *in rem*.—POUND, Readings in the Common Law (2d ed.), 420.

2 “*Jura rerum*.”—It will be observed that though the Roman writers shorten “*ius quod ad personas pertinet*” into “*ius personarum*,” they never abbreviate the “*ius quod ad res pertinet*” into “*ius rerum*.” Yet their later followers have talked of “*ius rerum*,” as well as of “*ius personarum*,” thereby causing not a little confusion; and Sir Matthew Hale, adopting these phrases, mistranslates them “Rights of Persons and of Things,” and is followed by Blackstone.—HOLLAND, Jurisprudence (11th ed.), 135.

Stephen’s classification of rights.—Stephen’s Commentaries, which adheres to Blackstone’s classification of the field of law into *rights* and *wrongs*, analyzes rights as follows (Vol. I, p. 83): “They regard either, first, a man’s own person; or, secondly, his dominion over things; or, thirdly, his private relations; or, fourthly, his condition as a member of the community. And of these varieties of rights, the first we may call *personal rights*; the second, *rights of property*; the third, *rights in private relations*; and the fourth, *public rights*.” This classification expresses the meaning of Hale and Blackstone much more clearly than their own distinctions into *rights of persons* and *rights of things*.

3 Civil injuries and crimes.—Likewise the meaning of Blackstone in his division of *wrongs* is better expressed in 1 Stephen’s Commentaries, 84, as follows: “*Wrongs* also may be subdivided; but the leading distinction here depends not on

§ 162. **Division of these Commentaries.**—The objects of the laws of England falling into this fourfold division, the present Commentaries will therefore consist of the four following parts: 1. *The rights of persons*; with the means whereby such rights may be either acquired or lost. 2. *The rights of things*; with the means also of acquiring and losing them. 3. *Private wrongs*, or civil injuries; with the means of redressing them by law. 4. *Public wrongs*; or crimes and misdemeanors; with the means of prevention and punishment.

§ 163. 1. **Rights of persons.**—We are now, first, to consider the *rights of persons*; with the means of acquiring and losing them.

[123] Now the rights of persons that are commanded to be observed by the municipal law are of two sorts: first, such as are due *from* every citizen, which are usually called *civil duties*; and secondly, such as belong *to* him, which is the more popular acceptance of *rights* or *jura*. Both may, indeed, be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man, or set of men, they must also be due *to* another. But I apprehend it will be more clear and easy to consider many of them as duties required from, rather than as rights belonging to particular persons. Thus, for instance, allegiance is usually, and therefore most easily, considered as the duty of the people, and protection as the duty of the magistrate; and yet they are, reciprocally, the rights as well as duties of each other. Allegiance is the right of the magistrate, and protection the right of the people.

§ 164. a. **Division of persons.**—Persons also are divided by the law into either natural persons, or artificial. Natural persons

the character of the right violated, but on the party who is supposed to sustain injury from its violation. That is to say, when the violation is left to be redressed by a particular individual only, it is called a *civil injury*; but when it may be the subject of a prosecution by the crown in the interests of the public, it is called a *crime*. (See 4 Bl. Comm., pp. 5, 6.) Thus, the withholding of a debt is a wrong to the individual, and consequently a civil injury; but to deprive a man of his money by theft or robbery, is held to be a wrong also to the public, and therefore a crime. It is, however, necessary to remember, that the same act, e. g., an assault, may be both a civil injury and a crime."

are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.

§ 165. **b. Division of rights of persons: absolute and relative.** The rights of persons considered in their natural capacities are also of two sorts, absolute and relative.<sup>4</sup> Absolute, which are such

<sup>4</sup> Langdell's classification of rights into absolute and relative.—Blackstone's classification of rights into absolute and relative, while severely censured by many writers, has been accepted and utilized by others. One of the most carefully considered discussions of the subject is that by the late Professor C. C. Langdell, whose name carries with it exceptional authority for discriminating scholarship. The substance of Professor Langdell's argument is as follows:

"Legal rights are either absolute or relative. An absolute right is one which does not imply any correlative obligation or duty. A relative right is one which does imply a correlative obligation or duty. (Writers upon jurisprudence generally use the terms *in rem* and *in personam* to mark the primary division of legal rights, and it is therefore proper for me to explain why I use the terms 'absolute' and 'relative' instead. It will, however, be more convenient to do this after treating of the different classes of legal rights.)

"Absolute rights are either personal rights or rights of property. A personal right is one which belongs to every natural person as such. A right of property is one which consists of ownership or dominion (*dominium*).

"Every personal right is born with the person to whom it belongs, and dies with him. Personal rights, therefore, can neither be acquired nor parted with, and hence they are never the subjects of commerce, nor have they any pecuniary value. For the same reasons, courts of justice never have occasion to take cognizance of them except when complaints are made of their infringement; and even then the only question of law that can be raised respecting them is whether or not they have been infringed. It follows, therefore, that all the knowledge that we have of personal rights relates to the one question, what acts will constitute an infringement of them? We can neither number them nor define them, and any attempt to do either will be profitless. There is, however, one personal right which differs so widely from most others that it deserves to be mentioned, namely, the equal right of all persons to use public highways, navigable waters, and the high seas.

"In all the foregoing particulars, rights of property are the very converse of personal rights. All such rights are acquired, and they may all be alienated. They are all, therefore, the subjects of commerce, and they all have, or are supposed to have, a pecuniary value. For the same reasons, courts of justice take cognizance of them for a great variety of purposes, and they are all capable of being enumerated and defined.

"Rights of property are said to be either corporeal or incorporeal. In truth, however, all rights are incorporeal; and what is meant is that the subjects of

as appertain and belong to particular men, merely as individuals or single persons: relative, which are incident to them as members of society, and standing in various relations to each other. The first, that is, absolute rights, will be the subject of the present chapter.

§ 166. (1) **Absolute rights.**—By the absolute *rights* of individuals we mean those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties*, which man is bound <sup>[124]</sup> to perform considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of

rights of property (i. e., things owned) are either corporeal or incorporeal. A thing owned is corporeal when it consists of some portion of the material world, and incorporeal when it does not.

“A single material thing may be owned by several persons, and that too without any division of it, either actual or supposed, each person owning an undivided share of it; and in that case each owner has a right of property just as absolute as if he were the sole owner of the thing. In case of land also, the ownership, instead of being divided into shares, may be divided among several persons in respect to the time of their enjoyment, one of them having the right of immediate enjoyment, and the others having respectively successive rights of future enjoyment. This peculiarity in the ownership of land comes from the feudal system. Land itself is also peculiar in this, namely, that a physical division of it among different owners is impossible; and hence the land of A, for example, is separated from the adjoining land only by a mathematical line described upon the surface, A’s ownership extending to the center of the earth, in one direction, and indefinitely in the other direction. By our law, land is also capable of an imaginary division, for the purposes of ownership, laterally as well as vertically; for one person may own the surface of the land, and another may own all the minerals which the land contains. Such a mode of dividing the ownership of land certainly creates many legal difficulties, but it seems to be persisted in notwithstanding, at least in England. (*Humphries v. Brogden*, 12 Q. B. 739, 755.) In like manner, by our law, a building is capable of an imaginary division, for purposes of ownership, both lateral and vertical. (*Ibid.* 756, 757.)

“Relative rights are either obligations or duties. Strictly, indeed, ‘obligation’ or ‘duty’ is the name of the thing with which a relative right correlates;



society, and stand in various relations to each other, they have consequently no business or concern with any but social or relative duties. Let a man therefore be ever so abandoned in his principles, or vicious in his practice, provided he keeps his wickedness to himself, and does not offend against the rules of public decency, he is out of the reach of human laws. But if he makes his vices public, though they be such as seem principally to affect himself (as drunkenness, or the like), they then become, by the bad example they set, of pernicious effects to society; and therefore it is then the business of human laws to correct them. Here the circumstance of publication is what alters the nature of the case. *Public* sobriety is a relative duty, and therefore enjoined by our laws; *private* sobriety is an absolute duty, which, whether it be performed or not, human tribunals can never know; and therefore they can never

but such is the poverty of language that we have to use the same word also to express the right itself.

“An obligation is either personal or real, according as the obligor is a person or a thing. An obligation may be imposed upon a person either by his own act, i. e., by contract (*obligatio ex contractu*), or by act of law (*obligatio ex lege*, or *obligatio quasi ex contractu*).

“An obligation may be imposed upon a thing either by the law alone, or by the law acting concurrently with the will of the owner of the thing. In the latter case, the will of the owner must be manifested in such manner as the law requires or sanctions. By our law, it is sometimes sufficient for the owner of a thing to impose an obligation upon himself, the law treating that as sufficient evidence of an intention to impose it upon the thing also—when, for example, the owner of land enters into a covenant respecting it, and the covenant is said to run with the land. The most common way, however, in which an owner of land manifests his will to impose an obligation upon it is by making a grant to the intended obligee of the right against the land which he wishes to confer, i. e., he adopts the same form as when he wishes to transfer the title to the land. If, however, an owner of land, upon transferring the title to it, wishes to impose upon it an obligation in his own favor, he does this by means of a reservation, i. e., by inserting in the instrument of transfer a clause by which he reserves to himself the right which he wishes to retain against the land. An owner of a movable thing imposes an obligation upon it by delivering the possession of it to the intended obligee, declaring the purpose for which he does it, as when a debtor delivers securities to his creditor by way of pledge to secure the payment of the debt.

“A real obligation is undoubtedly a legal fiction, but it is a very useful one. It was invented by the Romans, from whom it has been inherited by the



enforce it by any civil sanction. But with respect to *rights*, the case is different. Human laws define and enforce as well those rights which belong to a man considered as an individual, as those which belong to him considered as related to others.

§ 167. (a) **Protection of absolute rights.**—For the principal aim of society is to protect individuals in the enjoyment of those absolute rights, which were vested in them by the immutable laws of nature; but which could not be preserved in peace without that mutual assistance and intercourse, which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these *absolute* rights of individuals. Such rights as are social and *relative* result from, and are posterior to, the formation of states and

nations of modern Europe. That it would ever have been invented by the latter is very unlikely, partly because they have needed it less than did the ancients, and partly because they have not, like the ancients, the habit of personifying inanimate things. The invention was used by the Romans for the accomplishment of several important legal objects, some of which no longer exist, but others still remain in full force. It was by means of this that one person acquired rights in things belonging to others (*jura in rebus alienis*). Such rights were called *servitudes* (i. e., states of slavery) in respect to the thing upon which the obligation was imposed, and they included every right which one could have in a thing, short of owning it. These servitudes were divided into real and personal servitudes, being called real when the obligee as well as the obligor, i. e., the master (*dominus*) as well as the slave (*servus*), was a thing, and personal when the obligee was a person. The former, which may be termed servitudes proper, have passed into our law under the names of easements and profits *a prendre*. The latter included the *pignus* and the *hypotheca*, i. e., the Roman mortgage—which was called *pignus* when the thing mortgaged was delivered to the creditor, and *hypotheca* when it was constituted by a mere agreement, the thing mortgaged remaining in the possession of its owner.”  
LANGDELL, *Brief Survey of Equity Jurisdiction*, 219.

And the following is Professor Langdell's explanation of the reasons for using the terms “absolute” and “relative”: “I now proceed to do what, in a previous note, I postponed until now, namely, to explain why I used the terms ‘absolute’ and ‘relative’ to mark the primary division of legal rights, instead of the terms *in rem* and *in personam*. 1. If I had used the latter terms, I should have required them both to designate relative rights, and should, therefore, have had nothing left for absolute rights; for rights *in personam* would clearly have embraced only those rights which are created by personal obligations and duties, and, therefore, I must have used the term *in rem* to designate those

societies; so that to maintain and regulate these is clearly a subsequent consideration. And therefore the principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in [125] themselves are few and simple; and, then, such rights as are relative, which arising from a variety of connections, will be far more numerous and more complicated. These will take up a greater space in any code of laws, and hence may appear to be more attended to, though in reality they are not, than the rights of the former kind. Let us therefore proceed to examine how far all laws ought, and how far the laws of England actually do, take notice of these absolute rights, and provide for their lasting security.

§ 168. (b) **Natural liberty.**—The absolute rights of man, considered as a free agent, endowed with discernment to know good from evil, and with power of choosing those measures which appear to him to be most desirable, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This natural liberty consists properly in a power of acting as one thinks fit, without any restraint or control, unless by the law of nature; being a right inherent in us by birth, and one of the gifts of God to man at his creation, when He endued him with the faculty of

created by real obligations. 2. If the phrase '*rights in personam*' perfectly describes all those rights which are created by personal obligations or duties, then the phrase '*rights in rem*' perfectly describes those rights which are created by real obligations, when considered as obligations; and, if so, it is clearly impossible that it should also correctly describe absolute rights. 3. The phrase '*rights in rem*' does not, in fact, describe correctly either class of absolute rights. It might, indeed, be used, without any great impropriety, to describe ownership of corporeal things, but to use it to describe ownership of incorporeal things is certainly taking great liberties with language, and to use it to describe personal rights seems to me to be in the highest degree absurd. 4. The terms *in rem* and *in personam* are properly applicable to procedure only, and the use of them was limited to procedure by the Romans. 5. The terms 'absolute' and 'relative,' as used by me, require neither explanation nor justification, while the terms *in rem* and *in personam*, if used for the same purpose, would have required both. 6. The terms *in rem* and *in personam*, as applied to rights, are wholly foreign, while, in using the terms 'absolute' and 'relative' instead, I follow the example of Blackstone."—LANGDELL, *Brief Survey of Equity Jurisdiction*, 229 n.

free will. But every man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable than that wild and savage liberty which is sacrificed to obtain it.

§ 169. (c) *Civil liberty*.—For no man, that considers a moment, would wish to retain the absolute and uncontrolled power of doing whatever he pleases: the consequence of which is, that every other man would also have the same power; and then there would be no security to individuals in any of the enjoyments of life. Political, therefore, or civil, liberty, which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no further) as is necessary and expedient for the general advantage of the public.<sup>c</sup> Hence we may collect that the law, which restrains a man from doing mischief [126] to his fellow-citizens, though it diminishes the natural, increases the civil liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny: nay, that even laws themselves, whether made with or without our consent, if they regulate, and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty: whereas if any public advantage can arise from observing such precepts, the control of our private inclinations, in one or two particular points, will conduce to preserve our general freedom in others of more importance; by supporting that state of society which alone can secure our independence. Thus the statute of King Edward IV,<sup>d</sup> which forbade the fine gentlemen of those times (under the degree of a lord) to wear pikes upon their shoes or boots of more than two inches in length, was a law that savored of oppression; because, however ridiculous the fashion then in use might

<sup>c</sup> *Facultas ejus, quod cuique facere libet, nisi quid jure prohibetur*. (Its essence is the power of doing whatsoever we please, unless where authority or law forbids.) Inst. 1. 3. 1.

<sup>d</sup> 3 Edw. IV. c. 5 (Apparel, 1463).

appear, the restraining it by pecuniary penalties could serve no purpose of common utility. But the statute of King Charles II,\* which prescribes a thing seemingly as indifferent; viz., a dress for the dead, who are all ordered to be buried in woolen; is a law consistent with public liberty, for it encourages the staple trade, on which in great measure depends the universal good of the nation. So that laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr. Locke has well observed<sup>f</sup>) where there is no law there is no freedom. But then, on the other hand, that constitution or frame of government, that system of laws, is alone calculated to maintain civil liberty, which leaves the subject entire master of his own conduct, except in those points wherein the public good requires some direction or restraint.<sup>5</sup>

\* 30 Car. II. st. 1. c. 3 (Burying in Woolen, 1678).

<sup>f</sup> On Gov. p. 2. § 57.

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<sup>5</sup> The nature of legal rights and duties.—The assertion so frequently met, and so much insisted on by Austin, Stephen, and other recent English writers, that all law is the command of the state, and this command is the only criterion of a law, seems to repeat exactly Blackstone's definition; but it has in truth a very different meaning. No modern jurist could rationally believe that the English common law, or statute law, is composed of commands set by the sovereign to all Englishmen for them to obey. And when they claim this definition as a modern discovery, and laud its scientific clearness and superiority over the theories of modern civilians, the claim would be ludicrous if we were not able to ascertain from the history of legal doctrine, just what they meant by it. (See Stephen, *Introduction to Criminal Law*, p. viii.) When Austin speaks of a command of the state, his meaning is to exclude the laws of morality, of fashion, and all other forms of law which do not come strictly within the scope of jurisprudence, as he understands it. His purpose is to draw a firm and distinct line around the positive law of the state, and to get rid of the confusion which has been produced by mixing up ethics or natural law with it. Having denied to these an enforceable character, he adds nothing to his definition of law when he says that law is prescribed by the state. Professor Holland has expressed his meaning in a single word, and at the same time, corrected both Blackstone and Austin's statements, when he says that law is a rule *enforced* by the state instead of prescribed by the state. (*Jurisprudence*, p. 19.) In what sense it may correctly be said that the state is the author of the law it administers must be discussed elsewhere. The object here is only to show that the true meaning of the expression, as now held, is that the law enforced by the state must be law pure and simple, distinct from ethics.

§ 170. (d) **Civil liberty in England.**—The idea and practice of this political or civil liberty flourish in their highest vigor in these kingdoms, where it falls [127] little short of perfection, and can only be lost or destroyed by the folly or demerits of its owner: the legislature, and of course the laws of England, being peculiarly adapted to the preservation of this inestimable blessing even in the meanest subject. Very different from the modern constitutions of other states, on the continent of Europe, and from the genius of the imperial law; which in general are calculated to vest an arbitrary and despotic power, of controlling the actions of the subject, in the prince, or in a few grandees. And this spirit of liberty is so deeply implanted in our constitution, and rooted even in our

It is doubtful whether a clear and simple doctrine of law can ever be stated until we have got rid entirely of the notion that law consists in a command, or proceeds from a superior; it is certain that we cannot discuss the disputed topics which fill recent jurisprudence with reference to law, right, duty, etc., while this ancient error continues to pervade them all as it does. It is not merely the question of the origin of law that is affected by it, though there its effects are seen most clearly. So long as law necessarily implies a superior, we must look for that superior in every organized government, and perplex ourselves with that doctrine of sovereignty which otherwise might be dispensed with. The whole nature of rights and duties, especially in private law, is distorted by the necessity of representing them as the effects of a command, antecedent to the existence of the right or duty. Mr. Austin's account of these terms shows how difficult it is to discriminate between them, when right and duty alike must consist in obedience to a rule, imposed at once and in the same terms upon the party who owns the right and upon the party who owes the duty. There is no escape from this difficulty, except by recognizing the independent origin of these conceptions, or at least the existence in them of certain elements by which right and duty are mutually differentiated, independent of any law or rule.

Every municipal law when first prescribed acts upon men already in existence, and having interests and passions by which their conduct is largely influenced. Whoever lives, lives not only for himself, but affects others by almost every action of his life, and in turn is affected by them. Each man has to deal with imperfect beings who often disobey the laws of God, and his own duty of obedience is affected in its practical consequences by that disobedience of others. If the wrong of one person does not exempt others from doing right themselves, still it often affects the question what is right under the circumstances, and especially their right to insist upon his obedience to moral law, or his duty to them. It has been remarked by philosophers that a single act of disobedience to the law may so complicate the moral problem in relation



very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the laws, and so far becomes a free-man;<sup>g</sup> though the master's right to his service may *possibly* still continue.\*

§ 171. (e) **Vicissitudes of English liberties.**—The absolute rights of every Englishman (which taken in a political and extensive sense, are usually called their liberties), as they are founded on nature and reason, so they are coeval with our form of government; though subject at times to fluctuate and change: their establishment (excellent as it is) being still human. At some times we have seen them depressed by overbearing and tyrannical princes; at others so luxuriant as even to tend to anarchy, a worse state than tyranny itself, as any government is better than none at all.

\* The first edition reads, "and with regard to all natural rights becomes forthwith a freeman." The second reads as now, except that *probably* stands in that and in the third, while all later read *possibly*.

<sup>g</sup> Salk. 666. See c. 14.

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to all acts consequent upon it, whether by the same person or by others, as to make it almost impossible of solution, even as a question of pure ethics. And if such questions cannot be solved in pure ethics, still less would it be possible to give them a practical solution by the cruder methods of practical law. Thus the only hope of a consistent and logical legal system must always be found in excluding carefully the confusion between law and ethics, and treating them as two distinct systems. This the law does by means of legal rights and duties, to be exercised by every free man in his own discretion, and in a strict moral responsibility to his own conscience. These rights and duties are only two distinct aspects of the same phenomena; that being a right to one person which he finds it for his interest to claim against another; a duty to that other which he is bound to exercise when claimed by the former. It is not easy to state any better criterion than this; the same act or series of acts may be a right in one aspect, and a duty in the other—a right against the state or a fellow-citizen, or a duty towards the state or another fellow-citizen. Whenever a person may exercise it or not, upon his own moral responsibility and even against the objection of others, it is clearly a right. Whenever the law will require him to exercise it at the request of the state, or of another citizen, without reference to his own discretion in the matter, it is as clearly a legal duty. Now, whether there are permissive laws in ethics or not, there must be many such in the municipal law. A large proportion of all the actions committed by a citizen from his birth to his death, even including many which seriously affect his neighbor for good or ill, are of



But the vigor of our free constitution has always delivered the nation from these embarrassments: and, as soon as the convulsions consequent on the struggle have been over, the balance of our rights and liberties has settled to its proper level; and their fundamental articles have been from time to time asserted in parliament, as often as they were thought to be in danger.

§ 172. (i) Charters of liberty.—First, by the great charter of liberties, which was obtained, sword in hand, from King John, and afterwards, with some alterations confirmed in parliament by King Henry the Third, his son. Which charter contained very few new grants; but as Sir Edward Coke<sup>b</sup> observes, was for the most part declaratory of the principal grounds of the fundamental [128] laws of England. Afterwards by the statute called *confirmatio cartarum* (a confirmation of the charters),<sup>1</sup> whereby the great

<sup>b</sup> 2 Inst. Præm.

<sup>1</sup> 25 Edw. I. (1297).

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a kind that the law will not interfere with. Upon these neither rights nor duties can be based, except so far as to consider them parts of his personal freedom, and thus impose on everyone else a duty not to interfere with them. A very large part of the law comes under this category. The law does not require such acts to be done. It leaves all ordinary motives of human existence to act unrestrained. There is no legal duty which requires a man to labor if he chooses to be idle, to earn money if he chooses to work for nothing, to accumulate property, to marry and have children, or even to live. The last may perhaps be disputed, since suicide is regarded as a crime in most systems of municipal law; but it is the act of suicide, not the mere termination of life, which is so treated, because it is a positive breach of public order; and at all events it is clear that no citizen has a right in another's life, of which suicide will be a legal violation.

As already said, the theory supposes every action to be commanded or forbidden, irrespective of the benefit or harm to the individual subject of the action thus regulated; and of course it follows that every such action must be right or wrong. There is no moral liberty here, no act of which it may be said that the individual can do it or not in his own discretion; neither is there any basis for moral character. The individual, guided at every step by an infallible rule, finds virtue to consist only in blind obedience to that rule. We see at once that this is not a representation of the actual rule, or of human nature. It entirely ignores that freedom of choice, of which every human being is conscious, and offers no opportunity for the virtues of consistency, temperance, resistance of temptation, or even of generosity and self-abnegation; to find a field for the growth of these virtues we must seek a foundation

charter is directed to be allowed as the common law; all judgments contrary to it are declared void; copies of it are ordered to be sent to all cathedral churches, and read twice a year to the people; and sentence of excommunication is directed to be as constantly denounced against all those that by word, deed, or counsel, act contrary thereto, or in any degree infringe it. Next by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two<sup>k</sup>), from the first Edward to Henry the Fourth. Then, after a long interval, by *the petition of right*; which was a parliamentary declaration of the liberties of the people, assented to by King Charles the First in the beginning of his reign. Which

<sup>k</sup> 2 Inst. Præm.

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for the conception of human rights. The very existence of such a right implies, as I have said already, the power of the individual to exercise it in his own discretion. In many cases he can do this without the interference of ethical law, as when a man determines the amount of money which he shall give in charity, and the selection of the person to whom it shall be given. In other cases it is subject to ethical law, as when a man decides whether he ought to enforce a contract to the very letter of the bond, even though it exact "a pound of flesh nearest the heart," or whether he shall give up a part of his claims or remit them altogether. His conduct in enforcing or in using his legal rights is in such cases a matter of conscience, for which he is responsible only to the monitor within or to his Creator. But the fact that a harsh exercise of the right may be ethically wrong has no bearing whatever upon its existence as a legal right. The landlord may require his rent, or may turn a tenant who cannot pay into the street; the creditor may enforce the last penny of payment by his debtor, equally when these acts are done in the interests of strictest justice, and when the only motive is selfish greed. The law cannot discriminate and refuse the enforcement of a right because it is enforced from wrong motives or for evil purposes, without denying it the character of a legal right. Hence the necessity of discriminating at the outset between ethics and law. If Blackstone were right in saying that ethics or natural law is a part of the municipal law, and that no human laws are of any validity if contrary to this (p. \*41), it would follow that no court could properly enforce a legal right demanded unless it were satisfied of the good motives and honest purposes of the persons who made it. Every legal right would then be liable to be thwarted by higher ethical requirements; and the bad man would have no legal rights against the good man. It is needless to remark how impossible it would be to carry a system of this kind into practice, with human instruments and judges. We have had experience enough, in history, of attempts to do this, made with the best intentions but producing intolerable tyranny, to spare more than this passing allusion. Neither is it necessary here to draw

was closely followed by the still more ample concessions made by that unhappy prince to his parliament, before the fatal rupture between them; and by the many salutary laws, particularly the *habeas corpus* act, passed under Charles the Second. To these succeeded the *Bill of Rights*, or declaration delivered by the lords and commons to the Prince and Princess of Orange, 13 February, 1688; and afterwards enacted in parliament, when they became king and queen: which declaration concludes in these remarkable words: "and they do claim, demand, and insist upon all and singular the premises, as their undoubted rights and liberties. And the act of parliament itself<sup>1</sup> recognizes all and singular the rights and liberties asserted and claimed in the said declaration to be the true,

<sup>1</sup> 1 W. & M. st. 2. c. 2 (Bill of Rights, 1689).

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an exact line between ethics and law, so as to show how far moral considerations may and should influence the decisions of the judge. That is a subject of great complexity which must be discussed by itself.

The present position of the man before the law may be stated thus: so far as its rules are expressly stated to him, and so far as they command or forbid him, he obeys them because he knows that a penalty will follow disobedience; he does not feel that these commands or prohibitions express the will of a divine power, even when they coincide exactly with such will. The divine command to do no murder, and the public law declaring that whoever shall commit murder shall be hung, are precisely of the same character and on the same subject, but they are not one and the same law. The one forbids a sin, the other a crime. Having broken the former his guilt is inexpiable; it cannot be avoided or its consequences prevented by any means except repentance and the forgiveness of the lawgiver. But in other cases the sanction of the state, that is to say, the taking of his life upon the gallows, does not by any means follow inevitably. It has certain appointed conditions, without performing which no court or officer of justice has the right to inflict it. The wrongdoer may lawfully insist that every one of these conditions shall be scrupulously performed before he can be taken to the gallows. His conscience does not require him to submit to the human penalty as it does to the divine.

But by far the largest part of all human laws do not command or forbid, they simply fix the consequences which will follow a given course of action. This they may do expressly, as when the law says that a will made with certain formalities shall be valid, and all others void; or more frequently they may do it by stating the action in the form of a right, or breach of a right, and leaving the consequences to be inferred from other rules of law; for example, water is not property, in the strictest sense of the word, and no man could be convicted of theft for taking a bucket of water from his neighbor's pond. Until recently it made no difference that the water was frozen in the form

ancient, and indubitable rights of the people of this kingdom." Lastly, these liberties were again asserted at the commencement of the present century in the *act of settlement* (1700),<sup>m</sup> whereby the crown was limited to his present majesty's illustrious house; and some new provisions were added, at the same fortunate era, for better securing our religion, laws and liberties; which the statute declares to be "the birthright of the people of England," according to the ancient doctrine of the common law.<sup>n</sup>

§ 173. (f) **Classification of personal rights.**—<sup>[129]</sup> Thus much for the *declaration* of our rights and liberties. The rights themselves, thus defined by these several statutes, consist in a number of private immunities; which will appear, from what has been

<sup>m</sup> 12 & 13 W. III. c. 2 (Act of Settlement, 1700).

<sup>n</sup> Plowd. 55.

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of ice; the mere conversion by natural processes into solid form did not change the legal character of the thing. But within a few years the great increase in the use of ice for various purposes, and the large amount of capital and labor employed in collection and storing it, has changed the popular conception of its nature, and rendered needful greater safeguards for it. A court declares that ice cut and stored is property, and the decision is accepted by other courts as an authoritative precedent. The result is not merely that in a precisely similar case the term "property" may be applied to ice; it is that all the manifold consequences which follow from the conception of property shall hereafter be applied to a subject to which they did not formerly belong. A state may tax ice, or in a case of necessity may take it for its own use, but only upon the same conditions with other property, that is, by compensating the owner for it. A private individual may not take it from him without incurring punishment for trespass or theft according to the circumstances of the case. He will also be liable to that owner for the value of the ice he has wrongfully taken. He may indeed buy it, and will be held to pay the price which he has promised for it. In other words, it will be a sufficient consideration for an *assumpsit*. It is needless to point out the many other rules of law which will follow from the rule making ice property. Now, what is the effect of this rule upon persons subject to the law? Does it command or forbid anything? And can we say that the subject will feel himself bound to do or not to do what he desires by this law? Possibly such an effect may be attributed to it so far as it forbids theft or even trespass. But the subject who is deterred from taking it by this can hardly be said to feel a moral obligation. He is much more likely to weigh the chances of being detected and punished, as he would other events that would make a proposed

premised, to be indeed no other than either that *residuum* (remainder) of natural liberty, which is not required by the laws of society to be sacrificed to public convenience: or else those civil privileges, which society hath engaged to provide, in lieu of the natural liberties so given up by individuals. These, therefore, were formerly, either by inheritance or purchase, the rights of all mankind; but, in most other countries of the world being now more or less debased and destroyed, they at present may be said to remain, in a peculiar and emphatical manner, the rights of the people of England. And these may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty, and the right of private property;<sup>6</sup> because as there is no other known method of compulsion, or of abridging man's natural free will, but by an infringement or diminution of one or

transaction profitable or unprofitable; it is the divine law forbidding theft as a sin which binds the conscience in human law. The human law merely points out the results which will follow from any act the party may do in respect to it, leaving him at liberty to do them or not in his own discretion. These results may be very various, some favorable, others unfavorable. They will determine his conduct only as other foreseen consequences of that conduct do determine it. A command or prohibition acts directly upon his will; the human law acts only upon his judgment and reason; or in other words, the command is a direct cause of the action taken under it; the law only supplies a motive by which his conduct may be influenced, provided other and stronger motives do not conflict with it.—HAMMOND.

<sup>6</sup> **Liberty of conscience.**—To the absolute rights enumerated by Blackstone should be added that of liberty of conscience, secured in all American states by constitutional provisions, although inconsistent with the existence of a church established by law, or claiming its divine right to control the actions of men. Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof, or the freedom of speech. (U. S. Const., First Amendt.; 2 Kent, Comm., 34-37; Story on Constitution, sec. 1879; Cooley's Const. Lim., c. 13, p. 467, etc.; Sedgwick's Const. and Stat. Construction, pp. 512-516.) Similar provisions in most state constitutions are collected by Cooley in note, page 468. New Hampshire seems to be the only state that still allows towns to tax for the support of public Protestant teachers of religion, but even there they cannot tax those of other sects for their support. (Const. of N. H., pt. 1, art. 6.)

Neither this addition, however, nor that of freedom of speech, usually treated in immediate connection with it in American books (Kent and Cooley, *supra*), make any essential change in Blackstone's enumeration of the absolute rights. Both are subdivisions of the absolute right of *liberty*, if not under Blackstone's



other of these important rights, the preservation of these, inviolate, may justly be said to include the preservation of our civil immunities in their largest and most extensive sense.

§ 174. (i) **Personal security.**—The right of personal security consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

§ 175. (aa) **Life.**—Life is the immediate gift of God, a right inherent by nature in every individual; and it begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise killeth it in her womb; or if anyone beat her, whereby the child dieth in her body, and she is delivered of a dead child; this, though not murder, was by the ancient law homicide or man-

definition of that word, yet in its true sense as denoting the civil liberty of free and civilized men. (See note 14, *post*, p. \*134.)—HAMMOND.

The remainder of Professor Hammond's note, justifying Blackstone's classification of rights into absolute and relative rights, is omitted. (1 Hammond's Black. 348.)

**Right of privacy.**—The right of privacy is one of those rights referred to by some law-writers as "absolute"—"such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it." 1 Bl. Comm. 123. Among the absolute rights referred to by the commentator just cited is the right of personal security and the right of personal liberty. In the first is embraced a person's right to a "legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; and in the second is embraced "the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint, unless by due course of law." 1 Bl. Comm. 129, 134.

While neither Sir William Blackstone nor any of the other writers on the principles of the common law have referred in terms to the right of privacy, the illustrations given by them as to what would be a violation of the absolute rights of individuals are not to be taken as exhaustive, but the language should be allowed to include any instance of a violation of such rights which is clearly within the true meaning and intent of the words used to declare the principle. When the law guarantees to one the right to the enjoyment of his life, it gives to him something more than the mere right to breathe and exist. While, of course, the most flagrant violation of this right would be deprivation of life, yet life itself may be spared, and the enjoyment of life entirely destroyed. An individual has a right to enjoy life in any way that may be most agreeable



slaughter.\* But \*Sir Edward Coke doth not look [130] upon this offense\* in quite so atrocious a light, but merely as a heinous misdemeanor.\*

An infant in *ventre sa mere*, or in the mother's womb, is supposed in law to be born for many purposes.<sup>7</sup> It is capable of having a legacy, or a surrender of a copyhold estate made to it. It may have a guardian assigned to it;<sup>a</sup> and it is enabled to have an estate limited to its use, and to take afterwards by such limitation,

\* First edition reads, "at present it is not looked upon." The second to eighth inclusive read as in the text. The ninth substitutes for the name of Coke, "the modern law."

o *Si aliquis mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortivam; si puerperium jam formatum fuerit, et maxime si fuerit animatum facit homicidium.* (If anyone strike a woman when pregnant, or administer poison to her, by which abortion shall ensue, if the child should be already formed, and especially if it be alive, that person is guilty of manslaughter.) Bracton. l. 3. c. 21.

p 3 Inst. 50.

q Stat. 12 Car. II. c. 24 (Military Tenures, 1660).

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and pleasant to him, according to his temperament and nature, provided that in such enjoyment he does not invade the rights of his neighbor, or violate public law or policy. (*Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 106 Am. St. Rep. 104, 2 Ann. Cas. 561, 69 L. R. A. 101, 50 S. E. 68, 70.)

7 **Child in ventre sa mere.**—"The mother of the deceased slipped upon a defect in a highway of the defendant town, fell, and has had a verdict for her damages. At the time, she was between four and five months advanced in pregnancy, the fall brought on a miscarriage, and the child, although not directly injured, unless by a communication of the shock to the mother, was too little advanced in fetal life to survive its premature birth. There was testimony, however, based upon observing motion in its limbs, that it did live for ten or fifteen minutes. Administration was taken out, and the administrator brought this action upon the Pub. Stats., c. 52, sec. 17, for the further benefit of the mother in part or in whole, as next of kin. The court below ruled that the action could not be maintained; and we are of opinion that the ruling was correct.

"The plaintiff founds his argument mainly on a statement by Lord Coke, which seems to have been accepted as law in England, to the effect that if a woman is quick with child, and takes a potion, or if a man beats her, and the child is born alive and dies of the potion or battery, this is murder. (3 Inst. 50; 1 Hawk. P. C., c. 31, sec. 16; 1 Bl. Comm. 129, 130; 4 Bl. Comm. 198; *Beale v. Beale*, 1 P. Wms. 244, 246; *Burdet v. Hopegood*, 1 P. Wms. 486; *Rex v. Senior*, 1 Moody C. C. 346; *Regina v. West*, 2 Car. & K. 784; S. C., 2 Cox

as if it were then actually born.<sup>r</sup> And in this point the civil law agrees with ours.<sup>s</sup>

§ 176. (bb) **Limbs.**—A man's limbs (by which for the present we only understand those members which may be useful to him in fight, and the loss of which alone amounts to mayhem by the common law) are also the gift of the wise Creator; to enable man to protect himself from external injuries in a state of nature. To these, therefore, he has a natural inherent right; and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

<sup>r</sup> Stat. 10 & 11 W. III. c. 16 (1698).

<sup>s</sup> *Qui in utero sunt, in jure civili intelliguntur in rerum natura esse, cum de eorum commodo agatur.* (Those who are in the womb, are considered by the civil law to exist in the nature of things, as they are capable of being benefited.) Ff. 1. 5. 26.

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C. C. 500.) We shall not consider how far Lord Coke's authority should be followed in this commonwealth, if the matter were left to the common law, beyond observing that it was opposed to the case in 3 Ass., pl. 2; S. C., Y. B. 1 Edw. III, 23, pl. 18; which seems not to have been doubted by Fitzherbert or Brooke, and which was afterwards cited as law by Lord Hale. (Fitz. Abr., Enditement, pl. 4; Corone, pl. 146; Bro. Abr. Corone, pl. 68; 1 Hale P. C. 433.)

"For, even if Lord Coke's statement were the law of this commonwealth, the question would remain whether the analogy could be relied on for determining the rule of civil liability. Some ancient books seem to have allowed the mother an appeal for the loss of her child by a trespass upon her person. (Abbrev. Plac. 26, col. 2 (2 Joh.) Lincoln, rot. 3; Fleta, I, c. 35, sec. 3, and Sir Samuel Clarke's note, citing 45 H. III, rot. 22.) Which again others denied. (1 Britton (Nichols' ed.), 114. See Abbrev. Plac. 295, col. 2 (29 Edw. I), Norht. rot. 43; Kelham's Britton, 152, n. 14.) But no case, so far as we know, has ever decided that, if the infant survived, it could maintain an action for injuries received by it while in its mother's womb. Yet that is the test of the principle relied on by the plaintiff, who can hardly avoid contending that a pretty large field of litigation has been left unexplored until the present moment.

"If it should be argued that an action could be maintained in the case supposed, and that, on general principles, an injury transmitted from the actor to a person through his own organic substance, or through his mother, before he became a person, stands on the same footing as an injury transmitted to an existing person through other intervening substances outside him, the argument in this general form is not helped, but hindered, by the analogy drawn from Lord Coke's statement of the criminal law. For, apart from the question

§ 177. (cc) **Self-defense.**—Both the life and limbs of a man are of such high value, in the estimation of the law of England, that it pardons even homicide if committed *se defendendo* (in self-defense), or in order to preserve them. For whatever is done by a man, to save either life or member, is looked upon as done upon the highest necessity and compulsion. Therefore, if a man through fear of death or mayhem is prevailed upon to execute a deed, or do any other legal act; these, though accompanied with all other the requisite solemnities, may be afterwards avoided, if forced upon him by a well-grounded apprehension of losing his life, or even his limbs, in case of his noncompliance.<sup>†</sup> And the same is also a sufficient excuse for the commission of many misdemeanors, as will appear in the fourth book.

<sup>†</sup> 2 Inst. 483.

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of remoteness, the argument would not be affected by the degree of maturity reached by the embryo at the moment of the organic lesion or wrongful act. Whereas Lord Coke's rule requires that the woman be quick with child, which, as this court has decided, means more than pregnant, and requires that the child shall have reached some degree of *quasi* independent life at the moment of the act. (*Commonwealth v. Parker*, 9 Met. 263, 43 Am. Dec. 396; *State v. Cooper*, 22 N. J. L. 52, 51 Am. Dec. 248.)

"For the same reason, this limitation of criminal liability is equally inconsistent with any argument drawn from the rule as to devises and vouching to warranty, which is laid down without any such limitation, and which may depend on different considerations. (*Co. Litt.* 390a, and cases cited; *Reeve v. Long*, 1 Salk. 227; *Scatterwood v. Edge*, 1 Salk. 229; *Harper v. Archer*, 4 Sm. & M. 99, 43 Am. Dec. 472.)

"If these general difficulties could be got over, and if we should assume, irrespective of precedent, that a man might owe a civil duty and incur a conditional prospective liability in tort to one not yet in being, and if we should assume also that causing an infant to be born prematurely stands on the same footing as wounding or poisoning, we should then be confronted by the question raised by the defendant, whether an infant dying before it was able to live separated from its mother could be said to have become a person recognized by the law as capable of having a *locus standi* in court, or of being represented there by an administrator. (*Marsellis v. Thalheimer*, 2 Paige (N. Y.), 35, 21 Am. Dec. 66; *Harper v. Archer*, *ubi supra*; 4 Kent, Comm., 249 n. (b).) And this question would not be disposed of by citing those cases where equity has recognized the infant provisionally while still alive *en ventre*. (*Lutterel's Case*, stated in *Hale v. Hale*, Prec. Ch. 50; *Wallis v. Hodson*, 2 Atk. 114, 117. See *Musgrave v. Parry*, 2 Vern. 710.) And perhaps not by showing that such

§ 178. (dd) **Duress.**—The constraint a man is under in these circumstances is called in law *duress*, from the Latin *durities*, of which there are two <sup>[131]</sup> sorts; duress of imprisonment, where a man actually loses his liberty, of which we shall presently speak; and duress *per minas* (by threats), where the hardship is only threatened and impending, which is that we are now discoursing of.<sup>8</sup> Duress *per minas* is either for fear of loss of life, or else for fear of mayhem, or loss of limb. And this fear must be upon sufficient reason; \* “*non*,” as Bracton expresses it, “*suspicio cujuslibet vani et meticulosi hominis, sed talis qui possit cadere in virum constantem; talis enim debet esse metus, qui in se contineat vitæ periculum, aut corporis cruciatum* (it must not be the apprehension of a foolish and fearful man, but such as a courageous man may be susceptible of; it should be, for instance, such a fear as consists in an apprehension of bodily pain, or danger to life).<sup>u</sup>” A fear

\* Cited, 10 N. H. 497; 1 Heisk. 103; 46 Miss. 567. These cases criticise B.’s limitation of duress *per minas* to threats of life or limbs, and hold threat of imprisonment included. See *Robinson v. Gould*, 1 Cush. 67.

<sup>u</sup> 1. 2. c. 5.

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an infant was within the protection of the criminal law. (Compare 2 Savigny, *System des Heutiger Römischen Rechts*, Beylage III.)

“The Pub. Stats., c. 207, sec. 9 (Stats. 1845, c. 27, seemingly suggested by *Commonwealth v. Parker*, *ubi supra*), punish unlawful attempts to procure miscarriage, acts which, of course, have the death of the child for their immediate object; and, while they greatly increase the severity of the punishment if the woman dies in consequence of the attempt, they make no corresponding distinction if the child dies, even after leaving the womb. This statute seems to us to shake the foundation of the argument drawn from the criminal law, and no other occurs to us which has not been dealt with.

“Taking all the foregoing considerations into account, and further, that, as the unborn child was a part of the mother at the time of the injury, any damage to it which was not too remote to be recovered for at all was recoverable by her, we think it clear that the statute sued upon does not embrace the plaintiff’s intestate within its meaning.”—HOLMES, J., in *Dietrich v. Northampton*, 138 Mass. 14, 52 Am. Rep. 242.

<sup>8</sup> **Defense of duress.**—The general rule, that the misconduct of the obligee in procuring or enforcing a specialty obligation was no bar at common law to an action upon the instrument, was subject to one exception. As far back as Bracton’s time, at least, one who had duly signed and sealed an obligation, and who could not therefore plead *non est factum*, might still defeat an action by pleading affirmatively that he was induced to execute the specialty by duress

of battery, or being beaten, though never so well grounded, is no duress; neither is the fear of having one's house burned, or one's goods taken away and destroyed;<sup>9</sup> because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages;<sup>w</sup> but no suitable atonement can be made for the loss of life, or limb. And the indulgence shown to a man under this, the principal, sort of duress, the fear of losing his life or limbs, agrees also with that maxim of the civil law: *ignoscitur ei qui sanguinem suum qualiter qualiter redemptum voluit* (he is justified who has acted in pure defense of his own life or limb).<sup>x</sup>

The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessities of life from the more opulent part of the community,

<sup>w</sup> 2 Inst. 483.

<sup>x</sup> Ff. 48. 21. 1.

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practiced upon him by the plaintiff. The Roman law was more consistent than the English law in this respect. For, by the *jus civile*, duress, like fraud, was no answer to a claim upon a formal contract. All defenses based upon the conduct of the obligee were later innovations of the prætor, and were known as *exceptiones prætorix*, or as we should say, equitable defenses.

It is quite possible that the anomalous allowance of the defense of duress at common law may be due to some forgotten statute. But whatever its origin, the defense of duress does not differ in its nature from the defense of fraud. As Mr. Justice Holmes well says: "The ground upon which a contract is voidable for duress is the same as in the case for fraud; and is that, whether it springs from a fear or from a belief, the party has been subjected to an improper motive for action." Duress was, therefore, never regarded as negating the legal execution of the obligation. "The deed took effect, and the duty accrued to the party, although it were by duress and afterwards voidable by plea." The defense is strictly personal, and not real; that is, it is effective, like all equitable defenses, only against the wrongdoer, or one in privity with him. Duress by a stranger cannot, therefore, be successfully pleaded in bar of an action by an innocent obligee; and duress by the payee upon the maker of a negotiable note will not affect the rights of a subsequent *bona fide* holder for value.—AMES, Lect. on Leg. Hist. 113.

<sup>9</sup> **Duress of goods.**—This is still true as to duress for the commission of misdemeanors. But the same term is now commonly used, at least in this country, in the form of duress of goods or of property, to avoid the execution of deeds or contracts, or to recover back property or money unjustly obtained. Where a public officer refuses to deliver goods in his custody, or do an official



by means of the several statutes enacted for the relief of the poor, of which in their proper places. A humane provision; yet, though dictated by the principles of society, discountenanced by the Roman laws. For the edicts of the Emperor Constantine commanding the public to maintain the children of those who were unable to provide for them, in order to prevent the murder and exposure of infants, an institution founded on the same principle as our founding hospitals, though comprised in the Theodosian code,<sup>9</sup> were rejected in Justinian's collection.

§ 179. (ee) Civil death.—<sup>[132]</sup> These rights, of life and member, can only be determined by the death of the person; which is either a civil or natural death.<sup>10</sup> The civil death commences, if

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act without exacting illegal fees or other charges, and thus secures their payment, such payment will not be regarded as voluntary, but as extorted by duress, and the party may recover the sum back. It has been held that a protest at the time of payment is not absolutely necessary, though it is better to make one. (*Meek v. McClure*, 49 Cal. 624. And see cases collected in note, 54 Am. Dec. 162.)

The American doctrine that duress of goods will avoid a contract was first stated in *Sasportas v. Jennings*, 1 Bay, 470, and *Collins v. Westbury*, 2 Bay, 211, 1 Am. Dec. 643; following *Astley v. Reynolds*, 2 Strange, 915. Later cases are *Miller v. Miller*, 68 Pa. St. 486; *Spaids v. Barrett*, 57 Ill. 289, 11 Am. Rep. 10; *McKee v. Campbell*, 27 Mich. 497. Mr. Broom thinks that the American cases go further than the English ones. (See Broom's Comm., pp. 614, 615, and cases cited.) For the American rule see 2 Kent, Comm., p. 453, and notes c. and 2. Also Sharswood's note 12 to this passage. In *Collins v. Westbury* (1799), 2 Bay, 211, 1 Am. Dec. 643, it was held that "duress of goods will avoid a contract, where an unjust and unreasonable advantage is taken of a man's necessities, by getting his goods into his possession, and there is no other speedy means left of getting them back again but by giving a note or bond, or where a man's necessities may be so great as not to admit of the ordinary process of law." (Citing *Sasportas v. Jennings*, 1 Bay, 470, and *Ashley v. Reynolds*, 2 Strange, 916.) In *Elliott v. Swartwout* (1836), 10 Pet. 137, 156, 9 L. Ed. 373, it was settled that a payment, made as the only means of getting possession of the party's goods, illegally detained, e. g., a payment of illegal duties or charges to a collector, is not a voluntary payment, and an action will lie to recover it back.—HAMMOND.

<sup>10</sup> Civil death.—Civil death is unknown in this country. Neither a religious profession of any kind nor conviction of crime can take away the rights,



any man be banished the realm<sup>z</sup> by the process of the common law, or enters into religion; that is, goes into a monastery, and becomes there a monk professed: in which cases he is absolutely dead in law, and his next heir shall have his estate. For, such banished man is entirely cut off from society; and such a monk, upon his profession, renounces solemnly all secular concerns: and besides, as the popish clergy claimed an exemption from the duties of civil life and the commands of the temporal magistrate, the genius of the English laws would not suffer those persons to enjoy the benefits of society, who secluded themselves from it, and refused to submit to its regulations.<sup>a</sup> A monk was therefore accounted *civiliter mortuus* (dead in law), and when he entered into religion might, like other dying men, make his testament and executors; or, if he made none, the ordinary might grant administration to his next of kin,

<sup>z</sup> Co. Litt. 133.

<sup>a</sup> This was also a rule in the feudal law, l. 2. t. 21, *desiit esse miles seculi, qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium*. (He who becomes a soldier of Christ hath ceased to be a soldier of the world, nor is he entitled to any reward who acknowledges no duty.)

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which are inalienably vested in every human being so long as his natural life continues. Even complete idiocy, though preventing the exercise of many rights, does not prevent their existence. The idiot has the same right of security of person and of liberty, except so far as this may be restrained in his own interest or that of the community by lawful means, and of property. He may inherit land, or take as next of kin under the statute of distributions, and although a guardian or committee may be necessary for the care of his property, the title to it will be vested in himself. The nearest approach to a civil death known to our law is the condition of a criminal sentenced to imprisonment for life, and actually in confinement. In most of the states, it is provided by statute that his estate may be administered on as if he were dead (e. g., Mo. Rev. Stats. sec. 6543), and his wife may marry again. But even in this case these consequences would hardly be considered to result at common law.—HAMMOND.

Civil death may still take effect in England on outlawry, which, in criminal proceedings, is still a possible, though rare event; but outlawry on civil process has also now been abolished by the Civil Procedure Acts Repeal Act, 1879.—STEPHEN, 1 Comm. (16th ed.), 87.

In the United States, life imprisonment is said, in some jurisdictions, not to carry with it civil death. *Willingham v. King*, 23 Fla. 478, 2 South. 851; *Presbury v. Hull*, 34 Mo. 29; *Frazer v. Fulcher*, 17 Ohio, 260; *Davis v. Laning*, 85 Tex. 39, 84 Am. St. Rep. 784, 18 L. R. A. 82, 19 S. W. 846; while in other

as if he were actually dead intestate. And such executors and administrators had the same power, and might bring the same actions for debts due *to* the religious, and were liable to the same actions for those due *from* him, as if he were naturally deceased.<sup>b</sup> Nay, so far has this principle been carried, that when one was bound in a bond to an abbot and his successors, and afterwards made his executors and professed himself a monk of the same abbey, and in process of time was himself made abbot thereof; here the law gave him, in the capacity of abbot, an action of debt against his own executors to recover the money due.<sup>c</sup> In short, a monk or religious was so effectually dead in law, that a lease made even to a third person, during the life (generally) of one who afterwards became a monk, determined by such his entry into religion: for which reason leases, and other conveyances for life, are usually made to have and to hold for the term of one's *natural* life.<sup>d</sup> \*But, [133] even in the times of popery, the law of England took no cognizance of *profession* in any foreign country, because the fact could not be tried in our courts;<sup>e</sup> and therefore, since the Reformation, the disability is held to be abolished.<sup>f</sup> \*

§ 180. (ff) **Forfeiture of life.**—This natural life being, as was before observed, the immediate donation of the great Creator, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow-creatures,

\* Added in second edition. The ninth reads also, "This disability is held to be abolished, as is also the disability of banishment consequent upon abjuration, by Stat. 21 Jac. I. c. 28 (Continuation of Statutes, 1623)."

<sup>b</sup> Litt. § 200.

<sup>c</sup> Co. Litt. 133.

<sup>d</sup> 2 Rep. 48. Co. Litt. 132.

<sup>e</sup> Co. Litt. 132.

<sup>f</sup> 1 Salk. 162.

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jurisdictions one sentenced for life is held to be civilly dead. In *re Nerac*, 35 Cal. 392, 95 Am. Dec. 111; *Estate of Donnelly*, 125 Cal. 417, 73 Am. St. Rep. 62, 58 Pac. 61; *Coffee v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482; *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415; *Town of Baltimore v. Town of Chester*, 53 Vt. 315, 38 Am. Rep. 677. The California Penal Code, section 674, provides: "A person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead."

merely upon their own authority. Yet nevertheless it may, by the Divine permission, be frequently forfeited for the breach of those laws of society, which are enforced by the sanction of capital punishments; of the nature, restrictions, expedience, and legality of which we may hereafter more conveniently inquire in the concluding book of these Commentaries. At present, I shall only observe, that whenever the *constitution* of a state vests in any man, or body of men, a power of destroying at pleasure, without the direction of laws, the lives or members of the subjects such constitution is in the highest degree tyrannical: and that whenever any *laws* direct such destruction for light and trivial causes, such laws are likewise tyrannical, though in an inferior degree; because here the subject is aware of the danger he is exposed to, and may by prudent caution provide against it.

§ 181. (gg) **Due process of law.**—The statute law of England does, therefore, very seldom, and the common law does never inflict any punishment extending to life or limb, unless upon the highest necessity:<sup>11</sup> and the constitution is an utter stranger to any arbitrary power of killing or maiming the subject without the express warrant of law. “*Nullus liber homo*,” says the great charter,<sup>g</sup> “*aliquo modo destruat, nisi per legale iudicium parium suorum aut per legem terræ* (no freeman shall be deprived of life but by the lawful judgment of his peers, or by the law of the land).” Which words, “*aliquo modo destruat*,” according to Sir Edward Coke,<sup>h</sup> include a prohibition not only of *killing*, and *maiming*, but also of *torturing*<sup>12</sup> (to which our laws are strangers), and of every oppression by color of an illegal authority. And it is enacted by

<sup>g</sup> C. 29.

<sup>h</sup> 2 Inst. 48.

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<sup>11</sup> Judge Cooley (1 Cooley's Blackstone (4th ed.), 133 n.) says: “The student who reads this a century after the time when it was written, is not likely to agree with the author respecting the humanity of the law of England, for the criminal code then in force has been wholly remodeled since that time on the express ground that its penalties were so extremely barbarous and cruel as to fail of their intended effect as restraints upon crime.”

<sup>12</sup> Edward Jenks, Esq. (1 Stephen's Comm. (16th ed.), 88 n.) says: “As a matter of fact Coke does not, in this passage, speak of torture; but Blackstone's gloss is permissible.”

the statute 5 Edw. III, c. 9 (Confirmation of Great Charter, 1331), that no man shall be forejudged of life or limb, contrary to the great charter and the <sup>[134]</sup> law of the land: and again, by statute 28 Edw. III, c. 3 (Right of Trial, 1354), that no man shall be put to death without being brought to answer by due process of law.

§ 182. (hh) **Bodily immunity.**—Besides those limbs and members that may be necessary to a man, in order to defend himself or annoy his enemy, the rest of his person or body is also entitled by the same natural right, to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.

§ 183. (ii) **Preservation of health.**—The preservation of a man's health from such practices as may prejudice or annoy it, and

§ 184. (jj) **Security of reputation.**—The security of his reputation or good name from the arts of detraction and slander, are rights to which every man is entitled, by reason and natural justice; since without these it is impossible to have the perfect enjoyment of any other advantage or right. But these three last articles (being of much less importance than those which have gone before, and those which are yet to come), it will suffice to have barely mentioned among the rights of persons: referring the more minute discussion of their several branches to those parts of our Commentaries which treat of the infringement of these rights, under the head of personal wrongs.

§ 185. (ii) **Personal liberty.**—Next to personal security the law of England regards, asserts, and preserves the personal liberty of individuals.<sup>13</sup> This personal liberty consists in the power of

<sup>13</sup> In construing a statute forbidding, under penalty, any person from associating with persons having the reputation of being thieves, gamblers or other disreputable characters, the court says: "If the legislature may dictate who our associates may be, then what becomes of the constitutional protection to personal liberty, which Blackstone says 'consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law'?" (1 Bl. Comm. 134.) Obviously, there is no difference in point of

locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law.<sup>14</sup> Concerning which we may make the same observations as upon the preceding article: that it is a right strictly natural; that the laws of England have never abridged it without sufficient cause; and that in this kingdom it cannot ever be abridged at the mere discretion of the magistrate, without the explicit permission of the laws.

legal principle between a legislative or municipal act which forbids certain associations and one which commands certain associations." (Ex parte Smith (1896), 135 Mo. 223, 58 Am. St. Rep. 576, 33 L. R. A. 606, 36 S. W. 628, 629.)

<sup>14</sup> **Definition of civil liberty.**—No one can help feeling that this is a very jejune and imperfect definition of the right of liberty. Blackstone himself in another page (1 Comm. \*6) says that, rightly understood, this liberty consists in the power of doing whatever the laws permit, and that political or civil liberty is the very end or scope of the constitution. His distinction of natural and civil liberty is more fully stated on pages \*125 and \*126, where it appears that "natural liberty is the power of acting as one thinks fit, without any restraint or control, unless by the law of nature, being a right inherent in us by birth; while civil liberty is natural liberty so far restrained by human laws as is necessary and expedient for the general advantage of the public (p. \*126). To these definitions there is more than one objection. The notion of natural liberty implies that state of nature in which every individual ran wild, unrestrained by any law, and followed only his own caprice in doing as he pleased. The introduction of law, it is supposed, must limit this; since there are some things in every system of law that are forbidden, and in the theory of law which usually goes with these definitions, the law consists entirely of prohibitions or limits upon natural liberty. This theory, too, is evidently assumed in Blackstone's doctrine of *mala in se* and *mala prohibita*, according to which the entire object of the law is to forbid things which are regarded as *mala*. It follows that civil liberty has no meaning in itself, but only expresses the balance or residue of natural liberty which the laws have left to the individual; and this probably is implied in the definition quoted by Blackstone from the civilians through Bracton, that liberty is the power of doing whatsoever one pleases, unless prohibited by violence or by law. The two conceptions, of law as essentially negative and prohibitory, and of liberty as limited by it, belong together and are both of great antiquity.

But are they true? Is not the conception of a natural liberty to do every conceivable thing which the hand of man findeth to do, or which it entereth into his heart to conceive, as pure a fiction as the state of nature? According to this the freest man in the world is the shipwrecked solitary upon his desert isle, or the digger Indian ruling his own family, with no laws to restrain his own actions. To say that these men are free to do everything that they



§ 186. (aa) **Law of the land.**—Here again the language of the great <sup>[135]</sup> charter<sup>1</sup> is, that no freeman shall be taken or imprisoned, but by the lawful judgment of his equals, or by the law of the land. And many subsequent old statutes<sup>1</sup> expressly direct, that no man shall be taken or imprisoned by suggestion or petition to the king or his council, unless it be by legal indictment, or the

<sup>1</sup> C. 29.

<sup>1</sup> 5 Edw. III. c. 9 (Confirmation of Great Charter, 1331). 25 Edw. III. st. 5. c. 4 (Confirmation of Great Charter, 1351). 28 Edw. III. c. 3 (Right of Trial, 1354).

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please, or that the citizen of a civilized republic has less freedom than they, is a palpable absurdity, though it results logically from the notion of law as essentially a restraint. Both conceptions belong to the system imagined by the philosophers of the seventeenth and eighteenth century, of a primitive state of nature, in which man lived in a condition lower than domestic animals for the lack of all social life, but at the same time possessed all the moral and intellectual qualities, and all the aspirations and purposes of the highest civilization. But no one who takes any view of humanity possible to an intelligent man to-day can believe this; no one who has risen to the view of all law as a principle of order, rather than a mere collection of arbitrary rules imposed by superiors, can fail to see that it has been a great positive force constantly increasing man's powers rather than limiting them, extending his dominion over nature, and creating the organizations by virtue of which the civilized man possesses rights undreamed of by the savage. Even the ancient Roman jurists, so much less favorably placed than we are to recognize this truth, perceived it when they declared that the lowest and most primitive form of power over one's fellow-men, that is, slavery, was an institution of the *jus gentium* and not of the *jus naturale*. However much we may detest slavery, history shows it to have been one of the earliest forms of order, one of the processes by which man has been enabled to conquer the earth. It was the first form in which the distinction of civil liberty from natural made its appearance, so that Bracton's objection to the classic definition (*ante*, page \*40) may after all have been ill-taken. Even the relation of master and slave may have been an advance upon the primitive isolation of each man, and a step toward the civil liberty of to-day: at all events, we can see this advance by the aid of law in its abolition, or rather in the steps by which men have been enabled to dispense with it. A recent writer has shown with great acuteness that money has been the chief means by which labor has been organized and rendered effective for the purposes of society without the rude expedient of reducing the laborer to slavery. But money is the creation of law, even in its most primitive forms, still more so in those great developments which make commerce, finance, taxation, and all that taxation supports, possible. How greatly this has increased the power and therefore the liberty of the individual



process of the common law. By the petition of right, 3 Car. I (1627), it is enacted, that no freeman shall be imprisoned or detained without cause shown, to which he may make answer according to law.

§ 187. (bb) *Habeas corpus*.—By 16 Car. I, c. 10 (Star-Chamber, 1640), if any person be restrained of his liberty by order or decree of any illegal court, or by command of the king's majesty

hardly needs to be stated. The liberty of the savage extends, at the furthest, only so far as he can personally go. The liberty of the civilized man extends as far as he can make his personal will felt by the means which the law furnishes. When the American merchant, writing his name upon a slip of paper, can cause the Bank of England to give directions to its correspondents in China and India, the results of which will be to set hundreds of Asiatic laborers at work for a man they never saw or heard of, that the products of the antipodes may be sent him and placed at his disposal, he is exercising powers which are the direct gift of law, and which would be paralyzed in a minute in any portion of the entire circuit of the world, if law were not present to sustain it. But it needs no argument to show that the civilized man's liberty is measured by the power he may exert over his fellow-men and physical nature. To say that the savage may do these things, or that his natural liberty extends to all of them, is as pure a fiction as to make it include all physical impossibilities. Such impossibilities are excluded alike from human liberty and from human law.

There is therefore no inconsistency in defining civil liberty as distinct from natural liberty, and in saying that the former by the aid of law is more extensive than the latter. The law is not merely a restraint or shackle upon man's freedom; the more perfect it becomes, the wider is the liberty of action which it creates for every free man. "It consists not in a right to every man to do just as he pleases, but in equal right to all citizens to have, enjoy, and do in peace, security, and without molestation whatever the laws of the country admit to be consistent with the public good." (Chief Justice Jay in his first charge to the New York grand jury, April 4, 1790, as quoted by Flanders, "Lives of the Chief Justices," 1884.)

Closely connected with this is the question whether law is essentially a system of rights, or of prohibitions and safeguards against wrong. It has frequently been said by Bentham and his followers that the classification of law should be based on wrongs, not on rights, as it usually has been. "The fundamental idea, the idea which serves to explain all the others, is that of an offense. It is only by creating offenses, that is to say, by erecting certain actions into offenses, that the law confers rights. If it confer a right it is by giving the quality of offenses to the different actions by which the enjoyment of this right might be interrupted or opposed. The division of rights

in person, or by warrant of the council board, or of any of the privy council; he shall, upon demand of his council, have a writ of *habeas corpus*, to bring his body before the court of king's bench or common pleas; who shall determine whether the cause of his commitment be just, and thereupon do as to justice shall appertain. And by 31 Car. II, c. 2 (1679), commonly called the *habeas corpus act*, the methods of obtaining this writ are so plainly pointed out and enforced, that, so long as this statute remains unimpeached no subject of England can be long detained in prison, except in

ought therefore to correspond with the division of offenses." (Bentham, *View of a Complete Code of Laws*, c. 2; Works, vol. 3, p. 159.)

This implies the view of laws common to Bentham and Blackstone, composed entirely of restraints on natural liberty. Freedom consists in the power of doing anything at random without the slightest check or determination to one course rather than another, and law only takes away a certain number of the possible acts that are comprehended in this natural liberty, or as Bentham says, "erects them into offenses." Rights are the residuum of unforbidden acts, with perhaps a connotation of some benefit resulting or expected to result to the actor. "To assure to individuals the possession of a certain good is to confer a right upon them." But "the distinction between rights and offenses is therefore strictly verbal; there is no difference in the ideas. It is not possible to form the idea of a right without forming the idea of an offense."

Now, it is questionable whether the idea of a right is so completely dependent on that of an offense. I am willing to admit that such has been the origin of many of our rights, e. g., such as have grown up in equity from the use of certain remedies for wrongs. But a right is not necessarily a negative idea. Such rights as property, the right of a husband or father, have their basis in certain acts which would take place and be the subject of regulation even though never infringed. This is shown by the fact that the offenses corresponding to them have never been exhaustively defined or imagined. New offenses against property and other rights make their appearance even now, and are instantly recognized as offenses, which they could not be if men had no idea of the right except one formed from the offenses against it. The idea of government is at least as positive and definite as that of rebellion or treason; so of property and larceny, embezzlement, etc. And it may be questioned whether Blackstone has not mistaken the chronological for the logical sequence. Wrongs no doubt first attracted attention; but the very idea of a wrong or offense presupposed that of a right, while the converse can hardly be said. Therefore, it seems to be that right should still be the basis of classification even on Blackstone's own theory. But the argument is much stronger if we form a just conception of law (*jus*) as a science of right, directive, positive, not negative in its precepts, guiding the will, not merely thwarting and repressing it.—HAMMOND.

those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail, or sureties for the prisoner's appearance, it is declared by 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), that excessive bail ought not to be required.<sup>15</sup>

§ 188. (cc) **Suspension of writ of habeas corpus.**—Of great importance to the public is the preservation of this personal liberty: for if once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper (as in France it is daily practiced by the crown<sup>k</sup>), there would soon be an end of all other rights and immunities. Some have thought that unjust attacks, even upon life, or property, at the arbitrary will of the magistrate, <sup>[136]</sup> are less dangerous to the commonwealth, than such as are made upon the personal liberty of the subject. To bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny throughout the whole kingdom. But confinement of the person, by secretly hurrying him to jail, where his sufferings are unknown or forgotten, is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. And yet sometimes, when the state is in real danger, even this may be a necessary measure. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the

<sup>k</sup> I have been assured upon good authority, that, during the mild administration of Cardinal Fleury, above 54,000 *lettres de cachet* were issued, upon the single ground of the famous bull *unigenitus* (the only-begotten). (This note k was first added in fourth edition.) [*Lettre de cachet*, in French history, a letter or order under seal; a private letter of state: a name given especially to a written order proceeding from and signed by the king, and countersigned by the secretary of state, and used at first as an occasional means of delaying the course of justice, but later, in the seventeenth and eighteenth centuries, as a warrant for the imprisonment without trial of a person obnoxious for any reason to the government, often for life or for a long period, and on frivolous pretexts. *Lettres de cachet* were abolished at the Revolution. Century Dict.]

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<sup>15</sup> Further provisions for facilitating the procurement of bail have been made by the Indictable Offenses Act, 1848, and the Bail Act, 1898.

state is so great, as to render this measure expedient. For the parliament only, or legislative power, whenever it sees proper, can authorize the crown, by suspending the *habeas corpus* act for a short and limited time, to imprison suspected persons without giving any reason for so doing. As the senate of Rome was wont to have recourse to a dictator, a magistrate of absolute authority, when they judged the republic in any imminent danger. The decree of the senate, which usually preceded the nomination of this magistrate, "*dent operam consules, ne quid respublica detrimenti capiat* (let the consuls provide that the commonwealth receive no injury)," was called the *senatus consultum ultimæ necessitatis* (the decree of the senate of extreme emergency). In like manner this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever.

§ 189. (dd) False imprisonment.—The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment.<sup>1</sup> And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment*, which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like; he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, [137] and either to procure his discharge, or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it.<sup>m</sup> To make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*. If there be no cause expressed, the jailer is not bound to detain the prisoner.<sup>n</sup> For the law judges in this respect, saith Sir Edward Coke, like Festus the Roman governor,

<sup>1</sup> 2 Inst. 589.

<sup>n</sup> *Ibid.* 52, 53.

<sup>m</sup> 2 Inst. 482.

that it is unreasonable to send a prisoner, and not to signify withal the crimes alleged against him.

§ 190. (ee) **Banishment.**—A natural and regular consequence of this personal liberty is, that every Englishman may claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law. The king indeed, by his royal prerogative, may issue out his writ *ne exeat regnum* (let him not leave the kingdom), and prohibit any of his subjects from going into foreign parts without license.<sup>o</sup> This may be necessary for the public service and safeguard of the commonwealth.<sup>16</sup> But no power on earth, except the authority of parliament, can send any subject of England *out of* the land against his will; no, not even a criminal. For exile, or transportation is a punishment unknown to the common law; and, whenever it is now inflicted, it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament.<sup>17</sup> To this purpose the great charter<sup>p</sup> declares, that no freeman shall be banished, unless by the judgment of his peers, or by the law of

<sup>o</sup> F. N. B. 85.

<sup>p</sup> C. 29.

<sup>16</sup> Practically, the writ *ne exeat regno* is now only issued in cases falling under sections 4 and 6 of the Debtors' Act, 1869 (32 & 33 Vict., c. 62). *Colverson v. Bloomfield* (1885), 29 Ch. D. 341.—STEPHEN, 1 Comm. (16th ed.), 91 n.

<sup>17</sup> **Transportation, extradition, deportation, exile.**—Is extradition, then, an innovation upon the common law? Lord Coke says so in 2 Inst. 46, 47. (See criticism in Wynne's *Eunomus* Dial. 3, p. 167.) Wharton, *Private International Law*, thinks that the surrender of their own subjects for trial abroad by England and the United States is an exception to the rule of other nations, and attributes it to the (supposed) rule of the common law, refusing all jurisdiction of extraterritorial offenses. Story on *Conflict of Laws*, sections 626–628, and Wheaton on *International Law*, section 115, make no distinction between surrender of citizens and foreigners. In *Reg. v. Wilson*, 3 Q. B. D. 42, and In *re Dubois*, Law R., 2 Ch. 47, the refusal to surrender an English subject is put expressly on an exception to that effect in the treaty. (Cf. *dictum* of Heath, J., in *Mure v. Kaye*, 4 Taunt. 34; In *re Washburn*, 4 Johns. Ch. (N. Y.) 106, 8 Am. Dec. 548; *Commonwealth v. Deacon* 10 Serg. & R. (Pa.) 125; *Ex parte Reggel*, 114 U. S. 642, 29 L. Ed. 250.) That a state government cannot and should not surrender to a foreign state, see *Homes v. Jennison*, 14 Pet.



the land. And by the *habeas corpus* act, 31 Car. II, c. 2 (1679), (that second *magna carta*, and stable bulwark of our liberties), it is enacted, that no subject of this realm, who is an inhabitant of England, Wales, or Berwick, shall be sent prisoner into Scotland, Ireland, Jersey, Guernsey, or places beyond the seas (where [138] they cannot have the benefit and protection of the common law); but that all such imprisonments shall be illegal; that the person, who shall dare to commit another contrary to this law, shall be disabled from bearing any office, shall incur the penalty of a *præmunire* (to forewarn), and be incapable of receiving the king's pardon: and the party suffering shall also have his private action against the person committing, and all his aiders, advisers and abettors, and shall recover treble costs; besides his damages, which no jury shall assess at less than five hundred pounds.

The law is in this respect so benignly and liberally construed for the benefit of the subject, that, though *within* the realm the king

540, 10 L. Ed. 579 (court divided), and *Kentucky v. Dennison*, 24 How. 66, 16 L. Ed. 717, 5 Sup. Ct. Rep. 1148).—HAMMOND.

It is said that the first statute in which the word "transportation" was used is the 18 Car. II (1666), c. 3, which gave a power to the judges, at their discretion, either to execute, or to *transport* to America for life, the moss-troopers of Cumberland and Northumberland. Transportation was abolished by the Penal Servitude Act, 1857 (20 & 21 Vict., c. 3), and "penal servitude" in England substituted.

Mr. Justice Gray, in *Fong Yue Ting v. United States*, 149 U. S. 698, 709, 37 L. Ed. 905, 13 Sup. Ct. Rep. 1016, says: "Strictly speaking, 'transportation,' 'extradition,' and 'deportation,' although each has the effect of removing a person from the country, are different things, and have different purposes. 'Transportation' is by way of punishment of one convicted of an offense against the laws of the country. 'Extradition' is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished. 'Deportation' is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken."

Exile is said to have been introduced as a punishment in 1597 by statute 39 Eliz., c. 4, which enacted that such rogues as were dangerous to the inferior people should be banished the realm. (See Barrington, *Observations on the Statutes*, 268 n, 269; 1 Stephen's *Comm.* (16th ed.), 92 n.) Exile may practically be enforced in the United States by granting a pardon on condition that the person pardoned shall leave the country. (*Ex parte Marks*, 64 Cal.



may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service; excepting sailors and soldiers, the nature of whose employment necessarily implies an exception: he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador.<sup>a</sup> For this might in reality be no more than an honorable exile.

§ 191. (iii) **Right of private property: law of the land.**—The third absolute right, inherent in every Englishman, is that of property: which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land.<sup>18</sup> The original of private property is probably founded in nature, as will be more fully explained in the

<sup>a</sup> 2 Inst. 46.

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29, 49 Am. Rep. 684, 28 Pac. 109; *People v. James*, 2 Caines (N. Y.), 57; *Commonwealth v. Haggerty*, 4 Brewst. (Pa.) 326; *Flavell's Case*, 8 Watts & S. (Pa.) 197; *State v. Chancellor*, 1 Strob. (S. C.) 347, 47 Am. Dec. 557.)

<sup>18</sup> "The right of property, however, is an inherent or inalienable right of the citizen, and 'consists in the free use, enjoyment, and disposal of his acquisitions, without any control or diminution, save only of the laws of the land.' (1 Bl. Comm. 138.) But we venture to say that among the absolute rights of individuals enumerated by Blackstone no mention is made of a right to inherit property from another. All estates derived upon the death of another have been created by law, and are for that reason always subject to regulation by statute; indeed, frequent changes by legislative enactment have been and will doubtless yet be made in the law of descent and distribution. It is patent, therefore, that the guaranty in the Bill of Rights, and other provisions of the constitution, with respect to the right of acquiring and protecting property, does not include the mere privilege, right, or expectancy of inheritance."—SETTLE, J., in *Booth's Exr. v. Commonwealth*, 130 Ky. 88, 33 L. R. A. (N. S.) 592, 113 S. W. 61, 63.

"The right thus referred to and defined by the illustrious commentator is absolute and inherent in every American, subject of the United States, by virtue of the supreme law of the land. Therefore, 'when a law annihilates the value of property, and strips it of its attributes, by which alone it is distinguished as property, the owner is deprived of it according to the plainest interpretation, and certainly within the spirit of a constitutional provision intended especially to shield private rights from the exercise of arbitrary power.' *Wynehamer v. People*, 13 N. Y. 378, 398."—BARTCH, J., in *Block v. Schwartz*, 27 Utah, 387, 101 Am. St. Rep. 971, 1 Ann. Cas. 550, 65 L. R. A. 308, 76 Pac. 22, 25.

second book of the ensuing Commentaries; but certainly the modifications under which we at present find it, the method of conserving it in the present owner, and of translating it from man to man, are entirely derived from society: and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter<sup>r</sup> has declared that no freeman shall be disseized or divested of his freehold, or of his liberties, or free cus-<sup>[139]</sup>oms, but by the judgment of his peers, or by the law of the land. And by a variety of ancient statutes<sup>s</sup> it is enacted, that no man's lands or goods shall be seized into the king's hands, against the great charter, and the law of the land; and that no man shall be disinherited, nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by course of law; and if anything be done to the contrary, it shall be redressed, and holden for none.

§ 192. (aa) Right of eminent domain.—So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community.<sup>19</sup> If a new road, for instance, were to

<sup>r</sup> C. 29.

<sup>s</sup> 5 Edw. III. c. 9 (Confirmation of Great Charter, 1331). 25 Edw. III. st. 5. c. 4 (Confirmation of Great Charter, 1351). 28 Edw. III. c. 3 (Right of Trial, 1354).

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<sup>19</sup> Eminent domain.—Whether this remark was true of the English law at the time when it was written may justly be doubted. The omnipotent character of the English parliament was nowhere more distinctly shown than in its power to overrule the ordinary safeguards of private property, by divesting estates, or permitting the exercise of powers inconsistent with rights of ownership; and that, often, in the case of private bills for the benefit of individuals. In the United States, the taking of private property for *private* use cannot be justified by any considerations of benefit, either to individuals or the community. Although not expressly forbidden by the letter of our constitutions, it is deemed to be as clearly so by the provision contained in all of them, that private property shall not be taken for public use without just compensation. This has always been held to forbid *a fortiori*, such taking for private use, with compensation or without it; and the United States supreme court

be made through the grounds of a private person. it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In vain may it be urged, that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it be expedient

have recently put the prohibition upon stronger grounds by holding that the legislative power does not extend to the taking of one man's property for the benefit of another. (Miller, J., *Loan Association v. Topeka*, 20 Wall. 655, 663, 22 L. Ed. 455; citing *Whiting v. Sheboygan etc. R. Co.*, 25 Wis. 167, 188, 3 Am. Rep. 30; *Cooley on Const. Lim.*, pp. 129, 175, 487; *Dillon on Munic. Corp.*, sec. 587.)

But when private property is taken for public use, this may now be regarded not so much a violation of the right as the enforcement of a condition under which all private property must be holden in an organized state. This view is implied in the very term "eminent domain," which is so commonly employed to designate this power, that many writers and judges seem to forget that this is not its entire meaning. (Andrews, J., in *Bertholf v. O'Reilly*, 74 N. Y. 519, 30 Am. Rep. 323.) The eminent domain of the state properly signifies that higher ownership of all the property of its individual members, which warrants, not only the taking of it for public use, but also taxation, forfeiture, and escheat, or the entire absorption of it when no individual owner can be found. (See *Cooley's Constitutional Limitations*, pp. 523, 524, and the definitions found in n. 1; *Vattel*, c. 20, sec. 34; *Campbell, J.*, in *Sears v. Cottrell*, 5 Mich. 251, 274.)

Until recently this power of eminent domain was supposed to inhere in the state governments only, and to be denied to the federal government by its constitution. But since 1875, by the decision of *Kohl v. United States*, 91 U. S. 367, 23 L. Ed. 449, these decisions have been overruled, and the power of the federal government to take land for its own purposes, even within the states, has been fully vindicated.

Another extension of the power, the reason of which is much less justifiable, has been accepted practically without question from a very early date in our law. I mean the delegation of the power to corporate bodies: not only municipal, which are public in their nature, and may be considered as sharing to some extent the powers of the sovereign, but even to private corporations formed for the construction of railroads, canals, and other works, as a means of private profit. The right of such bodies to take land against the will of the owner at their own discretion, and subject only to the condition of paying the market price, is a most anomalous delegation of sovereign power, but may be too firmly vested now to be successfully questioned.—HAMMOND.

The remainder of this note is omitted. (1 Hammond's Black. 359.)

or no. Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained. The public is now considered as an individual, treating with an individual for an exchange. All that the legislature does is to oblige the owner to alienate his possessions for a reasonable price; and even this is an exertion of power, which the legislature indulges with caution, and which nothing but the legislature can perform.

§ 193. (bb) **Taxation and representation.**—<sup>[140]</sup> Nor is this the only instance in which the law of the land has postponed even public necessity to the sacred and inviolable rights of private property. For no subject of England can be constrained to pay any aids or taxes, even for the defense of the realm or the support of government, but such as are imposed by his own consent, or that of his representatives in parliament. By the statute 25 Edw. I, c. 5 and 6 (Taxation, 1297), it is provided that the king shall not take any aids or tasks, but by the common assent of the realm. And what that common assent is, is more fully explained by 34 Edw. I, st. 4, c. 1 (Taxation, 1306), which<sup>t</sup> enacts, that no talliage or aid shall be taken without the assent of the archbishops, bishops, earls, barons, knights, burgesses, and other freemen of the land: and again, by 14 Edw. III, st. 2, c. 1 (Taxation, 1340), the prelates, earls, barons, and commons, citizens, burgesses, and merchants shall not be charged to make any aid, if it be not by the common assent of the great men and commons in parliament. And as this fundamental law had been shamefully evaded under many suc-

<sup>t</sup> See the introduction to the great charter (*edit. Oxon.*) *sub anno* 1297; wherein it is shown that that statute *de talliagio non concedendo* (on the non-granting of talliage), supposed to have been made in 34 Edw. I (1306), is in reality nothing more than a sort of translation into Latin of the *confirmatio cartarum* (a confirmation of the charters), 25 Edw. I (1297), which was originally published in the Norman language. (The words "*edit. Oxon.*") were first added in the second edition. Blackstone himself was the editor.)

ceeding princes, by compulsive loans, and benevolences extorted without a real and voluntary consent, it was made an article in the petition of right, 3 Car. I (1627), that no man shall be compelled to yield any gift, loan, or benevolence, tax, or such like charge, without common consent by act of parliament. And, lastly, by the statute 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), it is declared that levying money for or to the use of the crown, by pretense of prerogative, without grant of parliament, or for longer time, or in other manner, than the same is or shall be granted, is illegal.

§ 194. (iv) **Bulwarks of personal rights.**—In the three preceding articles we have taken a short view of the principal absolute rights which appertain to every Englishman. But in vain would these rights be declared, ascertained, and protected by the dead letter of the laws, if the <sup>[141]</sup> constitution had provided no other method to secure their actual enjoyment. It has therefore established certain other auxiliary subordinate rights of the subject, which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property. These are,

§ 195. (aa) **Parliament.**—The constitution, powers, and privileges of parliament, of which I shall treat at large in the ensuing chapter.

§ 196. (bb) **Limitation of king's prerogative.**—The limitation of the king's prerogative, by bounds so certain and notorious, that it is impossible he should \*exceed them without the consent of the people. Of this also I shall treat in its proper place. The former of these keeps the legislative power in due health and vigor, so as to make it improbable that laws should be enacted destructive of general liberty: the latter is a guard upon the executive power by restraining it from acting either beyond or in contradiction to the laws, that are framed and established by the other.

§ 197. (cc) **The courts: due process of law.**—A third subordinate right of every Englishman is that of applying to the courts

\* The ninth edition inserts here after *should*, "either mistake or legally."



of justice for redress of injuries. Since the law is in England the supreme arbiter of every man's life, liberty, and property, courts of justice must at all times be open to the subject, and the law be duly administered therein. The emphatical words of *magna carta*,<sup>u</sup> spoken in the person of the king, who in judgment of law (says Sir Edward Coke<sup>w</sup>) is ever present and repeating them in all his courts, are these; *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam* (to none will we sell, to none deny, to none delay either right or justice): "and therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona* (either in his goods, lands, or person), by any other subject, be he ecclesiastical or temporal without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay." It were endless to enumerate all the *affirmative* acts of parliament, [142] wherein justice is directed to be done according to the law of the land; and what that law is, every subject knows, or may know, if he pleases; for it depends not upon the arbitrary will of any judge; but is permanent, fixed and unchangeable, unless by authority of parliament. I shall, however, just mention a few *negative* statutes, whereby abuses, perversions, or delays of justice, especially by the prerogative, are restrained. It is ordained by *magna carta*,<sup>x</sup> that no freeman shall be outlawed, that is, put out of the protection and benefit of the laws, but according to the law of the land. By 2 Edw. III, c. 8 (Delay of Justice, 1328), and 11 Rich II, c. 10 (Pre-eminence of Law, 1387), it is enacted, that no commands or letters shall be sent under the great seal, or the little seal, the signet, or privy seal, in disturbance of the law; or to disturb or delay common right: and, though such commandments should come, the judges shall not cease to do right; which is also made a part of their oath by statute 18 Edw. III, st. 4 (1344). And by 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), it is declared, that the pretended power of suspending, or dispensing with laws, or the execution of laws, by regal authority without consent of parliament, is illegal.

Not only the substantial part, or judicial decisions, of the law, but also the formal part, or method of proceeding cannot be altered

<sup>u</sup> C. 29.<sup>x</sup> C. 29.<sup>w</sup> 2 Inst. 55.



but by parliament; for, if once those outworks were demolished, there would be an inlet to all manner of innovation in the body of the law itself. The king, it is true, may erect new courts of justice; but then they must proceed according to the old-established forms of the common law. For which reason it is declared in the statute 16 Car. I, c. 10 (Star-Chamber, 1640), upon the dissolution of the court of star-chamber, that neither his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel (which were the course of proceeding in the star-chamber, borrowed from the civil law), or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

§ 198. (dd) Right of petition.—<sup>[143]</sup> If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, the right of petitioning the king, or either house of parliament, for the redress of grievances. In Russia we are told<sup>7</sup> that the Czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death, if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretense of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II, st. 1, c. 5 (Riot, 1661), that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed

<sup>7</sup> Montesq. Sp. L. xii. 26.

by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, in the country; and in London by the lord mayor, aldermen, and common council; nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

§ 199. (ee) **Right to bear arms.**—The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defense, suitable to their condition and degree, and such as are [<sup>144</sup>] allowed by law. Which is also declared by the same statute, 1 W. & M., st. 2, c. 2, and it is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression.<sup>20</sup>

§ 200. **Summary of chapter.**—In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigor; and limits, certainly known, be set to the royal pre-

<sup>20</sup> The constitutional right to bear arms in this country does not mean the right to bear them for individual defense, but only for the defense of the community against invasion or oppression. The use of arms for the latter purpose may be restricted but not prohibited; of all other, arms may be prohibited. (*Andrews v. State*, 3 Heisk. 165.)—HAMMOND.

rogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and lastly, to the right of having and using arms for self-preservation and defense. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints. Restraints in themselves so gentle and moderate, as will appear upon further inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do everything that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens. So that this review [145] of our situation may fully justify the observation of a learned French author, who indeed generally both thought and wrote in the spirit of genuine freedom;<sup>2</sup> and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world, where political or civil liberty is the direct end of its constitution. Recommending, therefore, to the student in our laws a further and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul to his country, “ESTO PERPETUA!” (Mayst thou endure forever!)

\* Montesq. Sp. L. xi. 5.

§ 201. **Relations of persons: public and private.**—We are next to treat of the right and duties of persons, as they are members of society, and stand in various relations to each other. These relations are either public or private: and we will first consider those that are public.<sup>1</sup>

<sup>1</sup> **Division of persons, of rights, and of law: Holland.**—A very radical division of rights is based upon a broad distinction between the public or private character of the persons with whom the right is connected. By a “public person” we mean either the state, or the sovereign part of it, or a body or individual holding delegated authority under it.

By a “private person” we mean an individual, or collection of individuals however large, who, or each one of whom, is of course a unit of the state, but in no sense represents it, even for a special purpose.

When both of the persons with whom a right is connected are private persons, the right also is private. When one of the persons is the state, while the other is a private person, the right is public.

From this division of rights there results a division of law, as the definer and protector of rights, which, when they subsist—

(1) Between subject and subject, are regulated by “private” law.

(2) When between state and subject, by “public” law.

And this distribution of the whole field of law is of such capital importance that we have no hesitation in adopting the division of rights out of which it springs as the radical division of them.

We have now to explain the application of the distinction, and to justify our assertion that this is the radical distinction between rights, and consequently between the departments of law.

By adopting this subdivision of municipal law, its whole field falls at once into two natural sections. On the one hand is the law which regulates rights where one of the persons concerned is “public”; where the state is, directly or indirectly, one of the parties. Here the very power which defines and protects the right is itself a party interested in or affected by the right. That is to say, it is at the option of one of the persons who are concerned with the right to uphold or to extinguish it. If the state is the “person of inherence,” it will naturally, though of course not of compulsion, protect its own right. If the state is the “person of incidence,” it may conceivably refuse to uphold the *quasi* right of the person of inherence against itself. If the state executes laws which protect rights against itself, it is acting upon the maxim applied to their own conduct by the Roman emperors: “*Legibus soluti legibus vivimus*”

§ 202. **Government.**—The most universal public relation, by which men are connected together, is that of government; namely, as governors and governed, or, in other words, as magistrates and people. Of magistrates some also are *supreme*, in whom the sovereign power of the state resides; others are *subordinate*, deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior secondary sphere.

§ 203. **1. Departments of government.**—In all tyrannical governments the supreme magistracy, or the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. The magistrate may enact tyrannical laws, and execute them in a tyrannical manner, since he is possessed in quality of dispenser of justice, with

(Though not bound by the laws, we yet live in obedience to them).” Opposed to this is the law which regulates rights where both of the persons concerned are “private” persons. Here the parties interested in or affected by the right have nothing to do with protecting it. This is done by the state, whenever the person of inherence invokes its aid.

The punishment, for instance, of a traitor is a matter of public law. The right violated by him is a public right, because the person in whom it resides is the state. The state has a right not to be conspired against. The traitor violates this right, and the same state whose right has been violated intervenes to protect itself and to punish the offender. If, on the other hand, a carrier damages my goods, the question raised is one of private law. My right to have my goods safely carried is a private right, because both the carrier and myself are private individuals; though I am entitled to call for the intervention of the state to obtain compensation from him for the injury I have sustained. (It is noteworthy that in the Articles of Union between England and Scotland (art. 18) a distinction is drawn between Scots laws “concerning public right, policy, and civil government, and those which concern private right.”) It is necessary, in order to obviate a frequent confusion upon the point, to mention that the same act may often infringe both a public and a private right. Thus an assault or a libel upon an individual is a violation of two distinct rights, i. e., of the private right of the individual to be unmolested, and of the public right of the state not to be disturbed by acts constituting, or tending towards, breaches of the public peace.

The distribution of law which has been thus shown to be logically consistent possesses other advantages also. A moment's consideration will show the convenience of an arrangement in accordance with which constitutional, ecclesiastical, criminal, and administrative law, on the one hand, and the law of



all the power which he as legislator thinks proper to give himself. But, where the legislative and executive authority are in distinct hands, the former will take care not to entrust the latter with so large a power, as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, in England this supreme power is divided into [147] two branches; the one legislative, to wit, the parliament, consisting of king, lords, and commons; the other executive, consisting of the king alone. It will be the business of this chapter to consider the British parliament; in which the legislative power, and (of course) the supreme and absolute authority of the state, is vested by our constitution.

§ 204. **Parliament: 1. Beginnings in Europe.**—The original or first institution of parliaments is one of those matters which lie so far hidden in the dark ages of antiquity, that the tracing of it out is a thing equally difficult and uncertain. The word, *parliament*, itself (*parlement* or *colloquium*, as some of our historians translate it), is comparatively of modern date; derived from the French, and signifying an assembly that met and conferred together. It was first applied to general assemblies of the states

contracts, of real and personal property, of wills and successions, and of torts, on the other hand, form two groups, to one or other of which every legal topic may be readily referred.

In recognizing as the primary principle of the division of our science the distinction between public and private persons, resulting, through the severance of public and private rights, in the opposition of public and private law, we have the irrecusable authority of the Roman jurists. "*Publicum ius*," says Ulpian, and his words adopted by Justinian have influenced the legal speculation of the world, "*est quod ad statum rei Romanæ spectat; privatum quod ad singulorum utilitatem pertinet*. (Public law relates to the welfare of the Roman state; private law relates to the advantage of the individual citizen.)" Or as Paulus says: "*Alterum utilitas privatorum, alterum vigor publicæ disciplinæ postulat*. (The advantage of private persons demands one thing, the vigor of public discipline another.)"

But indeed the distinction is much older. It is beautifully worked out by Aristotle, who classifies offenses according to those against whom they are committed. They are committed, he says, either against the state (Το κοινόν) or an individual (ἐν τῶν κοινωνούντων). An assault is an injury to an individual, while avoiding military service is an injury to the state.—HOLLAND, *Jurisprudence* (11th ed.), 124.



under Louis VII in France, about the middle of the twelfth century.<sup>a</sup> But it is certain that, long before the introduction of the Norman language into England, all matters of importance were debated and settled in the great councils of the realm. A practice which seems to have been universal among the northern nations, particularly the Germans;<sup>b</sup> and carried by them into all the countries of Europe, which they overran at the dissolution of the Roman empire. Relics of which constitution, under various modifications and changes, are still to be met with in the diets of Poland, Germany, and Sweden, and the assembly of the estates in France;<sup>c</sup> for what is there now called the parliament is only the supreme court of justice, consisting of the peers, certain dignified ecclesiastics, and judges; which neither is in practice, nor is supposed to be in theory, a general council of the realm.

§ 205. 2. Saxon wittena-gemote.—With us in England this general council hath been held immemorially, under the several names of *michelsynoth*, or great council, *michel-gemote* or great meeting, and more <sup>[148]</sup> frequently *wittena-gemote* or the meeting of wise men. It was also styled in Latin, *commune concilium regni*, *magnum concilium regis*, *curia magna*, *conventus magnatum vel procerum*, *assisa generalis* (the common council of the kingdom, the great council of the king, the high court, the assembly of the nobles, and the general assize), and sometimes *communitas regni Angliæ* (the community of the kingdom of England).<sup>d</sup> We have instances of its meeting to order the affairs of the kingdom, to make new laws, and to amend the old, or, as Fleta<sup>e</sup> expresses it, “*novis injuriis emersis nova constituere remedia* (new injuries having arisen, to appoint new remedies for them),” so early as the reign of Ina, King of the West Saxons, Offa, King of the Mercians,

<sup>a</sup> Mod. Un. Hist. xxiii. 307. The first mention of it in our statute law is in the preamble to the statute of Westm. 1. 3 Edw. I. A. D. 1275.

<sup>b</sup> *De minoribus rebus principes consultant, de majoribus omnes.* (In lesser affairs princes consult, in greater affairs, all the people.) Tac. de mor. Germ. c. 11.

<sup>c</sup> These were assembled for the last time, A. D. 1561 (See Whitelocke of Parl. c. 72) or according to Robertson, A. D. 1614. (Hist. Cha. V. i. 360.)

<sup>d</sup> Glanvill l. 13. c. 32. 1. 9. c. 10.—Pref. 9 Rep.—2 Inst. 526.

<sup>e</sup> l. 2. c. 2.

and Ethelbert, King of Kent, in the several realms of the heptarchy. And, after their union, the Mirror<sup>f</sup> informs us that King Alfred ordained for a perpetual usage, that these councils should meet twice in the year, or oftener, if need be, to treat of the government of God's people; how they should keep themselves from sin, should live in quiet, and should receive right. Our succeeding Saxon and Danish monarchs held frequent councils of this sort, as appears from their respective codes of laws; the titles whereof usually speak them to be enacted, either by the king with the advice of his wittena-gemote, or wise men, as, "*hæc sunt instituta, quæ Edgarus rex consilio sapientum suorum instituit* (these are the laws which King Edgar has instituted in an assembly of the wise men of his realm)"; or to be enacted by those sages with the advice of the king, as, "*hæc sunt judicia, quæ sapientes consilio regis Ethelstani instituerunt* (these are the decrees which the wise men, with the advice of King Ethelstane, have appointed)"; or lastly, to be enacted by them both together, as, "*hæc sunt institutiones, quas rex Edmundus et episcopi sui cum sapientibus suis instituerunt* (these are the institutions which King Edmund and his bishops and his wise men have decreed)."

§ 206. 3. Norman great council.—There is also no doubt but these great councils were occasionally held under the first princes of the Norman line. Glanvill, who wrote in the reign of Henry the Second, speaking of the particular amount of an amercement in the sheriff's court, says, it had never yet been ascertained by the general assize, or assembly, but was left to the custom of particular counties.<sup>g</sup> Here the general assize is spoken of as a meeting well known, and its statutes or decisions are put in <sup>[149]</sup> a manifest contradistinction to custom, or the common law. And in Edward the Third's time an act of parliament, made in the reign of William the Conqueror, was pleaded in the case of the Abbey of St. Edmund's-bury, and judicially allowed by the court.<sup>h</sup>

<sup>f</sup> C. 1. § 3.

<sup>g</sup> *Quanta esse debeat per nullam assisam generalem determinatum est, sed pro consuetudine singulorum comitatum debetur.* l. 9. c. 10.

<sup>h</sup> Year-Book, 21 Edw. III. 60 (1347).

§ 207. 4. The modern parliament: magna carta.—Hence it indisputably appears, that parliaments, or general councils, are coeval with the kingdom itself. How those parliaments were constituted and composed, is another question, which has been matter of great dispute among our learned antiquaries; and, particularly, whether the commons were summoned at all; or, if summoned, at what period they began to form a distinct assembly. But it is not my intention here to enter into controversies of this sort. I hold it sufficient that it is generally agreed that in the main the constitution of parliament, as it now stands, was marked out so long ago as the seventeenth year of King John, A. D. 1215, in the great charter granted by that prince; wherein he promises to summon all archbishops, bishops, abbots, earls, and greater barons, personally; and all other tenants in chief under the crown, by the sheriff and bailiffs: to meet at a certain place, with forty days' notice, to assess aids and scutages when necessary. And this constitution has subsisted in fact at least from the year 1266, 49 Hen. III: there being still extant writs of that date, to summon knights, citizens, and burgesses to parliament.<sup>2</sup> I proceed, therefore, to inquire wherein consists

2 Origin of parliament.—Far more important was the Great Council of the Magnates, a body consisting of the chief tenants *in capite* of the crown (including the prelates and the greater abbots), which, constructed on feudal lines, had assembled with more or less regularity on important occasions ever since the Norman Conquest. In strictness, this body should have contained all the tenants *in capite* of the crown; for every tenant *in capite* was bound to give his advice, if called upon, to his immediate lord, the king, and, conversely, to be consulted by his lord on important occasions. But the inconvenience and expense of attendance on, perhaps, a distant court, had, in practice, justified the abstention of the smaller tenants *in capite*; and, though the famous provision of the Great Charter (Cap. 14. It is noteworthy that this clause was clearly regarded as temporary, for it disappeared from the editions of the Charter which were issued after the death of King John) for summoning a "common council of the realm" recalls the existence of the theory, yet in fact the provision was never acted upon, and has generally been misunderstood.

In addition to the Great Council of the Magnates, there were, at the end of the thirteenth century, the convocations, or purely ecclesiastical assemblies of the two provinces of Canterbury and York, which had been rapidly assuming a regular and organized form during the earlier years of the thirteenth century, and may, perhaps, have given Simon de Montfort his famous idea of a representative gathering. (In 1265, after the battle of Lewes.) At any rate,

this constitution of parliament, as it now stands and has stood for the space of at least five hundred years. And in the prosecution of this inquiry, I shall consider, first, the manner and time of its assembling: secondly, its constituent parts: thirdly, the laws and customs relating to parliament, considered as one aggregate body: fourthly and fifthly, the laws and customs relating to each house, separately and distinctly taken: sixthly, the methods of proceeding, and of making statutes, in both houses: and lastly, the manner of the parliament's adjournment, prorogation and dissolution.

§ 208. 5. Constitution of parliament—a. Meeting.—[150] As to the manner and time of assembling. The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty days before it begins to sit. It is a branch of the royal prerogative, that no parliament can be convened by its own authority, or by the authority of any, except the king alone. And this prerogative is founded upon very good reason. For, supposing it had a right to meet spontaneously, without being called together, it is impossible to conceive that all the members, and each of the houses, would agree unanimously upon the proper time and place of meeting; and if half of the members met, and half absented themselves, who shall

it obviously suggested the inclusion of clerical "proctors" in the parliament of 1295.

Once more, in the ancient institution of the *county or shire court*, in which the freeholders of the county had from time immemorial been wont to assemble, and in the somewhat younger, but rapidly developing, councils and guilds of the chartered boroughs, King Edward the First found the material for his famous assembly; and it is not immaterial to observe that, in the county or shire court, there had long been in existence a practice of having the townships represented by the reeve, priest, and four best men. (*Leges Henrici Primi*, vii. (7).) It must not be hastily supposed that these "best men" were elected in any formal manner to represent the township in the shire court, still less that they were eager candidates for the office. Still, the fact of their presence as a familiar feature of a familiar institution would probably favor the policy of King Edward in applying his favorite maxim: "What touches all shall be approved by all." (This maxim appeared in the preamble of the bishops' writs which summoned them to the famous parliament of 1295. It was not, however, apparently, inserted in the writs sent to the lay peers and the sheriffs. See Stubbs, *Select Charters*, pp. 484-487.)—STEPHEN, 2 *Comm.* (16th ed.), 468.

determine which is really the legislative body, the part assembled, or that which stays away? It is therefore necessary that the parliament should be called together at a determinate time and place: and highly becoming its dignity and independence, that it should be called together by none but one of its own constituent parts: and, of the three constituent parts, this office can only appertain to the king; as he is a single person, whose will may be uniform and steady; the first person in the nation, being superior to both houses in dignity: and the only branch of the legislature that has a separate existence, and is capable of performing any act at a time when no parliament is in being.<sup>1</sup> Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and is to sit again for six months, unless dissolved by the successor: for this revived parliament must have been originally summoned by the crown.

[151] It is true, that by a statute, 16 Car. I, c. 1 (Triennial, 1640), it was enacted, that, if the king neglected to call a parliament for three years, the peers might assemble and issue out writs for choosing one; and, in case of neglect of the peers, the constituents might meet and elect one themselves. But this, if ever put in practice, would have been liable to all the inconveniences I have just now stated: and the act itself was esteemed so highly detrimental and injurious to the royal prerogative, that it was repealed by statute 16 Car. II, c. 1 (Parliament, 1664). From thence, therefore, no precedent can be drawn.

§ 209. (1) The convention parliament of 1660.—It is also true that the convention parliament, which restored King Charles the Second, met above a month before his return; the lords by their

<sup>1</sup> By motives somewhat similar to these, the republic of Venice was actuated, when towards the end of the seventh century it abolished the tribunes of the people, who were annually chosen by the several districts of the Venetian territory, and constituted a doge in their stead; in whom the executive power of the state at present resides. For which their historians have assigned these, as the principal reasons. 1. The propriety of having the executive power a part of the legislative, or senate; to which the former annual magistrates were not admitted. 2. The necessity of having a single person to convoke the great council when separated. (Mod. Un. Hist. xxvii. 15.)



own authority, and the commons in pursuance of writs issued in the name of the keepers of the liberty of England by authority of parliament: and that the said parliament sat till the twenty-ninth of December, full seven months after the restoration; and enacted many laws, several of which are still in force. But this was for the necessity of the thing, which supersedes all law; for if they had not so met, it was morally impossible that the kingdom should have been settled in peace. And the first thing done after the king's return was to pass an act declaring this to be a good parliament, notwithstanding the defect of the king's writs.<sup>j</sup> So that, as the royal prerogative was chiefly wounded by their so meeting, and as the king himself, who alone had a right to object, consented to waive the objection, this cannot be drawn into an example in prejudice of the rights of the crown. Besides we should also remember, that it was at that time a great doubt among the lawyers,<sup>k</sup> whether even this healing act made it a good parliament; and held by very many in the negative: though it seems to have been too nice a scruple. And yet out of abundant caution, it was thought necessary to confirm its acts in the next parliament, by statute 13 Car. II, c. 7, and c. 14 (Confirmation of Statutes, 1661).

§ 210. (2) The convention of 1688.—<sup>[152]</sup> It is likewise true, that at the time of the revolution, A. D. 1688, the lords and commons by their own authority, and upon the summons of the Prince of Orange (afterwards King William) met in a convention, and therein disposed of the crown and kingdom. But it must be remembered that this assembling was upon a like principle of necessity as at the Restoration; that is, upon a full conviction that King James the Second had abdicated the government, and that the throne was thereby vacant: which supposition of the individual members was confirmed by their concurrent resolution, when they actually came together. And, in such a case as the palpable vacancy of a throne, it follows *ex necessitate rei* (from the urgency of the affair), that the form of the royal writs must be laid aside, otherwise no parliament can ever meet again. For, let us put another possible case, and suppose, for the sake of argument, that the whole royal

<sup>j</sup> Stat 12 Car. II. c. 1 (Parliament, 1660).

<sup>k</sup> 1 Sid. 1.



line should at any time fail and become extinct, which would indisputably vacate the throne: in this situation it seems reasonable to presume, that the body of the nation, consisting of lords and commons, would have a right to meet and settle the government; otherwise there must be no government at all. And upon this and no other principle did the convention in 1688 assemble. The vacancy of the throne was precedent to their meeting without any royal summons, not a consequence of it. They did not assemble without writ, and then make the throne vacant; but, the throne being previously vacant by the king's abdication, they assembled without writ, as they must do if they assembled at all. Had the throne been full, their meeting would not have been regular; but, as it was really empty, such meeting became absolutely necessary. And accordingly it is declared by statute 1 W. & M., st. 1, c. 1 (Parliament, 1688), that this convention was really the two houses of parliament, notwithstanding the want of writs or other defects of form. So that, notwithstanding these two capital exceptions, which were justifiable only on a principle of necessity (and each of which, by the way, induced a revolution in the government), the rule laid down is in general certain, that the king, only, can convoke a parliament.

§ 211. (3) **Parliament convoked by the crown.**—[153] And this by the ancient statutes of the realm,<sup>1</sup> he is bound to do every year, or oftener, if need be. Not that he is, or ever was, obliged by these statutes to call a *new* parliament every year; but only to permit a parliament to sit annually for the redress of grievances, and dispatch of business, *if need be*. These last words are so loose and vague, that such of our monarchs as were inclined to govern without parliaments, neglected the convoking them, sometimes for a very considerable period, under pretense that there was no need of them. But, to remedy this, by the statute 16 Car. II, c. 1 (Parliament, 1664), it is enacted, that the sitting and holding of parliaments shall not be intermitted above three years at the most. And by the statute 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), it is declared to be one of the rights of the people, that for redress of

<sup>1</sup> 4 Edw. III. c. 14 (Annual Parliaments, 1330). 36 Edw. III. c. 10 (Annual Parliaments, 1362).

all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency* is again reduced to a certainty by statute 6 W. & M., c. 2 (Triennial, 1694), which enacts, as the statute of Charles the Second had done before, that a new parliament shall be called within three years<sup>m</sup> after the determination of the former.

§ 212. **b. Constituent parts of parliament.**—The constituent parts of a parliament are the next objects of our inquiry. And these are, the king's majesty, sitting there in his royal political capacity, and the three estates of the realm; the lords spiritual, the lords temporal (who sit together with the king in one house), and the commons, who sit by themselves in another.<sup>3</sup> And the king and these three estates, together, form the great corporation or body politic of the kingdom,<sup>n</sup> of which the king is said to be *caput, principium et finis* (the head, beginning and end). For

<sup>m</sup> This is the same period that is allowed in Sweden for intermitting their general diets, or parliamentary assemblies. Mod. Un. Hist. xxxiii. 15.

<sup>n</sup> 4 Inst. 1, 2. Stat. 1 Eliz. c. 3 (Succession to the Crown, 1558). Hale of Parl. 1.

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<sup>3</sup> The estates of the realm.—There can be no question, I suppose, that the three estates of the realm originally meant those that Blackstone mentions, and scarcely more that the lords spiritual and temporal had become so completely fused in one, even before the Reformation, that the spiritual lords have never since been able to vindicate a separate existence. In the seventh year of Henry VIII, it was holden that the presence of any spiritual lord was not essential to constitute a parliament. The reason given is that bishops have no place in parliament by means of their spiritual function, but only in respect of their temporal possessions or baronies; and, therefore, that the king might hold a parliament without any spiritual lords. (See Wooddesson, vol. 1, p. 22, and Blackstone's own note, p. \*156, n. b, citing the same authority, Keilw. 184.) The final result of this gradual change will be recorded by some future annotator, or, not impossibly, in another edition.

A full explanation of the three estates, and their importance in English history, will be found in Stubbs' Const. History, par. 185, 186, vol. 2, p. 163. Gneist's Hist. of the Eng. Const. 2, 80, makes a purely fanciful division into lords, knights, and commons. But this division of Gneist's, as well as the attempt to fill up the traditional number of three estates, by making the king one of them (king, lords, and commons), is not only inconsistent with history, but with the very notion of an estate. The king could not be an estate of his own realm any more than he could hold an estate in land, in fee simple,

upon their coming together the king meets them, either in person or by representation; without which there can be no beginning of a parliament;<sup>o</sup> and he also has alone the power of dissolving them.

§ 213. (1) **The crown.**—<sup>[154]</sup> It is highly necessary for preserving the balance of the constitution, that the executive power should be a branch, though not the whole, of the legislative. The total union of them, we have seen, would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislature would soon become tyrannical, by making continual encroachments, and gradually assuming to itself the rights of the executive power. Thus the long parliament of Charles the First, while it acted in a constitutional manner, with the royal concurrence, redressed many heavy grievances and established many salutary laws. But when the two houses assumed the power of legislation, in exclusion of the royal authority, they soon after assumed likewise the reins of administration; and, in consequence of these united powers, overturned both church and state, and established a worse oppression than any they pretended to remedy. To hinder, therefore, any such encroachments, the king is himself a part of the parliament: and, as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*; <sup>4</sup> this being sufficient to answer the end proposed. For we may apply to the royal negative, in this instance, what Cicero observes of the negative of the Roman tribunes, that the crown has not any power of *doing* wrong, but

<sup>o</sup> 4 Inst. 6.

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or otherwise, under his own suzerainty. The blunder is of no particular consequence, but spoils the distinctness of an important conception, which every student of the common law should strive to make as clear as possible. Those familiar with French history will find this conception illustrated in the discussion at the outbreak of the first revolution of the position of the *Tiers Etat*, as well as in the importance then attached to the union of the clergy and the nobles, which had preserved, till then, their distinct estates. (See Alison's *History of Europe*, c. 3, Am. reprint, 1, 72.)—HAMMOND.

<sup>4</sup> The king's right of veto has, in practice, been long since obsolete, not having been exercised since the reign of Queen Anne.

merely of *preventing* wrong from being done.<sup>p</sup> The crown cannot begin of itself any alterations in the present established law; but it may approve or disapprove of the alterations suggested and consented to by the two houses. The legislative, therefore, cannot abridge the executive power of any rights which it now has by law, without its own consent; since the law must perpetually stand as it now does, unless all the powers will agree to alter it. And herein, indeed, consists the true excellence of the English government, that all the parts of it form a mutual [155] check upon each other. In the legislature, the people are a check upon the nobility, and the nobility a check upon the people; by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two houses, through the privilege they have of inquiring into, impeaching, and punishing the conduct (not indeed of the king,<sup>q</sup> which would destroy his constitutional independence; but, which is more beneficial to the public) of his evil and pernicious counselors. Thus every branch of our civil polity supports and is supported, regulates and is regulated, by the rest: for the two houses naturally drawing in two directions of opposite interest, and the prerogative in another still different from them both, they mutually keep each other from exceeding their proper limits; while the whole is prevented from separation, and artificially connected together by the mixed nature of the crown, which is a part of the legislative, and the sole executive magistrate. Like three distinct powers in mechanics, they jointly impel the machine of government in a direction different from what either, acting by itself, would have done; but at the same time in a direction partaking of each, and formed out of all; a direction which constitutes the true line of the liberty and happiness of the community.

Let us now consider these constituent parts of the sovereign power, or parliament, each in a separate view. The king's majesty will be the subject of the next, and many subsequent chapters, to which we must at present refer.

<sup>p</sup> *Sulla—tribunis plebis sua lege injuriæ faciendæ potestatem ademit, auxilii ferendi reliquit.* (Sulla, by his law, deprived the tribunes of the people of the power of doing injury, but left them that of protection.) De LL. 3. 9.

<sup>q</sup> Stat. 12 Car. II. c. 30 (Attainder of Persons Guilty of Murder of Chas. I.—1660).

§ 214. (2) House of lords. (a) Lords spiritual.—The next in order are the spiritual lords. These consist of two archbishops, and twenty-four bishops; and at the dissolution of monasteries by Henry VIII consisted likewise of twenty-six mitred abbots, and two priors: <sup>r</sup> a very considerable body, and in those times equal in number to the temporal nobility.<sup>s</sup> All these hold, or are supposed to hold, certain <sup>[156]</sup> ancient baronies under the king: for William the Conqueror thought proper to change the spiritual tenure of frankalmoigne or free alms, under which the bishops held their lands during the Saxon government, into the feudal or Norman tenure by barony; which subjected their estates to all civil charges and assessments, from which they were before exempt:<sup>ss</sup> and, in right of succession to those baronies, which were unalienable from their respective dignities, the bishops and abbots were allowed their seats in the house of lords.<sup>t</sup> But though these lords spiritual are in the eye of the law a distinct estate from the lords temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of *the lords*; they intermix in their votes; and the majority of such intermixture joins both estates. And from this want of a separate assembly and separate negative of the prelates, some writers have argued <sup>u</sup> very cogently, that the lords spiritual and temporal are now in reality only one estate:<sup>w</sup> which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues. For if a bill should pass their house, there is no doubt of its validity, though every lord spiritual should vote against it; of which Selden <sup>x</sup> and Sir Edward Coke <sup>y</sup> gave many

<sup>r</sup> Seld. Tit. Hon. 2. 5. 27.

<sup>s</sup> Co. Litt. 97.

<sup>ss</sup> Gilb. Hist. Exch. 55. Spelm. W. I. 291.

<sup>t</sup> Glanv. 7. 1. Co. Litt. 97. Seld. Tit. Hon. 2. 5. 19.

<sup>u</sup> Whitelocke on Parliam. c. 72. Warburt. Alliance. b. 2. c. 3.

<sup>w</sup> Dyer. 60.

<sup>x</sup> Baronage. p. 1. c. 6. The Act of Uniformity, 1 Eliz. c. 2 (1558) was passed with the dissent of all the bishops (Gibs. codex. 286); and therefore the style of *lords spiritual* is omitted throughout the whole.

<sup>y</sup> 2 Inst. 585, 6, 7. See Keilw. 184; where it is holden by the judges, 7 Hen. VIII (1515) that the king may hold a parliament without any spiritual lords. This was also exemplified in fact in the two first parliaments of Charles II.; wherein no bishops were summoned, till after the repeal of the statute 16 Car. I. c. 27 (Clergy, 1640) by statute 13 Car. II. st. 1. c. 2 (Clergy, 1661).



instances: as, on the other hand, I presume it would be equally good if the lords temporal present were inferior to the bishops in number, and every one of those temporal lords gave his vote to reject the bill; though Sir Edward Coke seems to doubt<sup>2</sup> whether this would not be an *ordinance*, rather than an *act*, of parliament.

§ 215. (b) **Lords temporal.**—<sup>[157]</sup> The lords temporal consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament<sup>a</sup>) by whatever title of nobility distinguished; dukes, marquises, earls, viscounts, or barons; of which dignities we shall speak more hereafter. Some of these sit by descent, as do all ancient peers; some by creation, as do all new made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers, who represent the body of the Scots nobility.<sup>5</sup> Their number is indefinite, and may be increased at will by the power of the crown: and once, in the reign of Queen Anne, there was an instance of creating no less than twelve together; in contemplation of which, in the reign of King George the First, a bill passed the house of lords, and was countenanced by the then ministry, for limiting the number of the peerage. This was thought by some to promise a great acquisition to the constitution, by restraining the prerogative from gaining the ascendant in that august assembly, by pouring in at pleasure an unlimited number of new created lords. But the bill was ill-relished and miscarried in the house of commons, whose leading members were then desirous to keep the avenues to the other house as open and easy as possible.<sup>6</sup>

§ 216. (c) **Rank and honors in a state.**—The distinction of rank and honors is necessary in every well-governed state: in order to reward such as are eminent for their services to the public, in a

<sup>2</sup> 4 Inst. 25.

<sup>a</sup> Staunford. P. C. 153.

<sup>5</sup> There are six Lords of Appeal in Ordinary of parliament, who sit during their lives.

<sup>6</sup> It was decided in the Wensleydale Peerage Case, debated in the year 1856, that the power of the crown does not extend to the creation of life members of the house of lords, except under the provisions of an act of parliament specifically authorizing such creation.—STEPHEN, 2 Comm. (16th ed.), 474.



manner the most desirable to individuals, and yet without burden to the community: exciting thereby an ambitious yet laudable ardor, and generous emulation, in others. And emulation, or virtuous ambition, is a spring of action which, however dangerous or invidious in a mere republic or under a despotic sway, will certainly be attended with good effects under a free monarchy; where, without destroying its existence, its excesses may be continually restrained by that superior power, from which all honor is derived. Such a spirit, when nationally diffused, gives life and vigor to the community; it sets all the wheels of government in motion, [158] which under a wise regulator, may be directed to any beneficial purpose; and thereby every individual may be made subservient to the public good, while he principally means to promote his own particular views.

§ 217. (d) **Nobility in a state.**—A body of nobility is also more peculiarly necessary in our mixed and compounded constitution, in order to support the rights of both the crown and the people, by forming a barrier to withstand the encroachments of both. It creates and preserves that gradual scale of dignity which proceeds from the peasant to the prince; rising like a pyramid from a broad foundation, and diminishing to a point as it rises. It is this ascending and contracting proportion that adds stability to any government; for when the departure is sudden from one extreme to another, we may pronounce that state to be precarious. The nobility, therefore, are the pillars, which are reared from among the people, more immediately to support the throne; and, if that falls, they must also be buried under its ruins. Accordingly, when in the last century the commons had determined to extirpate monarchy, they also voted the house of lords to be useless and dangerous. And since titles of nobility are thus expedient in the state, it is also expedient that their owners should form an independent and separate branch of the legislature. If they were confounded with the mass of the people, and like them had only a vote in electing representatives, their privileges would soon be borne down and overwhelmed by the popular torrent, which would effectually level all distinctions. It is therefore highly necessary that the body of nobles should have a distinct assembly, distinct deliberations, and distinct powers from the commons.

§ 218. (3) **The house of commons.**—The commons consist of all such men of any property in the kingdom as have not seats in the house of lords; every one of which has a voice in parliament, either personally or by his representatives.

§ 219. (a) **Principle of representation.**—In a free state, every man, who is supposed a free agent, ought to be, in some measure, his own governor; and therefore a branch at least of the legislative power should reside in the whole body of the people. And this power, when the territories of the state are small and its citizens easily known, should be exercised by the people <sup>[159]</sup> in their aggregate or collective capacity, as was wisely ordained in the petty republics of Greece, and the first rudiments of the Roman state. But this will be highly inconvenient, when the public territory is extended to any considerable degree, and the number of citizens is increased. Thus when, after the social war, all the burghers of Italy, were admitted free citizens of Rome, and each had a vote in the public assemblies, it became impossible to distinguish the spurious from the real voter, and from that time all elections and popular deliberations grew tumultuous and disorderly; which paved the way for Marius and Sylla, Pompey and Cæsar, to trample on the liberties of their country, and at last to dissolve the commonwealth. In so large a state as ours it is therefore very wisely contrived, that the people should do that by their representatives, which it is impracticable to perform in person; representatives, chosen by a number of minute and separate districts, wherein all the voters are, or easily may be, distinguished. The counties are therefore represented by knights, elected by the proprietors of lands; the cities and boroughs are represented by citizens and burgesses, chosen by the mercantile part or supposed trading interest of the nation; much in the same manner as the burghers in the diet of Sweden are chosen by the corporate towns, Stockholm sending four, as London does with us, other cities two, and some only one.<sup>b</sup> The number of English representatives is 513, and of Scots 45; in all 558.<sup>7</sup> And every member, though chosen by one

<sup>b</sup> Mod. Un. Hist. xxxiii, 18.

<sup>7</sup> Representation in the house of commons.—Formerly the counties were represented by knights, and the cities and boroughs by citizens or burgesses;

particular district, when elected and returned serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the *commonwealth*; to advise his majesty (as appears from the writ of summons) “*de communi consilio super negotiis quibusdam arduis et urgentibus, regem, statum et defensionem regni Angliæ et ecclesiæ Anglicanæ concernentibus* (concerning the common council upon certain difficult and urgent affairs relating to the king, the state, and defense of the kingdom of England and of the English church).” And therefore he is not bound, like a deputy in the united provinces, to consult with, or take the advice, of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

§ 220. (4) Consent of all parts of parliament.—[<sup>160</sup>] These are the constituent parts of a parliament; the king, the lords, spiritual and temporal, and the commons. Parts, of which each is so necessary, that the consent of all three is required to make any new law that shall bind the subject. Whatever is enacted for law by one, or by two only, of the three is no statute; and to it no regard is due, unless in matters relating to their own privileges. For though, in the times of madness and anarchy, the commons once passed a vote,<sup>d</sup> “that whatever is enacted or declared for law by the commons in parliament assembled hath the force of law; and all the people of this nation are concluded thereby, although the

c 4 Inst. 14.

d 4 Jan. 1648.

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but the distinction between the qualifications of knights and burgesses, which had long been merely social, has now entirely ceased, as a consequence of the assimilation of the county with the borough franchise, under the Representation of the People Act, 1884, and the Redistribution of Seats Act, 1885, and the repeal of the Property Qualification Act of 1710. (This statute required a “knight of the shire” to have an income of 600*l.* a year from land, and a “burgess” 300*l.* a year. It was repealed in 1858.) In addition, the universities of Oxford, Cambridge, and London are represented by persons chosen by their respective graduates; as are also the Scottish universities, and the University of Dublin (Trinity College).

The aggregate number of members of the house of commons, under the Redistribution of Seats Act, 1885, is now 670; of whom 495 represent English, 72 Scottish, and 103 Irish constituencies.—STEPHEN, 2 Comm. (16th ed.), 475.

consent and concurrence of the king or house of peers be not had thereto''; yet, when the constitution was restored in all its forms, it was particularly enacted by statute 13 Car. II, c. 1 (Treason, 1661), that if any person shall maliciously or advisedly affirm, that both or either of the houses of parliament have any legislative authority without the king, such person shall incur all the penalties of a *præmunire*.<sup>8</sup>

§ 221. c. Laws and customs of parliament.—We are next to examine the laws and customs relating to parliament, thus united together and considered as one aggregate body.

§ 222. (1) Supreme power of parliament.—The power and jurisdiction of parliament, says Sir Edward Coke,<sup>e</sup> is so tran-

<sup>e</sup> 4 Inst. 36.

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<sup>8</sup> Changes introduced by the Parliament Act of 1911.—But, though the consent of the crown and both houses is still normally required for every legislative act, yet provision has recently been made for solving the difficulty which must inevitably arise, in the event of the two houses being strongly opposed to one another on a particular project. Thus, by the Parliament Act of 1911, it is enacted that, if a "Money Bill" (i. e., a legislative proposal certified by the speaker of the house of commons to be concerned only with taxation, the public debt, accounts, or finances generally, of the central government), after passing the commons and being sent to the house of lords for consideration, does not, during the following month of the parliamentary session, receive the assent of that house without amendment, it may be presented to the crown for the royal assent without it. And, with regard to public measures other than money bills, a similar provision is also contained in the Parliament Act; with the important modification, that the measure in question, before being presented to the crown, must have *thrice* passed the house of commons in three successive sessions, and have thrice in such sessions been rejected, or, at least, not passed without amendment, by the house of lords within one month of parliamentary session after it has been sent to that house. From this second provision, however, are excepted all measures proposing an extension of the maximum duration of a parliament beyond its present maximum of five years; while it is also provided that two years must elapse (if the act is to apply) between the second reading of the measure in the house of commons on the first occasion and the third reading on the third.—STEPHEN, 2 Comm. (16th ed.), 476. See further, note 19, p. \*170, *post*.

Penalties of *præmunire*.—The penalties of *præmunire* entailed forfeiture of lands and goods, imprisonment, and loss of all civil rights.

scendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. And of this high court he adds, it may be truly said, "*si antiquitatem spectes, est vetustissima; si dignitatem, est honoratissima; si jurisdictionem, est capacissima* (if you consider its antiquity, it is most ancient; if its dignity, it is most honorable; if its jurisdiction, it is most extensive)." It hath sovereign and uncontrollable authority in making, confirming, enlarging, restraining, abrogating, repealing, reviving, and expounding of laws, concerning matters of all possible denominations, ecclesiastical, or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is entrusted by the constitution of these kingdoms. All mischiefs and [161] grievances, operations and remedies, that transcend the ordinary course of the laws, are within the reach of this extraordinary tribunal. It can regulate or new-model the succession to the crown; as was done in the reign of Henry VIII and William III. It can alter the established religion of the land; as was done in a variety of instances, in the reigns of King Henry VIII and his three children. It can change and create afresh even the constitution of the kingdom and of parliaments themselves; as was done by the act of union, and the several statutes for triennial and septennial elections. It can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.<sup>9</sup> True it is, that what the

<sup>9</sup> Democratization of parliament.—"The omnipotence of parliament, which Bentham learned from Blackstone, might well, considered as an abstract doctrine, command the acquiescent admiration of the commentator. But the omnipotence of parliament—turned into a reality, and directed by bold reformers towards the removal of all actual or apparent abuses—might well alarm, not only adventurers who found in public life a lucrative as well as an honorable profession, but also statesmen, such as Pitt or Wilberforce, uninfluenced by any sinister interest. Parliamentary sovereignty, in short, taught as a theory by Blackstone and treated as a reality by Bentham, was an instrument well adapted for the establishment of democratic despotism. . . . Parliament under the progress of democracy became the representative, not of the middle classes, but of the whole body of householders; parliamentary sovereignty, therefore, came to mean, in the last resort, the unrestricted power of the wage-earners. English administrative mechanism was reformed and strengthened. The machinery was thus provided for the practical extension of the



parliament doth, no authority upon earth can undo. So that it is a matter most essential to the liberties of this kingdom, that such members be delegated to this important trust, as are most eminent for their probity, their fortitude, and their knowledge; for it was a known apothegm of the great Lord Treasurer Burleigh, "that England could never be ruined but by a parliament": and, as Sir Matthew Hale observes,<sup>f</sup> this being the highest and greatest court, over which none other can have jurisdiction in the kingdom, if by any means a misgovernment should any way fall upon it, the subjects of this kingdom are left without all manner of remedy. To the same purpose the President Montesquieu, though I trust too hastily, presages;<sup>g</sup> that as Rome, Sparta, and Carthage have lost their liberty and perished, so the constitution of England will in time lose its liberty, will perish; it will perish whenever the legislative power shall become more corrupt than the executive.<sup>10</sup>

It must be owned that Mr. Locke,<sup>h</sup> and other theoretical writers, have held, that "there remains still inherent in the people a supreme power to remove or alter the legislative, when they find the legislative act contrary to the trust reposed in them: for, when such trust is abused, it is thereby [162] forfeited, and devolves to those who gave it." But however just this conclusion may be in theory, we cannot practically adopt it, nor take any *legal* steps for carrying it into execution, under any dispensation of government at present actually existing. For this devolution of power, to the people at large, includes in it a dissolution of the whole form

<sup>f</sup> Of Parliaments. 49.

<sup>h</sup> On Gov. p. 2. § 149. 227.

<sup>g</sup> Sp. L. 11. 6.

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activity of the state; but, in accordance with the profound Spanish proverb, 'the more there is of the more the less there is of the less,' the greater the intervention of the government the less becomes the freedom of each individual citizen. Benthamites, it was then seen, had forged the arms most needed by socialists. Thus English collectivists have inherited from their utilitarian predecessors a legislative doctrine, a legislative instrument, and a legislative tendency pre-eminently suited for the carrying out of socialistic experiments." DICEY, *Law and Opinion in England*, 305, 310.

<sup>10</sup> This, as Professor A. V. Dicey says, is "the classical passage on the subject" of the unlimited legislative authority of parliament. For a highly informing discussion of this subject the reader is referred to the chapter entitled, "Nature of Parliamentary Sovereignty," in Dicey's "*Law of the Constitution*."



of government established by that people; reduces all the members to their original state of equality; and, by annihilating the sovereign power, repeals all positive laws whatsoever before enacted. No human laws will therefore suppose a case, which at once must destroy all law, and compel men to build afresh upon a new foundation; nor will they make provision for so desperate an event, as must render all legal provisions ineffectual.<sup>1</sup> So long, therefore, as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control.

§ 223. (2) *Qualification of members.*—In order to prevent the mischiefs that might arise, by placing this extensive authority in hands that are either incapable, or else improper, to manage it, it is provided by the custom and law of parliament,<sup>1</sup> that no one shall sit or vote in either house, unless he be twenty-one years of age. This is also expressly declared by statute 7 & 8 W. III, c. 25 (Parliamentary Elections, 1696), with regard to the house of commons; doubts have arisen, from some contradictory adjudications, whether or no a minor was incapacitated from sitting in that house.<sup>2</sup> It is also enacted by statute 7 Jac. I, c. 6 (Oath of Allegiance, 1609), that no member be permitted to enter the house of commons, till he hath taken the oath of allegiance before the lord steward or his deputy: and by 30 Car. II, st. 2 (Parliament, 1678), and 1 Geo. I, c. 13 (Succession to the Crown, 1714), that no member shall vote or sit in either house, till he hath in the presence of the house taken the oaths of allegiance, supremacy, and abjuration, and subscribed and repeated the declaration against transubstantiation, and invocation of saints, and the sacrifice of the mass. Aliens, unless naturalized, were likewise by the law of parliament incapable to serve therein:<sup>3</sup> and now it is enacted by statute 12 & 13 W. III, c. 2 (Act of Settlement, 1700), that no alien, [<sup>163</sup>] even though he be naturalized, shall be capable of being a member of either house of parliament. And there are not only these standing incapacities; but if any person is made

<sup>1</sup> See page \*244.

<sup>2</sup> Whitelocke. c. 50. 4 Inst. 47.

<sup>3</sup> Com. Journ. 16 Dec. 1690.

<sup>4</sup> Com. Journ. 10 Mar. 1623. 18 Febr. 1625.

a peer by the king, or elected to serve in the house of commons by the people, yet may the respective houses upon complaint of any crime in such person, and proof thereof, adjudge him disabled and incapable to sit as a member:<sup>m</sup> and this by the law and custom of parliament.

§ 224. (3) Jurisdiction of each house over its own affairs.—For, as every court of justice hath laws and customs for its direction, some the civil and canon, some the common law, others their own peculiar laws and customs, so the high court of parliament hath also its own peculiar law, called the *lex et consuetudo parliamenti* (the law and custom of parliament): a law which Sir Edward Coke<sup>n</sup> observes, is “*ab omnibus quærenda, a multis ignorata, a paucis cognita* (to be sought by all, unknown to many, known by few).” It will not, therefore, be expected that we should enter into the examination of this law, with any degree of minuteness: since, as the same learned author assures us,<sup>o</sup> it is much better to be learned out of the rolls of parliament, and other records, and by precedents, and continual experience, than can be expressed by any one man. It will be sufficient to observe, that the whole of the law and custom of parliament has its original from this one maxim, “that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere.”<sup>p</sup> Hence, for instance, the lords will not suffer the commons to interfere in settling the election of a peer of Scotland; the commons will not allow the lords to judge of the election of a burgess; nor will either house permit the subordinate courts of law to examine the merits of either case. But the maxims upon which they proceed, together with the method of proceeding, rest entirely in the breast of the parliament itself; and are not defined and ascertained by any particular stated laws.

<sup>m</sup> Whitelocke of Parl. c. 102. See Lord’s Journ. 3 May 1620. 13 May 1624. 26 May 1825. Com. Journ. 14 Feb. 1580. 21 Jun. 1628. 9 Nov. 21. Jan. 1640. 6 Mar. 1676. 6 Mar. 1711. 17 Feb. 1769.

<sup>n</sup> 1 Inst. 11.

<sup>o</sup> 4 Inst. 50.

<sup>p</sup> 4 Inst. 15.

§ 225. (4) Privileges of parliament.—<sup>[164]</sup> The *privileges* of parliament are likewise very large and indefinite.\* And therefore when in 31 Hen. VI (1452), the house of lords propounded a question to the judges concerning them, the chief justice, Sir John Fortescue, in the name of his brethren, declared, “that they ought not to make answer to that question: for it hath not been used aforetime that the justices should in any wise determine the privileges of the high court of parliament. For it is so high and mighty in its nature, that it may make law; and that which is law, it may make no law: and the determination and knowledge of that privilege belongs to the lords of parliament, and not to the justices.”<sup>q 11</sup> Privilege of parliament was principally established, in order to protect its members not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. If, therefore, all the privileges of parliament were once to be set down and ascertained, and no privilege to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretense thereof to harass any refractory member and violate the freedom of parliament. The dignity and independence of the two houses are therefore in great measure preserved by keeping their privileges indefinite.

§ 226. (a) Privileges of members.—Some, however, of the more notorious privileges of the members of either house are, privilege of speech, of person, of their domestics, and of their lands

\* Third and previous editions contained this in addition, “which has occasioned an observation that the principal privilege of parliament consisted in this, that its privileges were not certainly known to any but the parliament itself.”

q Seld. Baronage. part. 1. c. 4.

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<sup>11</sup> Lord Holt, however, expressed the opinion “that the authority of parliament being from the law is circumscribed by the law; and if the privilege is exceeded, the act is wrongful equally with the act of a private individual.” *Reg. v. Paty* (1705), 2 *Ld. Raym.* 1114. This has been approved in *Stockdale v. Hansard* (1839), 9 *Ad. & E.* 1; (1840) 11 *Ad. & E.* 253; *Howard v. Gossett* (1845), 10 *Q. B.* 359.

and goods.<sup>12</sup> As to the first, privilege of speech, it is declared by the statute 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament. So, likewise, are the other privileges, of person, servants, lands, and goods: which are immunities as ancient as Edward the Confessor; in whose laws<sup>r</sup> we find this precept, "*ad synodos venientibus, sive summoniti* [<sup>165</sup>] *sint, sive per se quid agendum habuerint, sit summa pax* (let there be perfect security to those coming to the synods; whether summoned or coming on their own business)"; and so, too, in the old Gothic constitutions, "*extenditur hæc pax et securitas ad quatuordecim dies, convocato regni senatu* (this freedom from molestation is extended to fourteen days from the assembling of the senate of the kingdom.)"<sup>s</sup> This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of either house, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity. It has likewise peculiar penalties annexed to it in the courts of law, by the statutes 5 Hen. IV, c. 6 (Privilege of Parliament, 1403), and 11 Hen. VI, c. 11 (Privilege of Parliament, 1433). Neither can any member of either house be arrested and taken into custody without a breach of the privilege of parliament.

But all other privileges, which derogate from the common law, are now at an end, save only as to the freedom of the member's person: which in a peer (by the privilege of peerage) is forever sacred and inviolable; and in a commoner (by the privilege of parliament) for forty days after every prorogation, and forty

<sup>r</sup> Cap. 3.

<sup>s</sup> Steirnh, de Jure Goth. l. 3. c. 3.

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<sup>12</sup> Privileges of domestics, lands, and goods were taken away by 10 Geo. III, c. 50 (Parliament Privilege, 1770).

days before the next appointed meeting; <sup>t</sup>13 which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. As to all other privileges, which obstruct the ordinary course of justice, they were restrained by the statutes 12 W. III, c. 3 (Parliamentary Privilege, 1700), 2 & 3 Ann., c. 18 (1703), and 11 Geo. II, c. 24 (Parliamentary Privilege, 1737), and are now totally abolished by statute 10 Geo. III, c. 50 (Parliamentary Privilege, 1770), which enacts, that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament; which shall not be impeached or delayed by pretense of any such privilege; except that the person of a member of the house of commons shall not thereby be subjected to any arrest or imprisonment.<sup>14</sup> Likewise, for the benefit of commerce, it is provided by statute 4 Geo. III, c. 33 (Bankrupts, 1764), that any trader, having privilege of parliament, may be served with legal process for any just debt (to the amount of 100*l.*), and unless he makes satisfaction within two months, it shall <sup>[166]</sup> be deemed an act of bankruptcy; and that commissions of bankrupt may be issued against such privileged traders, in like manner as against any other.

§ 227. (b) **Writ of privilege.**—The only way by which courts of justice could anciently take cognizance of privilege of parlia-

<sup>t</sup> 2 Lev. 72.

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<sup>13</sup> Blackstone's statement is criticised in *Hoppin v. Jenckes*, 8 R. I. 453, 459, where it is shown that this privilege was for a convenient or reasonable, and not for a period of forty days; and it was held that the privilege of a member of Congress under the constitution does not extend to forty days and more, but is limited to a reasonable time for going and returning.—HAMMOND.

<sup>14</sup> Editions previous to the fifth read, "Immediately after the dissolution or prorogation of the parliament, or adjournment of the houses for above a fortnight; and during these recesses a peer or member of the house of commons, may be sued like an ordinary subject, and in consequence of such suits may be dispossessed of his lands and goods. In these cases the king has also his prerogative: he may sue for his debts, though not arrest the person of a member, during the sitting of parliament; and by statute 2 & 3 Ann., c. 18 (1703), a member may be sued during the sitting of parliament for any misdemeanor or breach of trust in a public office."—HAMMOND.



ment was by writ of privilege, in the nature of a *supersedeas* (that you forbear. A command to stay or forbear doing that which ought not to be done), to deliver the party out of custody when arrested in a civil suit.<sup>u</sup> For when a letter was written by the speaker to the judges, to stay proceedings against a privileged person, they rejected it, as contrary to their oath of office.<sup>v</sup> But since the statute 12 W. III, c. 3 (Parliamentary Privilege, 1700), which enacts, that no privileged person shall be subject to arrest or imprisonment, it hath been held that such arrest is irregular *ab initio* (from the beginning), and that the party may be discharged upon motion.<sup>w</sup> It is to be observed, that there is no precedent of any such writ of privilege, but only in civil suits; and that the statute of 1 Jac. I, c. 13 (Execution, 1604), and that of King William (which remedy some inconveniences arising from privilege of parliament) speak only of civil actions. And therefore the claim of privilege hath been usually guarded with an exception as to the case of indictable crimes;<sup>x</sup> or, as it hath been frequently expressed, of treason, felony, and breach (or surety) of the peace.<sup>y</sup>

§ 228. (c) **No privilege in crimes.**—Whereby it seems to have been understood that no privilege was allowable to the members, their families, or servants, in any *crime* whatsoever; for all crimes are treated by the law as being *contra pacem domini regis* (against the king's peace). And instances have not been wanting, wherein privileged persons have been convicted of misdemeanors, and committed, or prosecuted to outlawry, even in the middle of a session;<sup>z</sup> which proceeding has afterwards received the sanction and approbation of parliament.<sup>a</sup> To which may be added, that, a few years ago, the case of writing and publishing seditious libels was resolved by both [1671] houses<sup>b</sup> not to be entitled to privileges; and that the reasons, upon which that case proceeded,<sup>c</sup> extended equally to

<sup>u</sup> Dyer 59. 4 Pryn. Brev. Parl. 757.

<sup>v</sup> Latch. 48. Noy. 83.

<sup>w</sup> Stra. 989.

<sup>x</sup> Com. Journ. 17 Aug. 1641.

<sup>y</sup> 4 Inst. 25. Com. Journ. 20 May 1675.

<sup>z</sup> Mich. 16 Edw. IV. in Scaccb.—Lord Raym. 1461.

<sup>a</sup> Com. Journ. 16 May 1726.

<sup>b</sup> Com. Journ. 24 Nov. Lord's Journ. 29 Nov. 1763.

<sup>c</sup> Lord's Protest. *Ibid.*



every indictable offense. So that the chief, if not the only, privilege of parliament, in such cases, seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained: a practice that is daily used upon the slightest military accusations, preparatory to a trial by a court-martial;<sup>d</sup> and which is recognized by the several temporary statutes for suspending the *habeas corpus* act;<sup>e</sup> whereby it is provided, that no member of either house shall be detained, till the matter of which he stands suspected be first communicated to the house of which he is a member, and the consent of the said house be obtained for his commitment or detaining. But yet the usage has uniformly been, ever since the revolution, that the communication has been subsequent to the arrest.<sup>15</sup>

These are the general heads of the laws and customs relating to parliament, considered as one aggregate body. We will next proceed to

§ 229. *d. Privileges of the lords.*—The laws and customs relating to the house of lords in particular. These, if we exclude their judicial capacity, which will be more properly treated of in the third and fourth books of these Commentaries, will take up but little of our time.

<sup>d</sup> Com. Journ. 20 Apr. 1761.

<sup>e</sup> Particularly 17 Geo. II. c. 6 (Conspiracy, 1743).

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<sup>15</sup> **Parliamentary privilege.**—In addition to the privileges of freedom of speech and of freedom from arrest, the right of parliament freely to publish its own reports, papers, votes, and other proceedings, is now specially protected by statute. For it has been provided by the Parliamentary Papers Act, 1840, that anyone sued or prosecuted on account of the publication of such matters by authority of either house, may have the proceedings against him stayed, and all process therein superseded, on production to the court of a proper certificate of such authority; and that no person shall be liable to any civil or criminal proceeding for printing extracts from, or abstracts of, parliamentary documents, provided he can show that he did so *bona fide* and without malice. It is moreover clearly settled, that in any case in which the privileges of either house of parliament have been violated, that house has power to commit to prison the person guilty of such contempt; and also, by its order, to set at liberty anyone who, in breach of its privileges, has been arrested in respect of any act by him done in his capacity of member of parliament.—STEPHEN, 2 Comm. (16th ed.), 482.

One very ancient privilege is that declared by the charter of the forest,<sup>f</sup> confirmed in parliament 9 Hen. III (1225); viz., that every lord spiritual or temporal summoned to parliament, and passing through the king's forests, may, both in going and returning, kill one or two of the king's deer without warrant; in view of the forester if he be present, or in blowing a horn if he be absent: that he may not seem to take the king's venison by stealth.

[168] In the next place they have a right to be attended, and constantly are, by the judges of the court of king's bench and common pleas, and such of the barons of the exchequer as are of the degree of the coif, or have been made sergeants at law; as likewise by the king's learned counsel, being sergeants, and by the matters of the court of chancery; for their advice in point of law, and for the greater dignity of their proceedings.<sup>16</sup> The secretaries of state, with the attorney and solicitor general, were also used to attend the house of peers, and have to this day (together with the judges, etc.) their regular writs of summons issued out at the beginning of every parliament,<sup>g</sup> *ad tractandum et consilium impendendum* (for consulting and giving advice), though not *ad consentiendum* (for consenting): but, whenever of late years they have been members of the house of commons,<sup>h</sup> their attendance here hath fallen into disuse.

Another privilege is, that every peer, by license obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence.<sup>i</sup> A privilege which a member of the

<sup>f</sup> C. 11.

<sup>g</sup> Stat. 31 Hen. VIII. c. 10. (Parliament (Precedence) 1539.) Smith's Commonw. b. 2. c. 3. Moor. 551. 4 Inst. 4. Hale of Parl. 140.

<sup>h</sup> See Com. Journ. 11 Apr. 1614. 8 Feb. 1620. 10 Feb. 1625. 4 Inst. 48.

<sup>i</sup> Seld. Baronage. p. 1. c. 1.

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<sup>16</sup> The house of lords, in the exercise of their appellate jurisdiction, have the right to request the opinion of the judges, on points of law upon the question before them for their determination. The power of summoning the judges, however, has been exercised only twice since the passage of the Judicature Act of 1873, namely, in the cases of *Dalton v. Angus*, [1881] 6 App. Cas. 740, and *Allen v. Flood*, [1898] App. Cas. 1.

other house can by no means have, as he is himself but a proxy for a multitude of other people.<sup>k 17</sup>

Each peer has also a right, by leave of the house, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the house, with the reasons for such dissent; which is usually styled his protest.

All bills likewise, that may in their consequences any way affect the rights of the peerage, are by the custom of parliament to have their first rise and beginning in the house of peers, and to suffer no changes or amendments in the house of commons.<sup>18</sup>

There is also one statute peculiarly relative to the house of lords, 6 Ann., c. 23 (1706), which regulates the election of the [169] sixteen representative peers of North Britain, in consequence of the twenty-second and twenty-third articles of the union: and for that purpose prescribes the oath, etc., to be taken by the electors; directs the mode of balloting; prohibits the peers electing from being attended in an unusual manner; and expressly provides, that no other matter shall be treated of in that assembly, save only the election, on pain of incurring a *præmunire*.

§ 230. e. Privileges of the commons.—The peculiar laws and customs of the house of commons relate principally to the raising of taxes, and the elections of members to serve in parliament.

§ 231. (1) In respect to money bills.—First, with regard to taxes: it is the ancient indisputable privilege and right of the house of commons, that all grants of subsidies or parliamentary aids do begin in their house, and are first bestowed by them;<sup>1</sup> although

<sup>k</sup> 4 Inst. 12.

<sup>1</sup> 4 Inst. 29.

<sup>17</sup> Proxies in the house of lords.—By the rules of the house, no proxy might vote on a question of guilty or not guilty; and only a spiritual lord could be proxy for a spiritual lord, and a temporal lord for a temporal lord. Since 1868 even this privilege has been discontinued, and all votes are given in person.

<sup>18</sup> It is said by Edward Jenks, Esq., in the sixteenth edition of Stephen's Commentaries (II, 484 n.), that "Blackstone gives no authority for this remarkable statement, which has not been followed in modern practice. (See May, Parliamentary Practice, 11th ed., p. 460.)"

their grants are not effectual to all intents and purposes, until they have the assent of the other two branches of the legislature. The general reason, given for this exclusive privilege of the house of commons, is, that the supplies are raised upon the body of the people, and therefore it is proper that they alone should have the right of taxing themselves. This reason would be unanswerable, if the commons taxed none but themselves: but it is notorious, that a very large share of property is in the possession of the house of lords; that this property is equally taxable, and taxed, as the property of the commons; and therefore the commons not being the *sole* persons taxed, this cannot be the reason of their having the *sole* right of raising and modeling the supply. The true reason, arising from the spirit of our constitution, seems to be this. The lords being a permanent hereditary body, created at pleasure by the king, are supposed more liable to be influenced by the crown, and when once influenced to continue so, than the commons, who are a temporary elective body, freely nominated by the people. It would therefore be extremely dangerous to give the lords any power of framing new taxes for the subject: it is sufficient that they have a power of rejecting, if they think the commons too lavish or impro- [170] vident in their grants. But so reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other house to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the lords to the mode of taxing the people by a money bill; under which appellation are included all bills, by which money is directed to be raised upon the subject, for any purpose or in any shape whatsoever; either for the exigencies of government, and collected from the kingdom in general, as the land tax; or for private benefit, and collected in any particular district, as by turnpikes, parish rates, and the like. Yet Sir Matthew Hale<sup>m</sup> mentions one case, founded on the practice of parliament in the reign of Henry VI,<sup>n</sup> wherein he thinks the lords may alter a money bill: and that is, if the commons grant a tax, as that of tonnage and poundage, for *four years*; and the lords alter it to a less time, as for

<sup>m</sup> On parliaments. 65, 66.

<sup>n</sup> Year-Book, 33 Hen. VI. 17 (1454). But see the answer to this case by Sir Heneage Finch, Com. Journ. 22 Apr. 1671.

*two* years; here, he says, the bill need not be sent back to the commons for their concurrence, but may receive the royal assent without further ceremony; for the alteration of the lords is consistent with the grant of the commons. But such an experiment will hardly be repeated by the lords, under the present improved idea of the privilege of the house of commons, and, in any case where a money bill is remanded to the commons, all amendments in the mode of taxation are sure to be rejected.<sup>19</sup>

§ 232. (2) *In election of members.*—Next, with regard to the elections of knights, citizens, and burgesses; we may observe, that

<sup>19</sup> *The Parliament Act of 1911.*—From the year 1861 to the year 1909, the alleged power of the lords even to reject a money bill was not exercised; and an attempt to insist upon it in the latter year led, after a general election, to the passing of the Parliament Act, 1911, under which (note 8, p. \*160, *supra*), the power of the house of lords to reject, amend, or even seriously to delay a money bill, has been formally abolished.—STEPHEN, 2 Comm. (16th ed.), 486.

The Parliament Act, 1911, is so significant of tendencies and so far-reaching in its effect, that the main portions are given here:

“THE PARLIAMENT ACT, 1911.

“An Act to make provision with respect to the powers of the House of Lords in relation to those of the House of Commons, and to limit the duration of Parliament. [18th August, 1911.]

“Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament:

“And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:

“And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords:

“Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present parliament assembled, and by the authority of the same, as follows:—

“*Powers of House of Lords as to Money Bills.*—1. (1) If a Money Bill, having been passed by the House of Commons, and sent up to the House of Lords at least one month before the end of the Session, is not passed by the House of Lords without amendment within one month after it is so sent up to



herein consists the exercise of the democratical part of our constitution: for in a democracy there can be no exercise of sovereignty but by suffrage, which is the declaration of the people's will. In all democracies, therefore, it is of the utmost importance to regulate by whom, and in what manner, the suffrages are to be given. And the Athenians were so justly jealous of this prerogative, that a stranger, who interfered in the assemblies of the people, was punished by their laws with death: because such a man was esteemed guilty of high treason, by [171] usurping those rights of sovereignty, to which he had no title. In England, where the people do not debate in a collective body but by representation, the exercise of this sovereignty consists in the choice of representatives. The laws have therefore very strictly guarded against

that House, the Bill shall, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified, notwithstanding that the House of Lords have not consented to the Bill."

Paragraph 2 defines a "money bill." Paragraph 3 requires the certificate of the speaker of the house of commons that the bill is a money bill.

*"Restriction of the Powers of the House of Lords as to Bills other than Money Bills.—2.* (1) If any Public Bill (other than a Money Bill or a Bill containing any provision to extend the maximum duration of Parliament beyond five years) is passed by the House of Commons in three successive sessions (whether of the same Parliament or not), and, having been sent up to the House of Lords at least one month before the end of the session, is rejected by the House of Lords in each of those sessions, that Bill shall, on its rejection for the third time by the House of Lords, unless the House of Commons direct to the contrary, be presented to His Majesty and become an Act of Parliament on the Royal Assent being signified thereto, notwithstanding that the House of Lords have not consented to the Bill: Provided that this provision shall not take effect unless two years have elapsed between the date of the second reading in the first of those sessions of the Bill in the House of Commons and the date on which it passes the House of Commons in the third of those sessions."

Paragraphs 2, 3, and 4 provide details for the carrying out of paragraph 1.

*"Certificate of Speaker.—3.* Any certificate of the Speaker of the House of Commons given under this Act shall be conclusive for all purposes, and shall not be questioned in any court of law.

*"Enacting words.—4.* (1) In every Bill presented to His Majesty under the preceding provisions of this Act, the words of enactment shall be as follows, that is to say:

"'Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Commons in this present Parliament assembled, in



usurpation or abuse of this power, by many salutary provisions; which may be reduced to these three points: 1. The qualifications of the electors. 2. The qualifications of the elected. 3. The proceedings at elections.

§ 233. (a) **Qualifications of electors.**—As to the qualifications of the electors. The true reason of requiring any qualification, with regard to property, in voters, is to exclude such persons as are in so mean a situation that they are esteemed to have no will of their own. If these persons had votes, they would be tempted to dispose of them under some undue influence or other. This would give a great, an artful, or a wealthy man, a larger share in elections than is consistent with general liberty. If it were probable that every man would give his vote freely and without influence of any kind, then, upon the true theory and genuine principles of liberty, every member of the community, however poor, should have a vote in electing those delegates, to whose charge is committed the disposal of his property, his liberty, and his life. But, since that can hardly be expected in persons of indigent fortunes, or such as are under the immediate dominion of others, all popular states have been obliged to establish certain qualifications; whereby some, who are suspected to have no will of their own, are excluded

accordance with the provisions of the Parliament Act, 1911, and by authority of the same, as follows.’

“(2) Any alteration of a Bill necessary to give effect to this section shall not be deemed to be an amendment of the Bill.

“*Provisional Order Bills excluded.*—5. In this Act the expression ‘Public Bill’ does not include any Bill for confirming a Provisional Order.

“*Saving for existing rights and privileges of the House of Commons.*—6. Nothing in this Act shall diminish or qualify the existing rights and privileges of the House of Commons.

“*Duration of Parliament, 1 Geo. I, stat. 2, c. 38.*—7. Five years shall be substituted for seven years as the time fixed for the maximum duration of Parliament under the Septennial Act, 1715.

“*Short title.*—8. This Act may be cited as the Parliament Act, 1911.”

An interesting essay on the import of the Parliament Act of 1911 is that by Professor A. V. Dicey, entitled “The Parliament Act, 1911, and the Destruction of all Constitutional Safeguards,” published in a little volume, “Rights of Citizenship,” London and New York, 1912. The text of the Parliament Act of 1911 is published at the end of the volume mentioned.

from voting, in order to set other individuals, whose wills may be supposed independent, more thoroughly upon a level with each other.

And this constitution of suffrages is framed upon a wiser principle, with us, than either of the methods of voting, by centuries or by tribes, among the Romans. In the method by centuries, instituted by Servius Tullius, it was principally property, and not numbers, that turned the scale: in the method by tribes, gradually introduced by the tribunes of the people, numbers only were regarded, and property entirely overlooked. Hence the laws passed by the former method had [172] usually too great a tendency to aggrandize the patricians or rich nobles; and those by the latter had too much of a leveling principle. Our constitution steers between the two extremes. Only such are entirely excluded, as can have no will of their own: there is hardly a free agent to be found, who is not entitled to a vote in some place or other in the kingdom. Nor is comparative wealth, or property, entirely disregarded in elections; for though the richest man has only one vote at one place, yet, if his property be at all diffused, he has probably a right to vote at more places than one, and therefore has many representatives. This is the spirit of our constitution: not that I assert it is in fact quite so perfect<sup>nn</sup> as I have here endeavored to describe it; for, if any alteration might be wished or suggested in the present frame of parliaments, it should be in favor of a more complete representation of the people.

§ 234. (i) Electors of knights of the shire.—But to return to our qualifications; and first those of electors for knights of the shire. 1. By statute 8 Hen. VI, c. 7 (Parliament, 1429), and 10 Hen. VI, c. 2 (Parliament, 1432) (amended by 14 Geo. III, c. 58)

<sup>nn</sup> The candid and intelligent reader will apply this observation to many other parts of the work before him, wherein the constitution of our laws and government are represented as nearly approaching to perfection; without descending to the invidious task of pointing out such deviations and corruptions, as length of time and a loose state of national morals have too great a tendency to produce. The incurvations of practice are then the most notorious when compared with the rectitude of the rule; and to elucidate the clearness of the spring, conveys the strongest satire on those who have polluted or disturbed it.

(Parliamentary Elections, 1774), the knights of the shire shall be chosen of people, whereof every man shall have freehold to the value of forty shillings by the year within the county; which (by subsequent statutes) is to be clear of all charges and deductions, except parliamentary and parochial taxes. The knights of shires are the representatives of the landholders, or landed interest of the kingdom: their electors must therefore have estates in lands or tenements within the county represented: these estates must be freehold, that is, for term of life at least; because beneficial leases for long terms of years were not in use at the making of these statutes, and copyholders were then little better than villeins, absolutely dependent upon their lords: this freehold must be of forty shillings annual value; because that [173] sum would then, with proper industry, furnish all the necessaries of life and render the freeholder, if he pleased, an independent man. For Bishop Fleetwood, in his *chronicon preciosum*, written at the beginning of the present century, has fully proved forty shillings in the reign of Henry VI to have been equal to twelve pounds *per annum* in the reign of Queen Anne; and, as the value of money is very considerably lowered since the bishop wrote, I think we may fairly conclude, from this and other circumstances, that what was equivalent to twelve pounds in his days is equivalent to twenty at present. The other less important qualifications of the electors for counties in England and Wales may be collected from the statutes cited in the margin;<sup>o</sup> which direct, 2. That no person under twenty-one years of age shall be capable of voting for any member. This extends to all sorts of members as well for boroughs as counties; as does also the next, viz.: 3. That no person convicted of perjury or subornation of perjury shall be capable of voting in any election. 4. That no person shall vote in right of any freehold, granted to him fraudulently to qualify him to vote. Fraudulent grants are such as contain an agreement to reconvey, or to defeat the estate granted; which agreements are made void, and the estate is absolutely vested in the person to whom it is so granted. And, to guard

<sup>o</sup> 7 & 8 W. III. c. 25 (Parliamentary Elections, 1696). 10 Ann. c. 23 (1711). 2 Geo. II. c. 21 (1728). 18 Geo. II. c. 18 (Parliamentary Elections, 1744). 31 Geo. II. c. 14 (Parliamentary Elections, 1757). 3 Geo. III. c. 24 (Parliamentary Elections, 1762).

the better against such frauds, it is further provided, 5. That every voter shall have been in the actual possession, or receipt of the profits, of his freehold to his own use for twelve calendar months before; except it came to him by descent, marriage, marriage settlement, will, or promotion to a benefice or office. 6. That no person shall vote in respect of an annuity or rent charge, unless registered with the clerk of the peace twelve calendar months before. 7. That in mortgaged or trust estates, the person in possession, under the above-mentioned restrictions, shall have the vote. 8. That only one person shall be admitted to vote for any one house or tenement, to prevent the splitting of freeholds. 9. That no estate shall qualify a voter, unless the estate has been assessed to some land tax aid, at least twelve months before the [174] election. 10. That no tenant by copy of court roll shall be permitted to vote as a freeholder. Thus much for the electors in counties.<sup>20</sup>

<sup>20</sup> *The franchise under modern English legislation.*—The knights of shires, that is to say, the members for counties, were for long considered to be peculiarly representative of the landed interest; and their electors were, down to the second quarter of the nineteenth century, required to have estates in lands or tenements within the county represented, and also, until the requirement was abolished by the 14 Geo. III (1774), c. 58, to be resident within that county. An estate of the value of 40s. per annum of free tenure, in which the voter had also a freehold interest, was from 1430 the invariable qualification for the franchise. And the law so continued until the year 1832, when, by the Representation of the People Act, 1832 (commonly called the "Reform Act"), the property vote in the counties was amended by the abolition of the forty shilling freehold franchise, unless acquired by settlement or devise, or for an estate of inheritance. The same act admitted, however, a general landed property franchise (freehold, copyhold, or long leasehold) of the annual value of ten pounds, and an occupation or short leasehold franchise of fifty pounds a year. The Reform Act of 1867 reduced the property qualification in the counties from ten pounds to five, and the occupation franchise from fifty pounds to twelve; while the Reform Act of 1884 introduced into the counties the residential and the ten pound lodger franchise. \* \* \*

The ancient borough franchise, as it stood on the eve of the Reform Act, 1832, was a mass of anomalies and inconsistencies, due chiefly to the fact that the parliamentary qualification had become mixed up with the municipal qualification in chartered boroughs, which varied almost in each case. There was nothing of the uniformity of the county forty shilling franchise; except, perhaps, in those few instances in which the borough was governed as a county. In the others, the anomalies and complexities were not only the cause of frequent disputes and contested elections; they directly favored the acquisition of

§ 235. (ii) **Electors of burgesses.**—As for the electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of this kingdom. But as trade is of a fluctuating nature, and seldom long fixed in a place, it was formerly left to the crown to summon, *pro re nata* (according to circumstances), the most flourishing towns to send representatives to parliament. So that as towns increased in trade, and grew populous, they were admitted to a share in the legislature.<sup>21</sup> But the misfortune is,

corrupt influence by wealthy patrons. In other words, they were the chief elements in the system of "close" or "rotten" boroughs.

The Reform Act of 1832, subject to a due regard to vested interests, swept away the whole mass of these anomalies, and substituted therefor a simple and uniform ten pound occupation franchise; while the act of 1867 added the resident household and lodger franchises, much on the lines that we have described above in speaking of the county franchise. But neither of these acts introduced the property franchise into the boroughs, where, therefore, it has no place; except in the anomalous "counties of towns" and "counties of cities" (see p. \*120). \* \* \*

In distinguishing between these various classes of franchise, the chief care of the student should be to note carefully the differences, not always easy to grasp, between the three processes of occupation, residence or inhabitancy, and lodging. "Occupation" merely means the exclusive right to possession; and may apply equally to a bare field, a warehouse or counting-house, a set of professional chambers, or a dwelling-house. "Residence," or "inhabitancy," does not necessarily imply sole possession; but it does imply actual living in a dwelling-house, while a man need never have actually seen the place which he "occupies." "Lodging" is, unfortunately, a term about which there has, recently, been so much dispute, that a writer may well shrink from any attempt to define it. But, broadly speaking, a lodger is a resident in part of a dwelling-house or tenement, the general control of which is in the hands of another person (the householder), but who yet has, in respect of his own part of such tenement, sufficient control to make him, in a sense, master thereof, though not so much so as an ordinary householder. \* \* \*

In order, however, that such a complicated system of franchises should be at all workable in a populous community like England, it is necessary that an official register of voters should be prepared in each constituency, and regularly kept up to date; so as to be ready for an election, which may, perchance, take place at the most unexpected moment. It is, therefore, a condition precedent to any exercise of the franchise, that the person claiming to exercise it should be *registered as a voter*.—STEPHEN, 2 Comm. (16th ed.), 487 ff.

<sup>21</sup> On account of the shifting of trade and of population, there came about during the years a great change in the relative importance of many towns. Small and obscure towns came to be centers of population, wealth and trade,



that the deserted boroughs continued to be summoned, as well as those to whom their trade and inhabitants were transferred; except a few which petitioned to be eased of the expense, then usual, of maintaining their members: four shillings a day being allowed for a knight of the shire, and two shilling for a citizen or burgess: which was the rate of wages established in the reign of Edward III.<sup>p</sup> Hence the members for boroughs now bear above a quadruple proportion to those for counties, and the number of parliament men is increased since Fortescue's time, in the reign of Henry the Sixth, from 300 to upwards of 500, exclusive of those of Scotland.

§ 236. (iii) Representation of universities.—The universities were in general not empowered to send burgesses to parliament; though once, in 28 Edw. I (1300), when a parliament was summoned to consider of the king's right to Scotland, there were issued writs, which required the University of Oxford to send up four or five, and that of Cambridge two or three, of their most discreet and learned lawyers for that purpose.<sup>q</sup> But it was King James the First who indulged them with the permanent privilege to send constantly two of their own body; to serve for those students who, though useful members of the community, were neither concerned in the landed nor the trading interest; and to protect in the legislature the rights of the republic of letters.<sup>22</sup> The right of election in boroughs is various, depending entirely on the several charters, customs, and constitutions of the respective places, which has occasioned infinite disputes; though now by statute [<sup>175</sup>] 2 Geo. II, c. 24 (Parliamentary Elections, 1728), the right of voting for the

<sup>p</sup> 4 Inst. 16.

<sup>q</sup> Prynné Parl. Writs. I. 345.

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but remained unrepresented. Other towns, once important and flourishing, sank to relative obscurity, but continued to send members to parliament. To correct this condition, redistribution of seats has been made by the several acts of 1832, 1867, and 1885. As a consequence, the distinctions of representation between boroughs and counties are now almost wiped out. There are, however, differences of franchise requirements, as shown in the last note.

<sup>22</sup> The privilege of representation in parliament is, also, now conferred on the universities of London, Dublin, Edinburgh, St. Andrews, Glasgow, and Aberdeen.



future shall be allowed according to the last determination of the house of commons concerning it. And by statute 3 Geo. III, c. 15 (Parliament, 1762), no freeman of any city or borough (other than such as claim by birth, marriage, or servitude) shall be entitled to vote therein, unless he hath been admitted to his freedom twelve calendar months before.

§ 237. (b) Qualifications of members of house of commons.—

Next, as to the qualifications of persons to be *elected* members of the house of commons. Some of these depend upon the law and custom of parliaments, declared by the house of commons;<sup>r</sup> others upon certain statutes. And from these it appears, 1. That they must not be aliens born,<sup>s</sup> or minors.<sup>t</sup> 2. That they must not be any of the twelve judges,<sup>u</sup> because they sit in the lords' house; nor of the clergy,<sup>w</sup> for they sit in the convocation; nor persons attainted of treason or felony,<sup>x</sup> for they are unfit to sit anywhere. 3. That sheriffs of counties, and mayors and bailiffs of boroughs, are not eligible in their respective jurisdictions, as being returning officers;<sup>y</sup> but that sheriffs of one county are eligible to be knights of another.<sup>z</sup> 4. That, in strictness, all members ought to have been inhabitants of the places for which they are chosen:<sup>a</sup> but this, having been long disregarded, was at length entirely repealed by statute 14 Geo. III, c. 58 (Parliamentary Elections, 1774). 5. That no persons concerned in the management of any duties or taxes created since 1692, except the commissioners of the treasury,<sup>b</sup> nor any of the officers following,<sup>c</sup> (viz., commissioners of prizes, transports,

<sup>r</sup> 4 Inst. 47, 48.

<sup>s</sup> See page \*162.

<sup>t</sup> *Ibid.*

<sup>u</sup> Com. Journ. 9 Nov. 1605.

<sup>w</sup> Com. Journ. 13 Oct. 1553. 8 Feb. 1620. 17 Jan. 1661.

<sup>x</sup> Com. Journ. 21 Jan. 1580. 4 Inst. 47.

<sup>y</sup> Bro. Abr. t. Parliament. 7. Com. Journ. 25 June 1604. 14 Apr. 1614. 22 Mar. 1620. 2. 4. 15 Jun. 17 Nov. 1685. Hal. of Parl. 114.

<sup>z</sup> 4 Inst. 48. Whitelocke of Parl. c. 99, 100, 101.

<sup>a</sup> Stat. 1 Hen. V. c. 1 (Parliamentary Elections, 1413). 23 Hen. VI. c. 15 (1444).

<sup>b</sup> Stat. 5 & 6 W. & M. c. 7. (Rates and Duties on Salt, etc., 1693.)

<sup>c</sup> Stat. 11 & 12 W. III. c. 2 (Forfeited Estates, 1699). 12 & 13 W. III. c. 10 (Defraying Expense of Navy Guards and Garrisons for One Year (Cus-

sick and wounded, wine licenses, navy, and victualing; secretaries or receivers of prizes; controllers of the army accounts; agents for regiments; governors of plantations and their deputies; officers of Minorca or Gibraltar; officers of the excise and customs; [176] clerks or deputies in the several offices of the treasury, exchequer, navy, victualing, admiralty, pay of the army or navy, secretaries of state, salt, stamps, appeals, wine licenses, hackney-coaches, hawkers, and peddlers) nor any persons that hold any new office under the crown created since 1705,<sup>d</sup> are capable of being elected or sitting as members. 6. That no person having a pension under the crown during pleasure, or, for any term of years, is capable of being elected or sitting.<sup>e</sup> 7. That if any member accepts an office under the crown, except an officer in the army or navy, accepting a new commission, his seat is void; but such member is capable of being re-elected.<sup>f</sup> 8. That all knights of the shire shall be actual knights, or such notable esquires and gentlemen as have estates sufficient to be knights, and by no means of the degree of yeomen.<sup>g</sup> This is reduced to a still greater certainty, by ordaining, 9. That every knight of a shire shall have a clear estate of freehold or copyhold to the value of six hundred pounds *per annum*, and every citizen and burgess to the value of three hundred pounds: except the eldest sons of peers, and of persons qualified to be knights of shires, and except the members for the two universities:<sup>h</sup> which somewhat balances the ascendant which the boroughs have gained over the counties, by obliging the trading interest to make choice of landed men: and of this qualification the member must make oath, and give in the particulars in writing at the time of his taking his seat.<sup>i</sup> But, subject to these standing restrictions and disqualifications, every subject of the realm is eligible of common right: though there are instances, wherein persons in particular circum-

toms), 1701). 6 Ann. c. 7, (1706). 15 Geo. II. c. 22 (House of Commons Disqualification, 1741)

<sup>d</sup> Stat. 6 Ann. c. 7 (1706).

<sup>e</sup> Stat. 6 Ann. c. 7. 1 Geo. I. c. 56 (Crown Pensioners' Disqualification, 1715).

<sup>f</sup> Stat. 6 Ann. c. 7.

<sup>g</sup> Stat. 23 Hen. VI. c. 15 (Parliamentary Elections, 1444).

<sup>h</sup> Stat. 9 Ann. c. 5 (Parliament, 1710).

<sup>i</sup> Stat. 33 Geo. II. c. 20 (House of Commons Qualification, 1759).

stances have forfeited that common right, and have been declared ineligible *for that parliament* by a vote of the house of commons,<sup>1</sup> or *forever* by an act of the legislature.<sup>k</sup> But it was an unconstitutional prohibition, which was grounded on an ordinance of the house of *lords*,<sup>1</sup> and inserted in the *king's* writs, for the parliament holden at Coventry, 6 Hen. IV (1404), that no apprentice or [177] other man of the law should be elected a knight of the shire therein:<sup>m</sup> in return for which our law books and historians<sup>n</sup> have branded this parliament with the name of *parliamentum indoctum*, or the lack-learning parliament; and Sir Edward Coke observes with some spleen,<sup>o</sup> that there was never a good law made thereat.<sup>23</sup>

§ 238. (c) Regulation of elections.—The third point, regarding elections, is the method of proceeding therein. This is also regulated by the law of parliament, and the several statutes referred to in the margin;<sup>p</sup> all which I shall blend together, and

<sup>1</sup> See page \*163.

<sup>k</sup> Stat. 7 Geo. I. c. 28 (1720).

<sup>1</sup> 4 Inst. 10. 48. Pryn. Plea for Lords, 379. 2 Whitlocke, 359, 368.

<sup>m</sup> Pryn. on 4 Inst. 13.

<sup>n</sup> Walsingh A. D. 1405.

<sup>o</sup> 4 Inst. 48.

<sup>p</sup> 7 Hen. IV. c. 15 (Election of Knights of the Shire, 1405). 8 Hen. VI. c. 7 (Parliament, 1429). 23 Hen. VI. c. 14 (Parliamentary Elections, 1444). 1 W. & M. st. 1. c. 2 (*Habeas Corpus* Suspension, 1688). 2 W. & M. st. 1. c. 7 (Parliamentary Elections, 1690). 5 & 6 W. & M. c. 20 (Bank of England, 1694). 7 W. III. c. 4 (1695). [7 & 8 W. III. c. 4, "Preventing Charge and Expense in Elections of Members to Serve in Parliament," 1695.] 7 & 8 W. III. c. 7 (House of Commons Elections, 1695), and c. 25 (Parliamentary Elections, 1696). 10 & 11 W. III. c. 7 (1698). [10 W. III. c. 7, Parliamentary Elections, 1698.] 12 & 13 W. III. c. 10 ("Defraying Expense of Guards and Garrisons for One Year," 1701). 6 Ann. c. 23 (1706). 9 Ann. c. 5 ("Freedom of Parliaments," 1710). 10 Ann. c. 19 (Customs and Excise, 1711), and c. 33 (Militia, 1711). 2 Geo. II. c. 24 (Parliamentary Elections, 1728). 8 Geo. II. c. 30 (Parliamentary Elections, 1735). 18 Geo. II. c. 18 (Parliamentary Elections, 1744). 19 Geo. II. c. 28 (Parliamentary Elections, 1745). 10 Geo. III. c. 16 (Parliamentary Elections, 1770). 11 Geo. III. c. 42 (Parliamentary Elections, 1771). 14 Geo. III. c. 15 (Parliamentary Elections, 1774). 15 Geo. III. c. 36 (Parliament, 1775).

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<sup>23</sup> In theory every male British subject of full age is capable of being elected to the house of commons for any constituency. But there are even

extract out of them a summary account of the method of proceeding to elections.<sup>24</sup>

As soon as the parliament is summoned, the lord chancellor (or if a vacancy happens during the sitting of parliament, the speaker, by order of the house; and without such order, if a vacancy happens by death, or the member's becoming a peer, in the time of a recess for upwards of twenty days) sends his warrant to the clerk of the crown in chancery; who thereupon issues out writs to the sheriff of every county, for the election of all the members to serve for that county, and every city and borough therein. Within three days after the receipt of this writ, the sheriff is to send his precept, under his seal, to the proper returning officers of the cities and boroughs, commanding them to elect their members: and the said returning officers are to proceed to election within eight days from the receipt of the precept, giving four days' notice of the same;<sup>a</sup> and to return the persons chosen, together with the precept, to the sheriff.

But elections of knights of the shire must be proceeded to by the sheriffs themselves in person, at the next county court [178] that shall happen after the delivery of the writ. The county court is a court held every month or oftener by the sheriff, intended to try

<sup>a</sup> In the borough of New-Shoreham in Sussex, wherein certain freeholders of the county are entitled to vote by statute 11 Geo. III, c. 55 (Parliamentary Elections, 1771), the election must be within *twelve* days, with *eight* days' notice of the same.

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more disqualifications to-day, although not the identical ones, than Blackstone enumerates. Some of these disqualifications are founded on personal incapacity or misconduct, others depend upon the office or employment of the disqualified person. Some arise from rules and custom of the house of commons, others are imposed by various statutes. An enumeration of the disqualifications may be found in 2 Stephen's Comm. (16th ed.), 499.

<sup>24</sup> **Secret ballot.**—The conduct of elections for members of the house of commons is regulated by statutes, the principal one being the Ballot Act of 1872. This act, although passed only for a period of six years, has been continued by successive acts. The most interesting change introduced by the Ballot Act was in the form of voting. Previously to the passage of this statute, the poll in a contested election was taken by each voter openly stating at the polling booth the name of the candidate for whom he desired to vote. The act of 1872 provides for a secret ballot, the voter marking the name of the candidate for whom he votes, and dropping the ballot in a closed box.

little causes not exceeding the value of forty shillings, in what part of the county he pleases to appoint for that purpose; but for the election of knights of the shire, it must be held at the most usual place. If the county court falls upon the day of delivering the writ, or within six days after, the sheriff may adjourn the court and election to some other convenient time, not longer than sixteen days, nor shorter than ten; but he cannot alter the place, without the consent of all the candidates: and, in all such cases, ten days' public notice must be given of the time and place of the election.

And, as it is essential to the very being of parliament that elections should be absolutely free, therefore all undue influences upon the electors are illegal, and strongly prohibited. For Mr. Locke<sup>r</sup> ranks it among those breaches of trust in the executive magistrate, which according to his notions amount to a dissolution of the government, "if he employs the force, treasure, and offices of the society to corrupt the representatives, or openly to pre-engage the electors, and prescribe what manner of persons shall be chosen. For thus to regulate candidates and electors, and new-model the ways of election, what is it, says he, but to cut up the government by the roots, and poison the very fountain of public security?" As soon, therefore, as the time and place of election, either in counties or boroughs, are fixed, all soldiers quartered in the place are to remove, at least one day before the election, to the distance of two miles or more; and not to return till one day after the poll is ended. Riots likewise have been frequently determined to make an election void. By vote also of the house of commons, to whom alone belongs the power of determining contested elections, no lord of parliament, or lord lieutenant of a county, hath any right to interfere in the election of commoners; and, by statute, the lord warden of the cinque ports shall not recommend any members there. If any officer of the excise, customs, stamps, [179] or certain other branches of the revenue, presumes to intermeddle in elections, by persuading any voter or dissuading him, he forfeits 100*l.*, and is disabled to hold any office.

§ 239. (i) **Purity of elections.**—Thus are the electors of one branch of the legislature secured from any undue influence from

<sup>r</sup> On Gov. p. 2. § 222.



either of the other two, and from all external violence and compulsion. But the greatest danger is that in which themselves co-operate, by the infamous practice of bribery and corruption. To prevent which it is enacted that no candidate shall, after the date (usually called the *teste* [witness]) of the writs, or after the vacancy, give any money or entertainment to his electors, or promise to give any, either to particular persons, or to the place in general, in order to his being elected: on pain of being incapable to serve for that place in parliament. And if any money, gift, office, employment, or reward be given or promised to be given to any voter, at any time, in order to influence him to give or withhold his vote, as well he that takes as he that offers such bribe forfeits 500*l.*, and is forever disabled from voting and holding any office in any corporation; unless, before conviction, he will discover some other offender of the same kind, and then he is indemnified for his own offense.<sup>s</sup> The first instance that occurs, of election bribery, was so early as 13 Eliz. (1571), when one Thomas Longe (being a simple man and of small capacity to serve in parliament) acknowledged that he had given the returning officer and others of the borough for which he was chosen four pounds to be returned member, and was for that premium elected. But for this offense the borough was amerced, the member was removed, and the officer fined and imprisoned.<sup>ss</sup> But, as this practice hath since taken much deeper and more universal root, it hath occasioned the making of these wholesome statutes; to complete the efficacy of which there is nothing wanting but resolution and integrity to put them in strict execution.

§ 240. (ii) The poll.—<sup>[180]</sup> Undue influence being thus (I wish the depravity of mankind would permit me to say, effectually) guarded against, the election is to be proceeded to on the day appointed; the sheriff or other returning officer first taking an oath against bribery, and for the due execution of his office. The candidates likewise, if required, must swear to their qualification; and

▪ In like manner the Julian law *de ambitu* (of bribery) inflicted fines and infamy upon all who were guilty of corruption at elections; but, if the person guilty convicted another offender, he was restored to his credit again. Ff. 48. 14. 1.

<sup>ss</sup> 4 Inst. 23. Hale of Parl. 112. Com. Journ. 10 & 11 May 1571.



the electors in counties to theirs; and the electors both in counties and boroughs are also compellable to take the oath of abjuration and that against bribery and corruption. And it might not be amiss, if the members elected were bound to take the latter oath, as well as the former; which in all probability would be much more effectual than administering it only to the electors.

§ 241. (iii) **Return and canvass of vote.**—The election being closed, the returning officer in boroughs returns his precept to the sheriff, with the persons elected by the majority; and the sheriff returns the whole, together with the writ for the county and the knights elected thereupon, to the clerk of the crown in chancery; before the day of meeting, if it be a new parliament, or within fourteen days after the election, if it be an occasional vacancy; and this under penalty of 500*l.* If the sheriff does not return such knights only as are duly elected, he forfeits, by the old statutes of Henry VI, 100*l.*; and the returning officer in boroughs for a like false return 40*l.*; and they are besides liable to an action, in which double damages shall be recovered, by the later statutes of King William: and any person bribing the returning officer shall also forfeit 300*l.* But the members returned by him are the sitting members, until the house of commons, upon petition, shall adjudge the return to be false and illegal. The form and manner of proceeding upon such petition are now regulated by statute 10 Geo. III, c. 16 (1770) (amended by 11 Geo. III, c. 42 (1771), and made perpetual by 14 Geo. III, c. 15—1774), which directs the method of choosing by lot a select committee of fifteen members, who are sworn well and truly to try the same, and a true judgment to give according to the evidence. And this abstract of the proceedings at elections of knights, citizens, and [181] burgesses, concludes our inquiries into the laws and customs more peculiarly relative to the house of commons.

§ 242. f. **Method of making laws.** (1) **Speakers;** (2) **Majority rule.**—I proceed now, sixthly, to the method of making laws; which is much the same in both houses: and I shall touch it very briefly, beginning in the house of commons. But first I must premise, that for dispatch of business each house of parliament has

its speaker. The speaker of the house of lords, whose office it is to preside there, and manage the formality of business, is the lord chancellor, or keeper of the king's great seal, or any other appointed by the king's commission: and, if none be so appointed, the house of lords (it is said) may elect. The speaker of the house of commons is chosen by the house; but must be approved by the king.<sup>25</sup> And herein the usage of the two houses differs, that the speaker of the house of commons cannot give his opinion or argue any question in the house; but the speaker of the house of lords, if a lord of parliament, may.<sup>26</sup> In each house the act of the majority binds the whole; and this majority is declared by votes openly and publicly given: not as at Venice, and many other senatorial assemblies, privately or by ballot. This latter method may be serviceable, to prevent intrigues and unconstitutional combinations: but is impossible to be practiced with us; at least in the house of commons, where every member's conduct is subject to the future censure of his constituents, and therefore should be openly submitted to their inspection.

§ 243. (3) **Introduction of bills.**—To bring a bill into the house, if the relief sought by it is of a private nature, it is first necessary to prefer a petition; which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the house; and then (or, otherwise, upon the mere petition) leave is given to bring in the bill.<sup>27</sup> In public matters the bill is brought in upon motion

<sup>25</sup> Sir Edward Coke, in his address to the throne, on being elected speaker in 1592, said: "This is only as yet a nomination, and no election, until your majesty giveth allowance and approbation." (2 Hats. 164.)

<sup>26</sup> **Speakers of the two houses.**—The powers of the speaker of the house of commons are greater than those of the speaker of the house of lords. The latter may be a commoner. The former may speak to a question when the house is in committee of the whole; he may vote in case of a tie, but not otherwise. The speaker of the house of lords, if a member, may vote on all questions.

<sup>27</sup> This duty is now performed by certain appointed officers, known as "examiners." The introduction of both private and public bills is governed by standing orders.

made to the house, without any petition at all. Formerly, all bills were drawn in the form of petitions, which were entered upon the *parliament rolls*, with the king's answer [182] thereunto subjoined; not in any settled form of words, but as the circumstances of the case required;† and at the end of each parliament the judges drew them into the form of a statute, which was entered on the *statute rolls*. In the reign of Henry V, to prevent mistakes and abuses, the statutes were drawn up by the judges before the end of the parliament; and, in the reign of Henry VI, bills in the form of acts, according to the modern custom, were first introduced.<sup>28</sup>

§ 244. (4) Reading of bills.—The persons directed to bring in the bill, present it in a competent time to the house, drawn out on paper, with a multitude of blanks, or void spaces, where anything occurs that is dubious, or necessary to be settled by the parliament itself (such, especially, as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised); being, indeed, only the skeleton of the bill. In the house of lords, if the bill begins there, it is (when of a private nature) referred to two of the judges, who examine and report the state of the facts alleged, to see that all necessary parties consent, and to settle all points of technical propriety. This is read a first time, and at a convenient distance a second time; and after each reading the speaker opens to the house the substance of the bill, and puts the question, whether it shall proceed any further. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and, if the opposition succeeds, the bill must be dropped for that session; as it must also if opposed with success in any of the subsequent stages.

† See, among numberless other instances, the *articuli cleri* (articles of the clergy), 9 Edw. II. (1315).

<sup>28</sup> The style now used in an action of parliament is as follows: "Be it enacted by the King's Most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same." But in measures passed under the special provisions of the Parliament Act, 1911, previously described (note 19, p. \*170, *ante*), there is a special form of preamble, which omits all reference to the lords, and states that the measure in question has been passed in accordance with the provisions of the act.—STEPHEN, 2 Comm. (16th ed.), 521.

§ 245. (5) **Debate and passage of bills.**—After the second reading it is committed, that is, referred to a committee; which is either selected by the house in matters of small importance, or else, upon a bill of consequence the house resolves itself into a committee of the whole house. A committee of the whole house is composed of every member; and, to form it, the speaker quits the chair (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new-modeled. After it [183] has gone through the committee, the chairman reports it to the house with such amendments as the committee have made; and then the house reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. When the house hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be engrossed, or written in a strong gross hand, on one or more long rolls (or presses) of parchment sewed together. When this is finished, it is read a third time, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a rider.<sup>u</sup> The speaker then again opens the contents, and, holding it up in his hands, puts the question, whether the bill shall pass. If this is agreed to, the title to it is then settled; which used to be a general one for all the acts passed in the session, till in the first year of Henry VIII (1509) distinct titles were introduced for each chapter. After this, one of the members is directed to carry it to the lords, and desire their concurrence; who, attended by several more, carries it to the bar of the house of peers, and there delivers it to their speaker, who comes down from his woolsack to receive it.<sup>29</sup>

§ 246. (6) **Consideration of bills in second house.**—It there passes through the same forms as in the other house (except engrossing, which is already done), and, if rejected, no more notice

<sup>u</sup> Noy. 84.

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<sup>29</sup> Bills are, of course, now printed and reprinted for their various stages in their passage through parliament.

is taken, but it passes *sub silentio* (in silence), to prevent unbecoming altercations. But if it is agreed to, the lords send a message by two masters in chancery (or sometimes two of the judges) that they have agreed to the same: and the bill remains with the lords, if they have made no amendment to it. But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the commons. If the commons disagree to the amendments, a conference usually follows between members deputed from each house; who for the most part settle and adjust the difference; but, if both houses remain inflexible, the bill is dropped.<sup>30</sup> If the commons agree to the amendments, the bill is sent back to the lords by one of the members, [184] with a message to acquaint them therewith. The same forms are observed, *mutatis mutandis* (altered according to the circumstances of the case), when the bill begins in the house of lords. But, when an act of grace or pardon is passed, it is first signed by his majesty, and then read once only in each of the houses, without any new engrossing or amendment.<sup>w</sup> And when both houses have done with any bill, it always is deposited in the house of peers, to wait the royal assent; except in the case of a bill of supply, which after receiving the concurrence of the lords is sent back to the house of commons.<sup>x</sup>

§ 247. (7) **The royal assent.**—The royal assent may be given two ways: In person; when the king comes to the house of peers, in his crown and royal robes, and sending for the commons to the bar, the titles of all the bills that have passed both houses are read; and the king's answer is declared by the clerk of the parliament in Norman-French: a badge it must be owned (now the only one remaining) of conquest; and which one could wish to see fall into total oblivion; unless it be reserved as a solemn memento to remind us that our liberties are mortal, having once been destroyed by a foreign force. If the king consents to a public bill, the clerk

<sup>w</sup> D'Ewes Journ. 20. 73. Com. Journ. 17 June 1747.

<sup>x</sup> Com. Journ. 24 Jul. 1660.

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<sup>30</sup> Bills may now be sent up to the king, notwithstanding the failure to receive the concurrence of the house of lords, in accordance with the provisions of the Parliament Act of 1911.



usually declares, "*le roy le veut*, the king wills it so to be"; if to a private bill, "*soit fait comme il est desire*, be it as it is desired." If the king refuses his assent, it is in the gentle language of "*le roy s'avisera*,"<sup>31</sup> the king will advise upon it." When a bill of supply is passed, it is carried up and presented to the king by the speaker of the house of commons;<sup>7</sup> and the royal assent is thus expressed, "*le roy remercie ses loyal subjects, accepte leur benevolence, et aussi le veut*, the king thanks his loyal subjects, accepts their benevolence, and wills it so to be." In case of an act of grace, which originally proceeds from the crown and has the royal assent in the first stage of it, the clerk of the parliament thus pronounces the gratitude of the subject; "*les prelates, seigneurs, et commons, en ce present parliament assemblees, au nom de tous vous autres subjects*, [185] *remercient tres humblement votre majesté, et prient a Dieu vous donner en santé bone vie et longue*; the prelates, lords, and commons, in this present parliament assembled, in the name of all your other subjects, most humbly thank your majesty, and pray to God to grant you in health and wealth long to live."<sup>2</sup>

2. By the statute 33 Hen. VIII, c. 21 (Act of Parliament, 1541), the king may give his assent by letters patent under his great seal, signed with his hand, and notified in his absence to both houses assembled together in the high house. And when the bill has received the royal assent in either of these ways, it is then, and not before, a statute or act of parliament.

§ 248. (8) Publication of a statute.—This statute or act is placed among the records of the kingdom; there needing no formal promulgation to give it the force of a law, as was necessary by the

<sup>7</sup> Rot. Parl. 9 Hen. IV. (1407) in Pryn. 4 Inst. 30, 31.

<sup>2</sup> D'Ewes Journ. 35.

<sup>31</sup> The indispensable nature of this royal power of rejecting acts of parliament has been shown by the commentator in treating of the parliament, chapter 2, page 154, of this book.

A sad comment on the value of all such theorizing has been furnished by the fact that it is now almost two centuries since the sovereign executive has ventured to *veto* an act: and although the power still formally exists, it has been said by a wise and conservative thinker to be "an exercise of prerogative which no ordinary circumstances can reconcile either with prudence or a constitutional administration of government." (Hallam, Const. Hist. c. xv.)—HAMMOND.



civil law with regard to the emperor's edicts; because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land.<sup>32</sup> And formerly, before the invention of printing, it was used to be published by the sheriff of every county; the king's writ being sent to him at the end of every session, together with a transcript of all the acts made at that session, commanding him, "*ut statuta illa, et omnes articulos in eisdem contentos, in singulis locis ubi expedire viderit, publice proclamari, et firmiter teneri et observari faciat* (that he cause those statutes, and all articles therein contained, to be publicly proclaimed and strictly observed and kept in every place where it shall seem expedient)."<sup>a</sup> And the usage was to proclaim them at his county court, and there to keep them, that whoever would might read or take copies thereof; which custom continued till the reign of Henry the Seventh.<sup>a</sup>

§ 249. (9) **Effect of acts of parliament.**—An act of parliament, thus made, is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land, and the dominions thereunto belonging; nay, even the king himself, if particularly named therein. And it cannot be altered, [186] amended, dispensed with, suspended or repealed, but in the same forms and by the same authority of parliament: for it is a maxim in law, that it requires the same strength to dissolve, as to create an obligation. It is true it was formerly held, that the king might in many cases dispense with penal statutes:<sup>b</sup> but now by statute 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), it is declared that the suspending or dispensing with laws by regal authority, without consent of parliament, is illegal.

§ 250. g. **Adjournment, prorogation, dissolution.**—There remains only, in the seventh and last place, to add a word or two concerning the manner in which parliaments may be adjourned, prorogued, or dissolved.

<sup>a</sup> 3 Inst. 41. 4 Inst. 26.

<sup>b</sup> Finch. L. 81. 234. Bacon Elem. c. 19.

<sup>32</sup> All acts of parliament are now printed by the king's printer for public information.

§ 251. (1) **Adjournment of parliament.**—An adjournment is no more than a continuance of the session from one day to another, as the word itself signifies: and this is done by the authority of each house separately every day; and sometimes for a fortnight or a month together, as at Christmas or Easter, or upon other particular occasions. But the adjournment of one house is no adjournment of the other.<sup>c</sup> It hath also been usual, when his majesty hath signified his pleasure that both or either of the houses should adjourn themselves to a certain day, to obey the king's pleasure so signified, and to adjourn accordingly.<sup>d</sup> Otherwise, besides the indecorum of a refusal, a prorogation would assuredly follow; which would often be very inconvenient to both public and private business. For prorogation puts an end to the session; and then such bills as are only begun and not perfected, must be resumed *de novo* (anew) (if at all) in a subsequent session; whereas, after an adjournment, all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

§ 252. (2) **Prorogation of parliament.**—A prorogation is the continuance of the parliament from one session to another, as an adjournment is a continuation [187] of the session from day to day. This is done by the royal authority, expressed either by the lord chancellor in his majesty's presence, or by commission from the crown, or frequently by proclamation.<sup>33</sup> Both houses are necessarily prorogued at the same time; it not being a prorogation of the house of lords, or commons, but of the parliament. The session is never understood to be at an end, until a prorogation: though, unless some act be passed or some judgment given in parliament, it is in truth no session at all.<sup>e</sup> And formerly the usage was, for the king to give the royal assent to all such bills as he

<sup>c</sup> 4 Inst. 28.

<sup>d</sup> Com. Journ. *passim*: e. g. 11 Jun. 1572. 5 Apr. 1604. 4 Jun. 14 Nov. 1. Dec. 1621. 11 Jul. 1625. 13 Sept. 1660. 25 Jul. 1667. 4 Aug. 1685. 24 Febr. 1691. 21 Jun. 1712. 16 Apr. 1717. 3 Feb. 1741. 10 Dec. 1745. 21 May 1768.

<sup>e</sup> 4 Inst. 28. Hale of Parl. 38.

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<sup>33</sup> Prorogation is now governed by the Prorogation Act of 1867.

approved, at the end of every session, and then to prorogue the parliament; though sometimes only for a day or two,<sup>f</sup> after which all business then depending in the houses was to be begun again. Which custom obtained so strongly, that it once became a question,<sup>g</sup> whether giving the royal assent to a single bill did not of course put an end to the session. And, though it was then resolved in the negative, yet the notion was so deeply rooted, that the statute 1 Car. I, c. 7 (Parliament, 1625), was passed to declare, that the king's assent to that and some other acts should not put an end to the session; and, even so late as the reign of Charles II we find a proviso frequently tacked to a bill,<sup>h</sup> that his majesty's assent thereto should not determine the session of parliament.<sup>34</sup> But it now seems to be allowed, that a prorogation must be expressly made, in order to determine the session. And, if at the time of an actual rebellion, or imminent danger of invasion, the parliament shall be separated by adjournment or prorogation, the king is empowered<sup>i</sup> to call them together by proclamation, with fourteen days' notice of the time appointed for their reassembling.

§ 253. (3) Dissolution of parliament. (a) By the king's will. A dissolution is the civil death of the parliament; and this may be effected three ways: 1. By the king's will, expressed either in person or by representation. For, as the king has the sole right of convening the parliament, so also [188] it is a branch of the royal prerogative, that he may (whenever he pleases) prorogue the parliament for a time, or put a final period to its existence. If nothing had a right to prorogue or dissolve a parliament but itself, it might happen to become perpetual. And this would be extremely

<sup>f</sup> Com. Journ. 21 Oct. 1553.

<sup>g</sup> *Ibid.* 21 Nov. 1554.

<sup>h</sup> Stat. 12 Car. II. c. 1 (Parliament, 1660). 22 & 23 Car. II. c. 1 (Criminal Law, 1670).

<sup>i</sup> Stat. 30 Geo. II. c. 25 (Militia, 1756).

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<sup>34</sup> The prorogation is to a day fixed; but by the joint effect of the Meeting of Parliament Acts, 1797, 1799, and 1870, the crown may now by proclamation at any time, without regard to the period to which parliament may stand prorogued or adjourned, appoint it to reassemble for dispatch of business at the expiration of six days from the date of the proclamation.—STEPHEN, 2 Comm. (16th ed.), 530.

dangerous, if at any time it should attempt to encroach upon the executive power: as was fatally experienced by the unfortunate King Charles the First; who, having unadvisedly passed an act to continue the parliament then in being till such time as it should please to dissolve itself, at last fell a sacrifice to that inordinate power, which he himself had consented to give them. It is therefore extremely necessary that the crown should be empowered to regulate the duration of these assemblies, under the limitations which the English constitution has prescribed: so that, on the one hand, they may frequently and regularly come together, for the dispatch of business, and redress of grievances; and may not, on the other, even with the consent of the crown, be continued to an inconvenient or unconstitutional length.

§ 254. (b) **By demise of the crown.**—A parliament may be dissolved by the demise of the crown. This dissolution formerly happened immediately upon the death of the reigning sovereign: for he being considered in law as the head of the parliament (*caput, principium, et finis*—the head, beginning and end), that failing, the whole body was held to be extinct.<sup>35</sup> But, the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 & 8 W. III, c. 15 (Parliament, 1695), and 6 Ann., c. 7 (1706), that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor: that, if the parliament be, at the time of the king's death, separated by adjournment or prorogation, it shall notwithstanding assemble immediately: and that, if no parliament is then in being, the members of the last parliament shall assemble, and be again a parliament.<sup>36</sup>

§ 255. (c) **By lapse of time.**—[189] Lastly, a parliament may be dissolved or expire by length of time. For if either the legis-

<sup>35</sup> Accordingly, offices held under the crown were formerly, in general, vacated by the demise of the crown (Bac. Ab., Courts, c.); but now, by virtue of the Demise of the Crown Act, 1901, the holding of any office under the crown is not affected by the demise of the crown.—STEPHEN, 2 Comm. (16th ed.), 531 n.

<sup>36</sup> The law on this subject, however, is now regulated by the Representation of the People Act, 1867, which enacts that the parliament in being at any

lative body were perpetual; or might last for the life of the prince who convened them, as formerly; and were so to be supplied, by occasionally filling the vacancies with new representatives; in these cases, if it were once corrupted, the evil would be past all remedy: but when different bodies succeed each other, if the people see cause to disapprove of the present, they may rectify its faults in the next. A legislative assembly also, which is sure to be separated again (whereby its members will themselves become private men, and subject to the full extent of the laws which they have enacted for others) will think themselves bound, in interest as well as duty, to make only such laws as are good. The utmost extent of time that the same parliament was allowed to sit, by the statute 6 W. & M., c. 2 (1694), [6 & 7 W. & M., c. 2 (Frequent Meeting of Parliaments)], was *three* years; after the expiration of which, reckoning from the return of the first summons, the parliament was to have no longer continuance. But by the statute 1 Geo. I, st. 2, c. 38 (Septennial, 1715) (in order, professedly, to prevent the great and continued expenses of frequent elections, and the violent heats and animosities consequent thereupon, and for the peace and security of the government then just recovering from the late rebellion), this term was prolonged to *seven* years; and, what alone is an instance of the vast authority of parliament, the very same house that was chosen for three years, enacted its own continuance for seven. So that, as our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year; if not sooner dissolved by the royal prerogative.<sup>37</sup>

future demise of the crown shall not be determined or dissolved by such demise, but shall continue so long as it would have continued but for such demise, unless it shall be sooner prorogued or dissolved by the crown.

It is also enacted by the Meeting of Parliament Act, 1797, that, in case of a demise of the crown between a dissolution and the day appointed by the writs of summons for the meeting of a new parliament, the last preceding parliament shall immediately convene for six months, unless sooner prorogued or dissolved by the succeeding monarch; and that, in the event of a demise on or after the day appointed for assembling the new parliament, but before it has in fact assembled, then the new parliament shall in like manner convene for six months, unless sooner prorogued or dissolved.—STEPHEN, 2 Comm. (16th ed.), 531.

<sup>37</sup> By the Parliament Act, 1911, the maximum duration of parliament is fixed at five years.



## OF THE KING, AND HIS TITLE.

§ 256. **The king: the supreme executive.**—The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen: for it matters not to which sex the crown descends; but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power; as is declared by statute 1 Mar., st. 3, c. 1 (Crown, 1554).

In discoursing of the royal rights and authority, I shall consider the king under six distinct views. 1. With regard to his title. 2. His royal family. 3. His councils. 4. His duties. 5. His prerogative. 6. His revenue. And first, with regard to his title.

§ 257. **Importance of a rule of succession.**—The executive power of the English nation being vested in a single person, by the general consent of the people, the evidence of which general consent is long and immemorial usage, it became necessary to the freedom and peace of the state, that a rule should be laid down, uniform, universal, and permanent; in order to mark out with precision, *who* is that single person, to whom are committed (in subservience to the law of the land) the care and protection of the community; and to whom, in return, the duty and allegiance of every individual are due. It is of the highest importance to the public tranquillity, and to the consciences [191] of private men, that this rule should be clear and indisputable; and our constitution has not left us in the dark upon this material occasion. It will therefore be the endeavor of this chapter to trace out the constitutional doctrine of the royal succession, with that freedom and regard to truth, yet mixed with that reverence and respect, which the principles of liberty and the dignity of the subject require.

§ 258. **Succession to the throne.**—The grand fundamental maxim upon which the *jus coronæ*, or right of succession to the throne of these kingdoms, depends, I take to be this: “that the



crown is, by common law and constitutional custom, hereditary; and this in a manner peculiar to itself: but that the right of inheritance may from time to time be changed or limited by act of parliament; under which limitations the crown still continues hereditary." And this proposition it will be the business of this chapter to prove, in all its branches; first, that the crown is hereditary; secondly, that it is hereditary in a manner peculiar to itself; thirdly, that this inheritance is subject to limitation by parliament; lastly, that when it is so limited, it is hereditary in the new proprietor.

§ 259. 1. The royal succession is hereditary.—First, it is in general *hereditary*, or descendible to the next heir, on the death or demise of the last proprietor. All regal governments must be either hereditary or elective: and, as I believe there is no instance wherein the crown of England has ever been asserted to be elective, except by the regicides at the infamous and unparalleled trial of King Charles I, it must of consequence be hereditary. Yet while I assert an hereditary, I by no means intend a *jure divino* (by divine right) title to the throne. Such a title may be allowed to have subsisted under the theocratic establishments of the children of Israel in Palestine; but it never yet subsisted in any other country; save only so far as kingdoms, like other human fabrics, are subject to the general and ordinary dispensations of providence. Nor indeed have a *jure divino* and an *hereditary* right any necessary connection with each other; as some have very weakly imagined. The titles of David and Jehu were <sup>[192]</sup> equally *jure divino*, as those of either Solomon or Ahab; and yet David slew the sons of his predecessor, and Jehu his predecessor himself. And when our kings have the same warrant as they had, whether it be to sit upon the throne of their fathers, or to destroy the house of the preceding sovereign, they will then, and not before, possess the crown of England by a right like theirs, *immediatly* derived from Heaven. The hereditary right which the laws of England acknowledge, owes its origin to the founders of our constitution, and to them only. It has no relation to, nor depends upon, the civil laws of the Jews, the Greeks, the Romans, or any other nation upon earth: the municipal laws of one society having no connection with, or influence upon, the fundamental polity of another. The

founders of our English monarchy might perhaps, if they had thought proper, have made it an elective monarchy; but they rather chose, and upon good reason, to establish originally a succession by inheritance. This has been acquiesced in by general consent; and ripened by degrees into common law: the very same title that every private man has to his own estate. Lands are not naturally descendible any more than thrones: but the law has thought proper, for the benefit and peace of the public, to establish hereditary succession in the one as well as the other.

§ 260. a. **Elective and hereditary monarchies.**—It must be owned, an elective monarchy seems to be the most obvious, and best suited of any to the rational principles of government, and the freedom of human nature: and accordingly we find from history that, in the infancy and first rudiments of almost every state, the leader, chief magistrate, or prince, hath usually been elective. And, if the individuals who compose that state could always continue true to first principles, uninfluenced by passion or prejudice, unassailed by corruption, and unawed by violence, elective succession were as much to be desired in a kingdom, as in other inferior communities. The best, the wisest, and the bravest man would then be sure of receiving that crown, which his endowments have merited; and the sense of an unbiassed majority would be dutifully acquiesced in by the few who were [193] of different opinions. But history and observation will inform us, that elections of every kind (in the present state of human nature) are too frequently brought about by influence, partiality, and artifice: and, even where the case is otherwise, these practices will be often suspected, and as constantly charged upon the successful, by a splenetic disappointed minority. This is an evil to which all societies are liable; as well those of a private and domestic kind, as the great community of the public, which regulates and includes the rest. But in the former there is this advantage; that such suspicions, if false, proceed no further than jealousies and murmurs, which time will effectually suppress; and, if true, the injustice may be remedied by legal means, by an appeal to those tribunals to which every member of society has (by becoming such) virtually engaged to submit. Whereas, in the great and independent society, which every nation

composes, there is no superior to resort to but the law of nature; no method to redress the infringements of that law, but the actual exertion of private force. As therefore between two nations, complaining of mutual injuries, the quarrel can only be decided by the law of arms; so in one and the same nation, when the fundamental principles of their common union are supposed to be invaded, and more especially when the appointment of their chief magistrate is alleged to be unduly made, the only tribunal to which the complainants can appeal is that of the God of battles, the only process by which the appeal can be carried on is that of a civil and intestine war. An hereditary succession to the crown is therefore now established, in this and most other countries, in order to prevent that periodical bloodshed and misery, which the history of ancient imperial Rome, and the more modern experience of Poland and Germany, may show us are the consequences of elective kingdoms.<sup>1</sup>

§ 261. 2. The royal succession is feudal in character.—But, secondly, as to the particular mode of inheritance, it in general corresponds with the feudal path of descents, chalked out by the common law in the succession to landed estates; yet with one or two material exceptions. Like estates, the crown will descend lineally to the issue of the reigning monarch; as it did from King John to Richard II, through <sup>[194]</sup> a regular pedigree of six lineal generations. As in common descents, the preference of males to females, and the right of primogeniture among the males, are strictly adhered to. Thus Edward V succeeded to the crown, in preference to Richard, his younger brother, and Elizabeth, his elder sister. Like lands or tenements, the crown, on failure of the male line, descends to the issue female; according to the ancient British custom remarked by Tacitus,<sup>a</sup> “*solent fœminarum ductu bellare, et sexum in imperiis non discernere* (they are accustomed to wage war under the conduct of women, and not to consider sex in the government of their empire).” Thus Mary I succeeded to Edward VI; and the line of Margaret, Queen of Scots, the daughter

<sup>a</sup> In Vit. Agricolaë.

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<sup>1</sup> Succession to the throne is now regulated by the Act of Settlement of 1700, 12 & 13 Wm. III, c. 2, § 1.

of Henry VII, succeeded on failure of the line of Henry VIII, his son. But, among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue; and not, as in common inheritances, to all the daughters at once; the evident necessity of a sole succession to the throne having occasioned the royal law of descents to depart from the common law in this respect: and therefore Queen Mary, on the death of her brother, succeeded to the crown alone, and not in partnership with her sister, Elizabeth. Again: the doctrine of representation prevails in the descent of the crown, as it does in other inheritances; whereby the lineal descendants of any person deceased stand in the same place as their ancestor, if living, would have done. Thus Richard II succeeded his grandfather, Edward III, in right of his father, the Black Prince; to the exclusion of all his uncles, his grandfather's younger children. Lastly, on failure of lineal descendants, the crown goes to the next collateral relations of the late king; provided they are lineally descended from the blood royal, that is, from that royal stock which originally acquired the crown. Thus Henry I succeeded to William II, John to Richard I, and James I to Elizabeth; being all derived from the Conqueror, who was then the only regal stock. But herein there is no objection (as in the case of common descents) to the succession of a brother, an uncle, or other collateral relation, of the *half* blood; that is, where the relationship proceeds not from the same *couple* of ancestors (which constitutes a kinsman of the *whole* blood) but from a *single* ancestor only; as when two persons <sup>[195]</sup> are derived from the same father, and not from the same mother, or *vice versa*: provided only, that the one ancestor, from whom both are descended, be that from whose veins the blood royal is communicated to each. Thus Mary I inherited to Edward VI, and Elizabeth inherited to Mary; all children of the same father, King Henry VIII, but all by different mothers. The reason of which diversity, between royal and common descents, will be better understood hereafter, when we examine the nature of inheritances in general.

§ 262. 3. The royal succession is not indefeasible.—The doctrine of *hereditary* right does by no means imply an *indefeasible* right to the throne. No man will, I think, assert this, that has con-

sidered our laws, constitution, and history, without prejudice, and with any degree of attention. It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right; and, by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in anyone else. This is strictly consonant to our laws and constitution; as may be gathered from the expression so frequently used in our statute book, of “the king’s majesty, his heirs, and successors.” In which we may observe, that as the word, “heirs,” necessarily implies an inheritance or hereditary right, generally subsisting in the royal person; so the word, “successors,” distinctly taken, must imply that this inheritance may sometimes be broken through; or, that there may be a successor, without being the heir, of the king. And this is so extremely reasonable, that without such a power, lodged somewhere, our polity would be very defective. For, let us barely suppose so melancholy a case, as that the heir apparent should be a lunatic, an idiot, or otherwise incapable of reigning: how miserable would the condition of the nation be, if he were also incapable of being set aside! It is therefore necessary that this power should be lodged somewhere: and yet the inheritance, and regal dignity, would be very precarious indeed, if this power were *expressly* and *avowedly* lodged in the hands of the subject only, to be exerted whenever prejudice, caprice, or discontent should happen to take the lead. Consequently it can nowhere be so properly lodged as in the two houses of parliament, by and with the consent [<sup>196</sup>] of the reigning king; who, it is not to be supposed, will agree to anything improperly prejudicial to the rights of his own descendants. And therefore in the king, lords, and commons, in parliament assembled, our laws have expressly lodged it.<sup>2</sup>

§ 263. 4. The royal succession is perpetual.—But, fourthly; however the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it.

<sup>2</sup> Under the Act of Settlement of 1700, the succession was transferred from the issue of King James the Second (who, as the law then stood, were entitled to it), to the Princess Sophia of Hanover, who represented a remoter branch, but who thus became the founder of the reigning royal family. *Post*, p. \*216.



And hence in our law the king is said never to die, in his political capacity; though, in common with other men, he is subject to mortality in his natural: because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor. For the right of the crown vests, *eo instanti* (from that instant) upon his heir; either the *hæres natus* (the heir born), if the course of descent remains unimpeached, or the *hæres factus* (the heir appointed), if the inheritance be under any particular settlement. So that there can be no *interregnum* (the space between two reigns); but, as Sir Matthew Hale<sup>b</sup> observes, the right of sovereignty is fully invested in the successor by the very descent of the crown. And therefore, however acquired, it becomes in him absolutely hereditary, unless by the rules of the limitation it is otherwise ordered and determined. In the same manner as landed estates, to continue our former comparison, are by the law hereditary, or descendible to the heirs of the owner; but still there exists a power, by which the property of those lands may be transferred to another person. If this transfer be made simply and absolutely, the lands will be hereditary in the new owner, and descend to his heir at law: but if the transfer be clogged with any limitations, conditions, or entails, the lands must descend in that channel, so limited and prescribed, and no other.

§ 264. Historical review of the rulers of England.—In these four points consists, as I take it, the constitutional notion of hereditary right to the throne: which will be still further elucidated, and made clear beyond all dispute, from a short historical view of the successions to the crown of England, the doctrines of our ancient lawyers, and the several acts of parliament that have from time to time been made, to create, to declare, to confirm, to limit, or to bar, the hereditary <sup>[197]</sup> title to the throne. And in the pursuit of this inquiry we shall find, that from the days of Egbert, the first sole monarch of this kingdom, even to the present, the four cardinal maxims above mentioned have ever been held the constitutional canons of succession. It is true, this succession, through fraud, or force, or sometimes through necessity, when in hostile times the crown descended on a minor or the like, has been very

<sup>b</sup> 1 Hist. P. C. 61.



frequently suspended; but has generally at last returned back into the old hereditary channel, though sometimes a very considerable period has intervened. And, even in those instances where the succession has been violated, the crown has ever been looked upon as hereditary in the wearer of it. Of which the usurpers themselves were so sensible, that they for the most part endeavored to vamp up some feeble show of a title by descent, in order to amuse the people, while they gained the possession of the kingdom. And, when possession was once gained, they considered it as the purchase or acquisition of a new estate of inheritance, and transmitted or endeavored to transmit it to their own posterity, by a kind of hereditary right of usurpation.

§ 265. 1. **King Egbert (802-839).**—King Egbert, about the year 800, found himself in possession of the throne of the West Saxons, by a long and undisturbed descent from his ancestors of above three hundred years. How his ancestors acquired their title, whether by force, by fraud, by contract, or by election, it matters not much to inquire; and is indeed a point of such high antiquity, as must render all inquiries at best but plausible guesses. His right must be supposed indisputably good, because we know no better. The other kingdoms of the heptarchy he acquired, some by consent, but most by a voluntary submission. And it is an established maxim in civil polity, and the law of nations, that when one country is united to another in such a manner, as that one keeps its government and states, and the other loses them; the latter entirely assimilates or is melted down in the former, and must adopt its laws and customs.<sup>e</sup> And in pursuance of this maxim there hath ever been, since the union of the heptarchy in King Egbert, a <sup>[198]</sup> general acquiescence under the hereditary monarchy of the west Saxons, through all the united kingdoms.

§ 266. 2. **From Egbert to Edmund Ironside (802-1016).**—From Egbert to the death of Edmund Ironside, a period of above two hundred years, the crown descended regularly, through a succession of fifteen princes, without any deviation or interruption: save only that the sons of King Ethelwolf succeeded to each other

<sup>e</sup> Puff. L. of N. and N. b. 8. c. 12. § 6.

in the kingdom, without regard to the children of the elder branches, according to the rule of succession prescribed by their father, and confirmed by the wittena-gemote, in the heat of the Danish invasions; and also that King Edred, the uncle of Edwy, mounted the throne for about nine years, in the right of his nephew, a minor, the times being very troublesome and dangerous. But this was with a view to preserve, and not to destroy, the succession; and accordingly Edwy succeeded him.

§ 267. 3. **The Danish kings (1014–1042).**—King Edmund Ironside was obliged, by the hostile irruption of the Danes, at first to divide his kingdom with Canute, King of Denmark; and Canute, after his death, seized the whole of it, Edmund's sons being driven into foreign countries. Here the succession was suspended by actual force, and a new family introduced upon the throne: in whom, however, this new acquired throne continued hereditary for three reigns; when, upon the death of Hardiknute, the ancient Saxon line was restored in the person of Edward the Confessor.

§ 268. 4. **Edward the Confessor (1042–1066); Harold (1066).** He was not, indeed, the true heir to the crown, being the younger brother of King Edmund Ironside, who had a son Edward, surnamed (from his exile) the Outlaw, still living. But this son was then in Hungary; and the English having just shaken off the Danish yoke, it was necessary that somebody on the spot should mount the throne; and the Confessor was the next of the royal line then in England. On his decease without issue, Harold II usurped the throne; and almost at the same instant came on the Norman invasion: the right to the crown being all the time in Edgar, surnamed Atheling (which signifies in the Saxon language *illustrious*, or of royal blood), who was the son of Edward the Outlaw, and grandson of Edmund <sup>[199]</sup> Ironside; or, as Matthew Paris<sup>d</sup> well expresses the sense of our old constitution "*Edmundus autem latusferreum, rex naturalis de stirpe regum, genuit Edwardum; et Edwardus genuit Edgarum, cui de jure debebatur regnum Anglorum* (but Edmund Ironside, who was natural king by descent from the race of kings, begat Edward, and Edward begat Edgar, to whom of right the kingdom of England belonged)."

<sup>d</sup> A. D. 1066.

§ 269. 5. William I (1066-1087).—William the Norman claimed the crown by virtue of a pretended grant from King Edward the Confessor: a grant which, if real, was in itself utterly invalid: because it was made, as Harold well observed in his reply to William's demand,\* "*absque generali senatus et populi conventu et edicto* (without the general assembly and edict of the senate and people)"; which also very plainly implies, that it then was generally understood that the king, with consent of the general council, might dispose of the crown and change the line of succession. William's title, however, was altogether as good as Harold's, he being a mere private subject, and an utter stranger to the royal blood. Edgar Atheling's undoubted right was overwhelmed by the violence of the times; though frequently asserted by the English nobility after the Conquest, till such time as he died without issue: but all their attempts proved unsuccessful, and only served the more firmly to establish the crown in the family which had newly acquired it.

§ 270. a. The Norman Conquest.—This Conquest, then, by William of Normandy was, like that of Canute before, a forcible transfer of the crown of England into a new family: but, the crown being so transferred, all the inherent properties of the crown were with it transferred also. For, the victory obtained at Hastings not being† a victory over the nation collectively, but only over the person of Harold, the only right that the Conqueror could pretend to acquire thereby, was the right to possess the crown of England, not to alter the nature of the government. And therefore, as the English laws still remained in force, he must necessarily take the crown subject to those laws, and with all its inherent properties; the first and principal of which was its descendibility. Here, then, we must drop our race of Saxon kings, at least for awhile, and derive our descents from William the Conqueror as from a new stock, who acquired by right of war (such as it is, yet still the *dernier* [200] resort—court of ultimate appeal—of kings) a strong and undisputed title to the inheritable crown of England.

§ 271. 6. William II (1087-1100); Henry I (1100-1135).—Accordingly it descended from him to his sons William II and

\* William of Malmsb. l. 3.

† Hale, Hist. C. L. c. 5. Seld. Review of Tithes, c. 8.

Henry I. Robert, it must be owned, his eldest son, was kept out of possession by the arts and violence of his brethren; who perhaps might proceed upon a notion, which prevailed for some time in the law of descents (though never adopted as the rule of public successions<sup>e</sup>), that when the eldest son was already provided for (as Robert was constituted Duke of Normandy by his father's will), in such a case the next brother was entitled to enjoy the rest of their father's inheritance. But, as he died without issue, Henry at last had a good title to the throne, whatever he might have at first.

§ 272. 7. Stephen (1135–1154).—Stephen of Blois, who succeeded him, was indeed the grandson of the Conqueror, by Adelia his daughter, and claimed the throne by a feeble kind of hereditary right: not as being the nearest of the male line, but as the nearest male of the blood royal, excepting his elder brother Theobald; who was Earl of Blois, and therefore seems to have waived, as he certainly never insisted on, so troublesome and precarious a claim. The real right was in the Empress Matilda or Maud, the daughter of Henry I; the rule of succession being (where women are admitted at all) that the daughter of a son shall be preferred to the son of a daughter. So that Stephen was little better than a mere usurper; and therefore he rather chose to rely on a title by election,<sup>b</sup> while the Empress Maud did not fail to assert her hereditary right by the sword: which dispute was attended with various success, and ended at last in a compromise,\* that Stephen should keep the crown, but that Henry, the son of Maud, should succeed him; as he afterwards accordingly did.

§ 273. 8. House of Plantagenet (1154–1399). a. Henry II (1154–1189).—Henry, the second of that name, was (next after his mother, Matilda) the undoubted heir of William the Conqueror; but he had also another connection in blood, which endeared [201]

\* Ninth edition inserts here, "made at Wallingford."

<sup>e</sup> See Lord Lyttelton's Life of Henry II. Vol. I. pag. 467.

<sup>b</sup> "*Ego Stephanus Dei gratia assensu cleri et populi in regem Anglorum electus*, etc. (Cart. A. D. 1136. Ric. de Hagustald. 314. Hearne ad Guil. Neubr. 711). (I, Stephen, elected King of England, by the grace of God, and the assent of the clergy and people.)

him still further to the English. He was lineally descended from Edmund Ironside, the last of the Saxon race of hereditary kings. For Edward the Outlaw, the son of Edmund Ironside, had (besides Edgar Atheling, who died without issue) a daughter Margaret, who was married to Malcolm, King of Scotland; and in her the Saxon hereditary right resided. By Malcolm she had several children, and among the rest Matilda, the wife of Henry I, who by him had the Empress Maud, the mother of Henry II. Upon which account the Saxon line is in our histories frequently said to have been restored in his person: though in reality that right subsisted in the sons of Malcolm by Queen Margaret; King Henry's best title being as heir to the Conqueror.

§ 274. b. Richard I (1189-1199); c. John (1199-1216); d. Henry III (1216-1272); e. Edward I (1272-1307); f. Edward II (1307-1327); g. Edward III (1327-1377); h. Richard II (1377-1399).—From Henry II the crown descended to his eldest son, Richard I, who dying childless, the right vested in his nephew Arthur, the son of Geoffrey, his next brother: but John, the youngest son of King Henry, seized the throne; claiming, as appears from his charters, the crown by hereditary right;<sup>1</sup> that is to say, he was next of kin to the deceased king, being his surviving brother: whereas Arthur was removed one degree further, being his brother's son, though by right of representation he stood in the place of his father Geoffrey. And however flimsy this title, and those of William Rufus and Stephen of Blois, may appear at this distance to us, after the law of descents hath now been settled for so many centuries, they were sufficient to puzzle the understandings of our brave, but unlettered, ancestors. Nor, indeed, can we wonder at the number of partisans, who espoused the pretensions of King John in particular; since even in the reign of his father, King Henry II, it was a point undetermined<sup>1</sup> whether, even in common inheritances, the child of an elder brother should succeed to the land in right of representation, or the younger surviving brother in right of proximity of blood. Nor is it to this day decided in the

<sup>1</sup> "*Regni Angliæ; quod nobis jure competit hæreditario* (Of the kingdom of England; which falls to us by hereditary right)." Spelm. Hist. R. Joh. apud Wilkins. 354.

<sup>1</sup> Glanv. l. 7. c. 3.



collateral succession to the fiefs of the empire, whether the order of the stocks, or the proximity of degree shall take place.<sup>k</sup> However, on the death of Arthur [202] and his sister Eleanor without issue, a clear and indisputable title vested in Henry III, the son of John: and from him to Richard the Second, a succession of six generations, the crown descended in the true hereditary line. Under one of which race of princes<sup>l</sup> we find it declared in parliament, "that the law of the crown of England is, and always hath been, that the children of the king of England, whether born in England or elsewhere, ought to bear the inheritance after the death of their ancestors. Which law our sovereign lord, the king, the prelates, earls, and barons, and other great men, together with all the commons in parliament assembled, do approve and affirm forever."

§ 275. 9. House of Lancaster (1399-1461); a. Henry IV (1399-1413).—Upon Richard the Second's resignation of the crown, he having no children, the right resulted to the issue of his grandfather, Edward III. That king had many children, besides his eldest, Edward the Black Prince of Wales, the father of Richard II: but to avoid confusion I shall only mention three; William, his second son, who died without issue; Lionel, Duke of Clarence, his third son; and John of Gant, Duke of Lancaster, his fourth. By the rules of succession, therefore, the posterity of Lionel, Duke of Clarence, were entitled to the throne, upon the resignation of King Richard; and had accordingly been declared by the king, many years before, the presumptive heirs of the crown: which declaration was also confirmed in parliament.<sup>m</sup> But Henry, Duke of Lancaster, the son of John of Gant, having then a large army in the kingdom, the pretense of raising which was to recover his patrimony from the king, and to redress the grievances of the subject, it was impossible for any other title to be asserted with any safety; and he became king under the title of Henry IV. But, as Sir Matthew Hale remarks,<sup>n</sup> though the people unjustly assisted Henry IV in his usurpation of the crown, yet he was not admitted

<sup>k</sup> Mod. Un. Hist. xxx. 512.

<sup>l</sup> Stat. 25 Edw. III. st. 2 (Bastardy, 1350).

<sup>m</sup> Sandford's Geneal. Hist. 246.

<sup>n</sup> Hist. C. L. c. 5.



thereto, until he had declared that he claimed, not as a conqueror (which he very much inclined to do<sup>o</sup>), but as a successor, descended by right line of the blood royal; as appears from the rolls of parliament in those times. And in order to this he set up a show of two titles: [203] the one upon the pretense of being the first of the blood royal in the entire male line, whereas the Duke of Clarence left only one daughter, Philippa; from which female branch, by a marriage with Edmond Mortimer, Earl of March, the house of York descended: the other, by reviving an exploded rumor, first propagated by John of Gant, that Edmond, Earl of Lancaster (to whom Henry's mother was heiress), was in reality the elder brother of King Edward I. though his parents, on account of his personal deformity, had imposed him on the world for the younger: and therefore Henry would be entitled to the crown, either as successor to Richard II, in case the entire male line was allowed a preference to the female; or, even prior to the unfortunate prince, if the crown could descend through a female, while an entire male line was existing.

§ 276. (1) **Act of Succession to the Crown, 1405.**—However, as in Edward the Third's time, we find the parliament approving and affirming the law of the crown, as before stated, so in the reign of Henry IV they actually exerted their right of new settling the succession to the crown. And this was done by the statute 7 Hen. IV, c. 2 (Succession to the Crown, 1405), whereby it is enacted, "that the inheritance of the crown and realms of England and France, and all other the king's dominions, shall be *set and remain*" in the person of our sovereign lord the king, and in the heirs of his body issuing"; and Prince Henry is declared heir apparent to the crown, to hold to him and the heirs of his body issuing, with remainder to Lord Thomas, Lord John, and Lord Humphry, the king's sons, and the heirs of their bodies respectively. Which is, indeed, nothing more than the law would have done before, provided Henry the Fourth had been a rightful king. It, however, serves to show that it was then generally understood that the king and parliament had a right to new-model and regulate the succession to the crown. And we may observe, with what caution and delicacy

• Seld. Tit. Hon. 1. 3.

▷ *Soit mys et demerge.*

the parliament then avoided declaring any sentiment of Henry's original title. However, Sir Edward Coke more than once expressly declares,<sup>a</sup> that at the time of [204] passing this act the right of the crown was in the descent from Philippa, daughter and heir of Lionel, Duke of Clarence.

§ 277. **b. Henry V (1413-1422); c. Henry VI (1422-1461).**—Nevertheless, the crown descended regularly from Henry IV to his son and grandson, Henry V and VI; in the latter of whose reigns the house of York asserted their dormant title; and, after imbruing the kingdom in blood and confusion for seven years together, at last established it in the person of Edward IV.

§ 278. **10. House of York (1461-1485); a. Edward IV (1461-1483).**—At his accession to the throne, after a breach of the succession that continued for three descents, and above threescore years, the distinction of a king *de jure* (by right) and a king *de facto* (in fact) began to be first taken; in order to indemnify such as had submitted to the late establishment, and to provide for the peace of the kingdom by confirming all honors conferred and all acts done, by those who were now called the usurpers, not tending to the disherison of the rightful heir. In statute 1 Edw. IV, c. 1 (Confirmation, 1461), the three Henrys are styled, "late kings of England successively in dede, and not of ryght." And, in all the charters which I have met with of King Edward, wherever he has occasion to speak of any of the line of Lancaster, he calls them "*nuper de facto, et non de jure, reges Angliæ* (recently kings of England, in fact and not of right)."

§ 279. **b. Edward V (1483); c. Richard III (1483-1485).**—Edward IV left two sons and a daughter; the eldest of which sons, King Edward V, enjoyed the regal dignity for a very short time, and was then deposed by Richard, his unnatural uncle; who immediately usurped the royal dignity, having previously insinuated to the populace a suspicion of bastardy in the children of Edward IV, to make a show of some hereditary title: after which he is gen-

<sup>a</sup> 4 Inst. 37. 205.

erally believed to have murdered his two nephews; upon whose death the right of the crown devolved to their sister, Elizabeth.

§ 280. 11. **House of Tudor (1485-1603).**—The tyrannical reign of King Richard III gave occasion to Henry, Earl of Richmond, to assert his title to the crown. A title the most remote and unaccountable that was ever set up, and which nothing could have given success to, but the universal detestation of the then usurper, Richard. For, besides that he claimed under a descent from John of Gant, whose title was now exploded, the claim (such as it was) was through John, Earl of Somerset, a bastard son, begotten by John of [205] Gant upon Catherine Swinford. It is true that, by an act of parliament 20 Rich. II (1396), this son was, with others, legitimated and made inheritable to all lands, offices, and dignities, as if he had been born in wedlock: but still, with an express reservation of the crown, "*excepta dignitate regali.*"<sup>r</sup>

§ 281. a. **Henry VII (1485-1509).**—Notwithstanding all this, immediately after the battle of Bosworth field, he assumed the regal dignity; the right of the crown then being, as Sir Edward Coke expressly declares,<sup>s</sup> in Elizabeth, eldest daughter of Edward IV: and his possession was established by parliament, holden the first year of his reign. In the act for which purpose, the parliament seems to have copied the caution of their predecessors in the reign of Henry IV: and therefore (as Lord Bacon, the historian of this reign, observes) carefully avoided any recognition of Henry VII's right, which indeed was none at all;<sup>3</sup> and the king would not have it by way of new law or ordinance, whereby a right might seem to be created and conferred upon him; and therefore a middle way was rather chosen, by way (as the noble historian expresses it) of *establishment*, and that under covert and indifferent words,

<sup>r</sup> 4 Inst. 36.

<sup>s</sup> *Ibid.* 37.

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<sup>3</sup> **Title of Henry VII.**—The title of Henry VII by descent from Edward III, and his relation to Richard III, whom he overthrew and succeeded, is more explicitly stated by Blackstone himself. (*Post*, Book II, page \*207.)

Instead of commenting on the manifest exaggeration of the hereditary element in the succession to the English crown as stated by Blackstone in this chapter, I would refer the student to the excellent little work of Professor

“that the inheritance of the crown should *rest, remain, and abide* in King Henry VII and the heirs of his body”: thereby providing for the future, and at the same time acknowledging his present possession; but not determining either way, whether that possession was *de jure* or *de facto* merely. However, he soon after married Elizabeth of York, the undoubted heiress of the Conqueror, and thereby gained (as Sir Edward Coke<sup>ss</sup> declares) by much his best title to the crown. Whereupon the act made in his favor was so much disregarded, that it never was printed in our statute books.

§ 282. b. Henry VIII (1509–1547); (1) Act of Succession to the Crown, 1534.—Henry the Eighth, the issue of this marriage, succeeded to the crown by clear indisputable hereditary right, and transmitted it to his three children in successive order. But in his reign we at several times find the parliament busy in regulating the succession to the kingdom. And, first, by [206] statute 25 Hen. VIII, c. 12 (1533), which recites the mischiefs, which have and may ensue by disputed titles, because no perfect and substantial provision hath been made by law concerning the succession; and then enacts, that the crown shall be entailed to his majesty, and the sons or heirs males of his body; and in default of such sons to the Lady Elizabeth (who is declared to be the king’s eldest issue female, in exclusion of the Lady Mary, on account of her supposed illegitimacy by the divorce of her mother, Queen Catherine) and to the Lady Elizabeth’s heirs of her body; and so on from issue female to issue female, and the heirs of their bodies, by course of inheritance according to their ages, *as the crown of England hath been accustomed and ought to go*, in case where there be heirs female of the same: and in default of issue female, then to the king’s right heirs forever. This single statute is an ample proof of all the four positions we at first set out with.

<sup>ss</sup> *Ibid.*

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E. A. Freeman, of Oxford, on the Growth of the English Constitution, c. i, pp. 24–40. (Lond. 1872.)

Professor Freeman has perhaps given the elective element more than its due weight in such a problem: but for that very reason his work is well adapted to reading in connection with this chapter, and the student will thus have both sides of the question presented by advocates of the highest merit.—HAMMOND.

§ 283. (2) **Acts of Succession to the Crown, 1536, 1543; c. Edward VI (1547–1553); d. Mary (1553–1558).**—But, upon the king's divorce from Ann Boleyn, this statute was, with regard to the settlement of the crown, repealed by statute 28 Hen. VIII, c. 7 (Succession to the Crown, 1536), wherein the Lady Elizabeth is also, as well as the Lady Mary, bastardized, and the crown settled on the king's children by Queen Jane Seymour, and his future wives; and, in defect of such children, then with this remarkable remainder, to such persons as the king by letters patent, or last will and testament, should limit and appoint the same. A vast power; but, notwithstanding, as it was regularly vested in him by the supreme legislative authority, it was therefore indisputably valid. But this power was never carried into execution; for by statute 35 Hen. VIII, c. 1 (Succession to the Crown, 1543), the king's two daughters are legitimated again, and the crown is limited to Prince Edward by name, after that to the Lady Mary, and then to the Lady Elizabeth, and the heirs of their respective bodies; which succession took effect accordingly, being indeed no other than the usual course of the law, with regard to the descent of the crown.

§ 284. (1) **Act of Succession to the Crown, 1554.**—But lest there should remain any doubt in the minds of the people, through this jumble of acts for limiting the succession, by statute 1 Mar., p. 2, c. 1 (Crown, 1554), Queen Mary's hereditary <sup>[207]</sup> right to the throne is acknowledged and recognized in these words: "the crown of these realms is most lawfully, justly, and rightly *descended* and come to the queen's highness that now is, being the very true, and undoubted heir and inheritrix thereof." And again, upon the queen's marriage with Philip of Spain, in the statute which settles the preliminaries of that match,<sup>†</sup> the hereditary right to the crown is thus asserted and declared: "as touching the right of the queen's inheritance in the realm and dominions of England, the children, whether male or female, shall succeed in them, according to the known laws, statutes, and customs of the same." Which determination of the parliament, that the succession *shall* continue

† 1 Mar. p. 2. c. 2 (1554).



in the usual course, seems tacitly to imply a power of new-modeling and altering it, in case the legislature had thought proper.

§ 285. **e. Elizabeth (1558-1603); (1) Acts of Succession to the Crown, 1558, 1571.**—On Queen Elizabeth's accession, her right is recognized in still stronger terms than her sister's; the parliament acknowledging,<sup>u</sup> "that the queen's highness is, and in very deed and of most mere right ought to be, by the laws of God, and the laws and statutes of this realm, our most lawful and rightful sovereign liege lady and queen; and that her highness is rightly, lineally, and lawfully descended and come of the blood royal of this realm of England; in and to whose princely person, and to the heirs of her body lawfully to be begotten, after her, the imperial crown and dignity of this realm doth belong." And in the same reign, by statute 13 Eliz., c. 1 (Treason, 1571), we find the right of parliament to direct the succession of the crown asserted in the most explicit words. "If any person shall hold, affirm, or maintain that the common laws of this realm, not altered by parliament, ought not to direct the right of the crown of England; or that the queen's majesty, with and by the authority of parliament, is not able to make laws and statutes of sufficient force and validity, to limit and bind the crown of this realm, and the descent, limitation, inheritance, and government thereof;—such person so holding, affirming, or maintaining, shall, [<sup>208</sup>] during the life of the queen, be guilty of high treason; and after her decease shall be guilty of a misdemeanor, and forfeit his goods and chattels."

§ 286. **12. House of Stuart (1603-1714); a. James I (1603-1625).**—On the death of Queen Elizabeth, without issue, the line of Henry VIII became extinct. It therefore became necessary to recur to the other issue of Henry VII, by Elizabeth of York, his queen: whose eldest daughter, Margaret, having married James IV, King of Scotland, King James the Sixth of Scotland, and of England the First, was the lineal descendant from that alliance. So that in his person, as clearly as in Henry VIII, centered all the claims of different competitors, from the Conquest downwards, he being indisputably the lineal heir of the Conqueror. And, what

<sup>u</sup> Stat. 1 Eliz. c. 3 (Succession to the Crown, 1558).

is still more remarkable, in his person also centered the right of the Saxon monarchs, which had been suspended from the Conquest till his accession. For, as was formerly observed, Margaret, the sister of Edgar Atheling, the daughter of Edward the Outlaw, and granddaughter of King Edmund Ironside, was the person in whom the hereditary right of the Saxon kings, supposing it not abolished by the Conquest, resided. She married Malcolm, King of Scotland; and Henry II, by a descent from Matilda, their daughter, is generally called the restorer of the Saxon line. But it must be remembered, that Malcolm by his Saxon queen had sons as well as daughters; and that the royal family of Scotland from that time downwards were the offspring of Malcolm and Margaret. Of this royal family King James the First was the direct lineal heir, and therefore united in his person every possible claim by hereditary right to the English as well as Scottish throne, being the heir both of Egbert and William the Conqueror.

§ 287. (1) **Act of Succession to the Crown, 1603.**—And it is no wonder that a prince of more learning than wisdom, who could deduce an hereditary title for more than eight hundred years, should easily be taught by the flatterers of the times to believe there was something divine in this right, and that the finger of Providence was visible in its [209] preservation. Whereas, though a wise institution, it was clearly a human institution; and the right inherent in him no natural, but a positive, right. And in this and no other light was it taken by the English parliament; who by statute 1 Jac. I, c. 1 (Succession to the Crown, 1603), did “recognize and acknowledge, that immediately upon the dissolution and decease of Elizabeth, late queen of England, the imperial crown thereof did by inherent birthright, and lawful and undoubted succession, descend and come to his most excellent majesty, as being lineally, justly, and lawfully, next and sole heir of the blood royal of this realm.” Not a word here of any right immediately derived from Heaven: which, if it existed anywhere, must be sought for among the *aborigines* of the island, the ancient Britons; among whose princes indeed some have gone to search it for him.▼

▼ Elizabeth of York, the mother of Queen Margaret of Scotland, was heiress of the house of Mortimer. And Mr. Carte observes, that the house of Mor-

§ 288. **b. Charles I (1625–1649); (1) The Commonwealth (1649–1660); (2) Proclamation of restoration; c. Charles II (1660–1685).**—But, wild and absurd as the doctrine of divine right most undoubtedly is, it is still more astonishing, that when so many human hereditary rights had centered in this king, his son and heir, King Charles the First, should be told by those infamous judges, who pronounced his unparalleled sentence, that he was an elective prince; elected by his people, and therefore accountable to them, in his own proper person, for his conduct. The confusion, instability, and madness, which followed the fatal catastrophe of that pious and unfortunate prince, will be a standing argument in favor of hereditary monarchy to all future ages; as they proved at last to the then deluded people: who, in order to recover that peace and happiness which for twenty years together they had lost, in a solemn parliamentary convention of the states restored the right heir of the crown. And in the proclamation for that purpose, which was drawn up and attended by both houses,<sup>x</sup> they declared, “that, according to their duty and allegiance, they did heartily, joyfully, and unanimously acknowledge and proclaim, that immediately upon the [210] decease of our late sovereign lord, King Charles, the imperial crown of these realms did by inherent birthright and lawful and undoubted succession descend and come to his most excellent majesty, Charles the Second, as being lineally, justly, and lawfully, next heir of the blood royal of this realm: and thereunto they most humbly and faithfully did submit and oblige themselves, their heirs, and posterity forever.”

§ 289. (1) **The crown hereditary subject to parliament.**—Thus I think it clearly appears, from the highest authority this nation is acquainted with, that the crown of England hath been ever an hereditary crown; though subject to limitations by parliament. The remainder of this chapter will consist principally of those instances, wherein the parliament has asserted or exercised this right of altering and limiting the succession; a right

timer, in virtue of its descent from Gladys, only sister to Llewellyn ap Jorwerth the Great, had the true right to the principality of Wales. *Hist. Eng.* iii, 705.

<sup>x</sup> *Com. Journ.* 8 May 1660.

which, we have seen, was before exercised and asserted in the reigns of Henry IV, Henry VII, Henry VIII, Queen Mary, and Queen Elizabeth.

§ 290. (a) **The bill of exclusion.**—The first instance, in point of time, is the famous bill of exclusion, which raised such a ferment in the latter end of the reign of King Charles the Second. It is well known that the purport of this bill was to have set aside the king's brother and presumptive heir, the Duke of York, from the succession, on the score of his being a papist; that it passed the house of commons, but was rejected by the lords; the king having also declared beforehand, that he never would be brought to consent to it. And from this transaction we may collect two things; 1. That the crown was universally acknowledged to be hereditary; and the inheritance indefeasible unless by parliament: else it had been needless to prefer such a bill. 2. That the parliament had a power to have defeated the inheritance: else such a bill had been ineffectual. The commons acknowledged the hereditary right then subsisting; and the lords did not dispute the power, but merely the propriety, of an exclusion.

§ 291. d. **James II (1685–1689).**—However, as the bill took no effect, King James the Second succeeded to the throne of his ancestors; and might have enjoyed it during the remainder of his life, but for his own infatuated conduct, which (with other concurring circumstances) brought on the revolution in 1688.

§ 292. (1) **The revolution of 1688.**—<sup>[211]</sup> The true ground and principle, upon which that memorable event proceeded, was an entirely new case in politics, which had never before happened in our history; the abdication of the reigning monarch, and the vacancy of the throne thereupon. It was not a defeasance of the right of succession, and a new limitation of the crown, by the king and both houses of parliament: it was the act of the nation alone, upon a conviction that there was no king in being. For in a full assembly of the lords and commons, met in a convention upon the supposition of this vacancy, both houses' came to this resolution;

† Com. Journ. 7 Feb. 1688.

“that King James the Second, having endeavored to subvert the constitution of the kingdom, by breaking the original contract between king and people; and, by the advice of jesuits and other wicked persons, having violated the fundamental laws; and having withdrawn himself out of this kingdom, has abdicated the government, and that the throne is thereby vacant.” Thus ended at once, by this sudden and unexpected vacancy of the throne, the old line of succession; which from the Conquest had lasted above six hundred years, and from the union of the heptarchy in King Egbert almost nine hundred. The facts themselves thus appealed to, the king’s endeavor to subvert the constitution by breaking the original contract, his violation of the fundamental laws, and his withdrawing himself out of the kingdom, were evident and notorious: and the consequences drawn from these facts (namely, that they amounted to an abdication of the government; which abdication did not affect only the person of the king himself, but also all his heirs, and rendered the throne absolutely and completely vacant) it belonged to our ancestors to determine. For, whenever a question arises between the society at large and any magistrate vested with powers originally delegated by that society, it must be decided by the voice of the society itself; there is not upon earth any other tribunal to resort to. And that these consequences were fairly deduced from these facts, our ancestors have solemnly determined, in a full parliamentary convention representing the whole society. The reasons <sup>[212]</sup> upon which they decided may be found at large in the parliamentary proceedings of the times; and may be matter of instructive amusement for us to contemplate, as a speculative point of history. But care must be taken not to carry this inquiry further, than merely for instruction or amusement. The idea, that the consciences of posterity were concerned in the rectitude of their ancestors’ decisions, gave birth to those dangerous political heresies, which so long distracted the state, but at length are all happily extinguished. I therefore rather choose to consider this great political measure upon the solid footing of authority, than to reason in its favor from its justice, moderation, and expedience: because that might imply a right of dissenting or revolting from it, in case we should think it to have been unjust, oppressive, or inexpedient. Whereas,



our ancestors having most indisputably a competent jurisdiction to decide this great and important question, and having in fact decided it, it is now become our duty at this distance of time to acquiesce in their determination; being born under that establishment which was built upon this foundation, and obliged by every tie, religious as well as civil, to maintain it.

§ 293. (a) Character of the revolution.—But, while we rest this fundamental transaction, in point of authority, upon grounds the least liable to cavil, we are bound both in justice and gratitude to add, that it was conducted with a temper and moderation which naturally arose from its equity; that, however it might in some respects go beyond the letter of our ancient laws (the reason of which will more fully appear hereafter<sup>a</sup>), it was agreeable to the spirit of our constitution, and the rights of human nature; and that though in other points (owing to the peculiar circumstances of things and persons) it was not altogether so perfect as might have been wished, yet from thence a new era commenced, in which the bounds of prerogative and liberty have been better defined, the principles of government more thoroughly examined and understood, and the rights of the subject more explicitly guarded by legal provisions, than in any other period of the English history. In particular it is worthy [<sup>213</sup>] observation that the convention, in this their judgment, avoided with great wisdom the wild extremes into which the visionary theories of some zealous republicans would have led them. They held that this misconduct of King James amounted to an *endeavor* to subvert the constitution; and not to an actual subversion, or total dissolution of the government, according to the principles of Mr. Locke:<sup>a</sup> which would have reduced the society almost to a state of nature; would have leveled all distinctions of honor, rank, offices, and property; would have annihilated the sovereign power, and in consequence have repealed all positive laws; and would have left the people at liberty to have erected a new system of state upon a new foundation of polity. They therefore very prudently voted it to amount to no more than an abdication of the government, and a consequent vacancy of the throne; whereby the government was allowed to subsist, though

<sup>a</sup> See chap. 7.

<sup>a</sup> On Gov. p. 2. c. 19.

the executive magistrate was gone, and the kingly office to remain, though King James was no longer king.<sup>b</sup> And thus the constitution was kept entire; which upon every found principle of government must otherwise have fallen to pieces, had so principal and constituent a part as the royal authority been abolished, or even suspended.

§ 294. *e. William and Mary (1689-1702); (1) Regulation of the Succession (Bill of Rights, 1689).*—This single postulatam, the vacancy of the throne, being once established, the rest that was then done followed almost of course. For, if the throne be at any time vacant (which may happen by other means besides that of abdication; as if all the blood royal should fail, without any successor appointed by parliament); if, I say, a vacancy by any means whatsoever should happen, the right of disposing of this vacancy seems naturally to result to the lords and commons, the trustees and representatives of the nation. For there are no other hands in which it can so properly be entrusted; and there is a necessity of its being entrusted somewhere, else the whole frame of government must be dissolved and perish. The lords and commons having therefore determined this main fundamental article, that there was a vacancy of the throne, they proceeded to fill up that vacancy in such manner as they <sup>[214]</sup> judged the most proper. And this was done by their declaration of 12 February, 1688,<sup>c</sup> in the following manner: “that William and Mary, Prince and Princess of Orange, be, and be declared king and queen, to hold the crown and royal dignity during their lives, and the life of the survivor of them; and that the sole and full exercise of the regal power be only in, and executed by, the said Prince of Orange, in the names of the said prince and princess, during their joint lives: and after their deceases the said crown and royal dignity to be to the heirs of the body of the said princess; and for default of such issue to the Princess Anne of Denmark and the heirs of her body and for default of such issue to the heirs of the body of the said Prince of Orange.”<sup>4</sup>

<sup>b</sup> Law of Forfeit, 118, 119.

<sup>c</sup> Com. Journ. 12 Feb. 1688.

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<sup>4</sup> This order of succession was embodied in the great statute known as the Bill of Rights, 1689, 1 W. & M., st. 2, c. 2.

§ 295. f. Anne (1702–1714).—Perhaps, upon the principles before established, the convention might (if they pleased) have vested the regal dignity in a family entirely new, and strangers to the royal blood: but they were too well acquainted with the benefits of hereditary succession, and the influence which it has by custom over the minds of the people, to depart any further from the ancient line than temporary necessity and self-preservation required. They therefore settled the crown, first on King William and Queen Mary, King James' eldest daughter, for their joint lives: then on the survivor of them; and then on the issue of Queen Mary: upon failure of such issue, it was limited to the Princess Anne, King James' second daughter, and her issue; and lastly, on failure of that to the issue of King William, who was the grandson of Charles the First, and nephew as well as son-in-law of King James the Second, being the son of Mary, his eldest sister. This settlement included all the Protestant posterity of King Charles I, except such other issue as King James might at any time have, which was totally omitted through fear of a popish succession. And this order of succession took effect accordingly.

§ 296. (1) Title of William, Mary, and Anne.—These three princes, therefore, King William, Queen Mary, and Queen Anne, did not take the crown by hereditary right or *descent*, but by way of donation or *purchase*, as the <sup>[215]</sup> lawyers call it; by which they mean any method of acquiring an estate otherwise than by descent. The new settlement did not merely consist in excluding King James, and the person pretended to be Prince of Wales, and then suffering the crown to descend in the old hereditary channel: for the usual course of descent was in some instances broken through; and yet the convention still kept it in their eye, and paid a great, though not total, regard to it. Let us see how the succession would have stood, if no abdication had happened, and King James had left no other issue than his two daughters, Queen Mary and Queen Anne. It would have stood thus: Queen Mary and her issue; Queen Anne and her issue; King William and his issue. But we may remember that Queen Mary was only nominally queen, jointly with her husband, King William, who alone had the regal power; and King William was personally preferred to Queen Anne,

though his issue was postponed to hers. Clearly, therefore, these princes were successively in possession of the crown by a title different from the usual course of descent.

§ 297. (2) **Act of Settlement, 1700.**—It was towards the end of King William's reign, when all hopes of any surviving issue from any of these princes died with the Duke of Gloucester, that the king and parliament thought it necessary again to exert their power of limiting and appointing the succession, in order to prevent another vacancy of the throne; which must have ensued upon their deaths, as no further provision was made at the revolution than for the issue of Queen Mary, Queen Anne, and King William. The parliament had previously by the statute of 1 W. & M., st. 2, c. 2 (Bill of Rights, 1689), enacted, that every person who should be reconciled to, or hold communion with, the See of Rome, should profess the popish religion, or should marry a papist, should be excluded and forever incapable to inherit, possess, or enjoy, the crown; and that in such case the people should be absolved from their allegiance, and the crown should descend to such persons, being Protestants, as would have inherited the same, in case the person so reconciled, holding communion, professing, or marrying, were naturally dead. To act, therefore, consistently with themselves, and at the same <sup>[216]</sup> time pay as much regard to the old hereditary line as their former resolutions would admit, they turned their eyes on the Princess Sophia, electress and duchess dowager of Hanover, the most accomplished princess of her age.<sup>d</sup> For, upon the impending extinction of the Protestant posterity of Charles the First, the old law of regal descent directed them to recur to the descendants of James the First; and the Princess Sophia, being the youngest daughter of Elizabeth, Queen of Bohemia, who was the daughter of James the First, was the nearest of the ancient blood royal, who was not incapacitated by professing the popish religion. On her, therefore, and the heirs of her body, being Protestants, the remainder of the crown, expectant on

<sup>d</sup> Sandford in his *Genealogical History*, published A. D. 1677, speaking (page 535) of the Princesses Elizabeth, Louisa, and Sophia, daughters of the Queen of Bohemia, says, the first was reputed the most learned, the second the greatest artist, and the last one of the most accomplished ladies in Europe.

the death of King William and Queen Anne without issue, was settled by statute 12 & 13 W. III, c. 2 (Act of Settlement, 1700). And at the same time it was enacted, that whosoever should hereafter come to the possession of the crown should join in the communion of the church of England as by law established.

§ 298. (3) **Act of Succession to the Crown, 1707.**—This is the last limitation of the crown that has been made by parliament: and these several actual limitations, from the time of Henry IV to the present, do clearly prove the power of the king and parliament to new-model or alter the succession. And indeed it is now again made highly penal to dispute it: for by the statute 6 Ann., c. 7 (1703), it is enacted, that if any person maliciously, advisedly, and directly, shall maintain by writing or printing, that the kings of this realm with the authority of parliament are not able to make laws to bind the crown and the descent thereof, he shall be guilty of high treason; or if he maintains the same by only preaching, teaching, or advised speaking, he shall incur the penalties of a *præmunire*.

§ 299. 13. **House of Hanover (1714—)**; a. George I (1714–1727); b. George II (1727–1760); c. George III (1760–1820).—The Princess Sophia dying before Queen Anne, the inheritance thus limited descended on her son and heir, King George the First; and, having on the death of the queen taken effect in his person, from him it descended to his late majesty, King George the Second; and from him to his grandson and heir, our present gracious sovereign, King George the Third.<sup>5</sup>

§ 300. **Succession to the crown, conditionally hereditary.**—[217] Hence, it is easy to collect, that the title to the crown is at present hereditary, though not quite so absolutely hereditary as formerly: and the common stock or ancestor, from whom the de-

<sup>5</sup> **Later sovereigns of the Hanoverian House.**—From George the Third to his son, George the Fourth, who, dying childless, was succeeded by his brother, William the Fourth (1830–1837). The next in succession was Victoria (1837–1901), daughter of Edward, Duke of Kent, brother of William the Fourth. From Victoria the crown descended to her son, Edward the Seventh (1901–1910), and on his death, in 1910, to his eldest surviving son, George the Fifth.



scent must be derived, is also different. Formerly the common stock was King Egbert; then William the Conqueror; afterwards in James the First's time the two common stocks united, and so continued till the vacancy of the throne in 1688: now it is the Princess Sophia, in whom the inheritance was vested by the new king and parliament. Formerly the descent was absolute, and the crown went to the next heir without any restriction: but now, upon the new settlement, the inheritance is conditional; being limited to such heirs only, of the body of the Princess Sophia, as are Protestant members of the church of England, and are married to none but Protestants.

§ 301. **Constitutional basis of succession to the crown.**—And in this due medium consists, I apprehend, the true constitutional notion of the right of succession to the imperial crown of these kingdoms. The extremes, between which it steers, are each of them equally destructive of those ends for which societies were formed and are kept on foot. Where the magistrate, upon every succession, is elected by the people, and may by the express provision of the laws be deposed (if not punished) by his subjects, this may sound like the perfection of liberty, and look well enough when delineated on paper; but in practice will be ever productive of tumult, contention, and anarchy. And, on the other hand, divine indefeasible hereditary right, when coupled with the doctrine of unlimited passive obedience, is surely of all constitutions the most thoroughly slavish and dreadful. But when such an hereditary right, as our laws have created and vested in the royal stock, is closely interwoven with those liberties, which, we have seen in a former chapter, are equally the inheritance of the subject; this union will form a constitution, in theory the most beautiful of any, in practice the most approved, and, I trust, in duration the most permanent. It was the duty of an expounder of our laws to lay this constitution before the student in its true and genuine light; it is the duty of every good Englishman to understand, to revere, to defend it.

## CHAPTER THE FOURTH.

[218]

### OF THE KING'S ROYAL FAMILY.

§ 302. **The queen.**—The first and most considerable branch of the king's royal family, regarded by the laws of England, is the queen.

§ 303. **1. Queen, regent, regnant, or sovereign.**—The queen of England is either queen *regent*, queen *consort*, or queen *dowager*. The queen *regent*, *regnant*, or *sovereign*, is she who holds the crown in her own right; as the first (and perhaps the second) Queen Mary, Queen Elizabeth, and Queen Anne; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king. This was observed in the entrance of the last chapter, and is expressly declared by statute 1 Mar. I, st. 3, c. 1 (Crown, 1554).

§ 304. **2. Queen consort.**—But the queen *consort* is the wife of the reigning king; and she by virtue of her marriage is participant of divers prerogatives above other women.<sup>a</sup> And, first, she is a public person, exempt and distinct from the king; and not like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands, and to convey them, to make leases, to grant copyholds, and do other acts of ownership, without the concurrence of her lord; which no other married woman can do;<sup>b</sup> a privilege as old as the Saxon era.<sup>c</sup> She is also capable of taking a grant from the king, which no other wife is from her husband; and in this particular she agrees with the *Augusta*, or *piissima regina conjux divi imperatoris* (the most pious queen consort of the divine emperor) of the Roman laws; who, according to Justinian,<sup>d</sup> was equally [219] capable of making a grant to, and receiving one from, the emperor. The queen of England hath separate courts and officers distinct from the king's

<sup>a</sup> Finch. L. 86.

<sup>c</sup> Seld. Jan. Angl. 1. 42.

<sup>b</sup> 4 Rep. 23.

<sup>d</sup> Cod. 5. 16. 26.

not only in matters of ceremony, but even of law; and her attorney and solicitor general are entitled to a place within the bar of his majesty's courts, together with the king's counsel.<sup>e</sup> She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a *feme sole*, and not as a *feme covert*; as a single, not as a married woman.<sup>f</sup> For which the reason given by Sir Edward Coke is this: because the wisdom of the common law would not have the king (whose continual care and study is for the public, and *circa ardua regni*—concerning the arduous affairs of the kingdom) to be troubled and disquieted on account of his wife's domestic affairs; and therefore it vests in the queen a power of transacting her own concerns, without the intervention of the king, as if she was an unmarried woman.

§ 305. a. **Queen consort's exemptions and prerogatives.**—The queen hath also many exemptions, and minute prerogatives. For instance: she pays no toll;<sup>g</sup> nor is she liable to any amercement in any court.<sup>h</sup> But in general, unless where the law has expressly declared her exempted, she is upon the same footing with other subjects: being to all intents and purposes the king's subject, and not his equal: in like manner as, in the imperial law, "*Augusta legibus soluta non est* (The queen is not exempt from the laws)."<sup>i</sup>

§ 306. (1) **Queen consort's revenue: queen-gold.**—The queen hath also some pecuniary advantages, which form her a distinct revenue; as, in the first place, she is entitled to an ancient perquisite called queen-gold or *aurum reginæ*; which is a royal revenue, belonging to every queen consort during her marriage with the king, and due from every person who hath made a voluntary offering or fine to the king, amounting to ten marks or upwards, for and in consideration of any privileges, grants, licenses, pardons, or [220] other matter of royal favor conferred upon him by the king: and it is due in the proportion of one-tenth part more, over and above the entire offering or fine made to the king; and becomes

<sup>e</sup> Seld. Tit. Hon. 1. 6. 7.

<sup>h</sup> Finch. L. 185.

<sup>f</sup> Finch. L. 86. Co. Litt. 133.

<sup>i</sup> Ff. 1. 3. 31.

<sup>g</sup> Co. Litt. 133.

an actual debt of record to the queen's majesty by the mere recording of the fine.<sup>k</sup> As, if an hundred marks of silver be given to the king for liberty to take in mortmain, or to have a fair, market, park, chase, or free-warren: there the queen is entitled to ten marks in silver, or (what was formerly an equivalent denomination) to one mark in gold, by the name of queen-gold, or *aurum reginæ*.<sup>l</sup> But no such payment is due for any aids or subsidies granted to the king in parliament or convocation: nor for fines imposed by courts on offenders, against their will: nor for voluntary presents to the king, without any consideration moving from him to the subject; nor for any sale or contract whereby the present revenues or possessions of the crown are granted away or diminished.<sup>m</sup>

§ 307. (a) **Origin and history of the queen-gold.**—The original revenue of our ancient queens, before and soon after the Conquest, seems to have consisted in certain reservations or rents out of the demesne lands of the crown, which were expressly appropriated to her majesty, distinct from the king. It is frequent in Domesday Book, after specifying the rent due to the crown, to add likewise the quantity of gold or other renders reserved to the queen.<sup>n</sup> These were frequently appropriated to particular purposes; to buy wool for her majesty's use,<sup>o</sup> to purchase oil for her lamps,<sup>p</sup> or to furnish her attire from head to foot,<sup>q</sup> which was frequently very costly, as one single robe in the fifth year of Henry II

<sup>k</sup> Pryn. Aur. Reg. 2.

<sup>l</sup> 12 Rep. 21. 4 Inst. 358.

<sup>m</sup> *Ibid.* Pryn. 6. Madox. Hist. Exch. 242.

<sup>n</sup> *Bedefordscire. Maner. Lestone redd. per annum xxii lib. etc.: ad opus reginæ ii uncias auri.*—*Herefordscire. In Lene, etc., consuetud. ut præpositus manerii veniente domina sua (regina) in maner, præsentaret ei xviii oras denar. ut esset ipsa læto animo.* (Bedfordshire: The manor of Leighton pays twenty-two pounds per annum, etc.; two ounces of gold for the queen's use. Herefordshire: In Lene, etc., it is the custom for the steward of the manor, on the arrival of his lady (the queen) at the manor to congratulate her with a present of eighteen oras denarii.) Pryn. Append. to Aur. Reg. 2, 3.

<sup>o</sup> *Causa coadunandi lanam reginæ.* Domesd. *Ibid.*

<sup>p</sup> *Civitas London. Pro oleo ad lampad. reginæ.* (Mag. Rot. Pip. temp. Hen. II. *Ibid.*)

<sup>q</sup> *Vicecomes Berkescire, xvi l. pro cappa reginæ.* (Mag. Rot. Pip. 19.—22 Hen. II. (1175) *Ibid.*) *Civitas Lund. cordubanario reginæ xx s.* Mag. Rot. 2 Hen. II. (1155). (Madox Hist. Exch. 419.)

[221] stood the city of London in upwards of fourscore pounds.<sup>r</sup> A practice somewhat similar to that of the eastern countries, where whole cities and provinces were specifically assigned to purchase particular parts of the queen's apparel.<sup>s</sup> And, for a further addition to her income, this duty of queen-gold is supposed to have been originally granted: those matters of grace and favor, out of which it arose, being frequently obtained from the crown by the powerful intercession of the queen. There are traces of its payment, though obscure ones, in the book of Domesday and in the great pipe-roll of Henry the First.<sup>t</sup> In the reign of Henry the Second the manner of collecting it appears to have been well understood, and it forms a distinct head in the ancient dialogue of the exchequer<sup>u</sup> written in the time of that prince, and usually attributed to Gervase of Tilbury. From that time downwards it was regularly claimed and enjoyed by all the queen consorts of England till the death of Henry VIII: though after the accession of the Tudor family the collecting of it seems to have been much neglected: and, there being no queen consort afterwards till the accession of James I, a period of near sixty years, its very nature and quantity became then a matter of doubt: and, being referred by the king to the chief justices and chief baron, their report of it was so very unfavorable,<sup>v</sup> that his consort, Queen Anne (though she claimed it), yet never thought proper to exact it. In 1635, 11 Car. I, a time fertile of expedients for raising money upon dormant precedents in our old records (of which ship-money was a fatal instance), the king, at the petition of his Queen Henrietta Maria, issued out his writ<sup>w</sup> for levying it: but afterwards pur-

<sup>r</sup> *Pro roba ad opus reginæ, quater xx l, and vi s. viii d.* (Mag. Rot. 5 Hen. II. (1158), *Ibid.* 250.)

<sup>s</sup> *Solere aiunt barbaros reges Persarum ac Syrorum—uxoribus civitates attribuerent, hoc modo; hæc civitas mulieri redimiculum præbeat, hæc in collum, hæc in crines, etc.* (They say that the barbarian kings of Persia and Syria were accustomed to assess cities for their wives in this manner; one city was to provide her headdress, another the ornaments for her neck, and the third those for her hair, etc.) (Cic. in Verrem, lib. 3. cap. 33.)

<sup>t</sup> See Madox Disceptat. Epistolar. 74. Pryn. Aur. Reg. Append. 5.

<sup>u</sup> Lib. 2. c. 26.

<sup>v</sup> Mr. Prynne, with some appearance of reason, insinuates that their researches were very superficial. (Aur. Reg. 125.)

<sup>w</sup> 19 Rym. Fœd. 721.



chased it of his consort at the price of ten thousand pounds: finding it, perhaps, too trifling and troublesome to levy. And when afterwards, at the Restoration, by [222] the abolition of the military tenures, and the fines that were consequent upon them, the little that legally remained of this revenue was reduced to almost nothing at all, in vain did Mr. Prynne, by a treatise which does honor to his abilities as a painful and judicious antiquary, endeavor to excite Queen Catherine to revive this antiquated claim.

§ 308. (2) *Other perquisites of the queen consort.*—Another ancient perquisite belonging to the queen consort, mentioned by all our old writers,\* and, therefore only, worthy notice, is this: that on the taking of a whale on the coasts, which is a royal fish, it shall be divided between the king and queen; the head only being the king's property, and the tail of it the queen's. "*De sturgione observetur, quod rex illum habebit integrum: de balena vero sufficit, si rex habeat caput, et regina caudam* (Of the sturgeon be it known that the king shall have the whole: but with respect to a whale it is sufficient if the king have the head and the queen the tail)."<sup>7</sup> The reason of this whimsical division, as assigned by our ancient records,<sup>7</sup> was, to furnish the queen's wardrobe with whalebone.

§ 309. (3) *Queen consort's personal security and liability.*—But further: though the queen is in all respects a subject, yet, in point of the security of her life and person, she is put on the same footing with the king. It is equally treason (by the statute 25 Edw. III—Treason, 1351) to compass or imagine the death of our lady, the king's companion, as of the king himself: and to violate, or defile the queen consort, amounts to the same high crime; as well in the person committing the fact, as in the queen herself, if consenting. A law of Henry the Eighth<sup>2</sup> made it treason also for any woman, who was not a virgin, to marry the king without informing him thereof: but this law was soon after repealed; it trespassing too strongly, as well on natural justice as female modesty. If, however, the queen be accused of any species of

\* Bracton. l. 3. c. 3. Britton. c. 17. Flet. l. 1, c. 45 & 46.

<sup>7</sup> Pryn. Aur. Reg. 127.

▪ Stat. 33 Hen. VIII. c. 21 (Treason, 1542).

treason, she shall (whether consort or dowager) be tried by the peers of parliament, as Queen Ann Boleyn was in 28 Hen. VIII (1536).

§ 310. (4) **The prince consort.**—The husband of a queen regnant, as Prince George of Denmark was to Queen Anne, is her subject; and may be guilty of high treason against her: but, in the instance of conjugal infidelity, he is not subjected to the same penal [223] restrictions. For which the reason seems to be, that, if a queen consort is unfaithful to the royal bed, this may debase or bastardize the heirs to the crown; but no such danger can be consequent on the infidelity of the husband to a queen regnant.

§ 311. 3. **Queen dowager.**—A queen *dowager* is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high treason to conspire her death; or to violate her chastity, for the same reason as was before alleged, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali* (for the royal dignity), no man can marry a queen dowager without special license from the king, on pain of forfeiting his lands and goods. This Sir Edward Coke<sup>a</sup> tells us was enacted in parliament in 6 Hen. VI (Queen Dowager, 1427), though the statute be not in print. But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is.<sup>b</sup> A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners. For Katherine, queen dowager of Henry V, though she married a private gentleman, Owen ap Meredith ap Theodore, commonly called Owen Tudor; yet, by the name of Katherine, Queen of England, maintained an action against the bishop of Carlisle. And so, the queen dowager of Navarre marrying with Edmond, Earl of Lancaster, brother to King Edward the First, maintained an action of dower (after the death of her second husband) by the name of Queen of Navarre.<sup>c</sup>

<sup>a</sup> 2 Inst. 18. See Riley's Plac. Parl. 72.

<sup>b</sup> Co. Litt. 31.

<sup>c</sup> 2 Inst. 50.

§ 312. **The heir apparent.**—The Prince of Wales, or heir apparent to the crown, and also his royal consort, and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For, by statute 25 Edw. III (Treason, 1351), to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king, or violate the chastity of the queen. And this upon the same reason, as was before given: because the Prince of Wales is next in succession to the crown, and to violate his wife might taint the blood royal with bastardy; and the eldest daughter of the king is also alone inheritable to the [224] crown, on failure of issue male, and therefore more respected by the laws than any of her younger sisters; insomuch that upon this, united with other (feudal) principles, while our military tenures were in force, the king might levy an aid for marrying his eldest daughter, and her only. The heir apparent to the crown is usually made Prince of Wales and Earl of Chester, by special creation, and investiture; but, being the king's eldest son, he is by inheritance Duke of Cornwall, without any new creation.<sup>d</sup>

§ 313. **Meaning of royal family.**—The rest of the royal family may be considered in two different lights, according to the different senses in which the term *royal family*, is used. The larger sense includes all those who are by any possibility inheritable to the crown. Such, before the revolution, were all the descendants of William the Conqueror; who had branched into an amazing extent, by intermarriages with the ancient nobility. Since the revolution and Act of Settlement, it means the Protestant issue of the Princess Sophia; now comparatively few in number, but which in process of time may possibly be as largely diffused. The more confined sense includes only those who are within a certain degree of propinquity to the reigning prince, and to whom, therefore, the law pays an extraordinary regard and respect: but, after that degree is past, they fall into the rank of ordinary subjects, and are seldom considered any further, unless called to the succession upon failure of the nearer lines. For, though collateral consanguinity is regarded indefinitely, with respect to inheritance or suc-

<sup>d</sup> 8 Rep. 1. Seld. Tit. of Hon. 2. 5.

cession, yet it is and can only be regarded within some certain limits in any other respect, by the natural constitution of things and the dictates of positive law.<sup>e</sup>

§ 314. 1. **Younger sons and daughters.**—The younger sons and daughters of the king, and other branches of the royal family, who are not in the immediate line of succession, were therefore little further regarded by the ancient law, than to give them to a certain degree precedence before all peers and public officers as well ecclesiastical as temporal. This is done by the statute 31 Hen. VIII, c. 10 (Parliament (Precedence), 1539), [225] which enacts that no person, except the king's children, shall presume to sit or have place at the side of the cloth of estate in the parliament chamber; and that certain great officers therein named shall have precedence above all dukes, except only such as shall happen to be the king's son, brother, uncle, nephew (which Sir Edward Coke<sup>f</sup> explains to signify grandson or *nepos*) or brother's or sister's son.

§ 315. 2. **Other members of the royal family.**—But under the description of the king's *children* his *grandsons* are held to be included, without having recourse to Sir Edward Coke's interpretation of *nephew*: and therefore when his late majesty, King George II, created his grandson Edward, the second son of Frederick, Prince of Wales, deceased, Duke of York, and referred it to the house of lords to settle his place and precedence, they certified<sup>g</sup> that he ought to have place next to the late Duke of Cumberland, the then king's youngest son; and that he might have a seat on the left hand of the cloth of estate. But when, on the accession of his present majesty, those royal personages ceased to take place as the *children*, and ranked only as the *brother* and *uncle*, of the king, they also left their seats on the side of the cloth of estate: so that when the Duke of Gloucester, his majesty's second brother, took his seat in the house of peers,<sup>h</sup> he was placed on the upper end of the earls' bench (on which the dukes usually

<sup>e</sup> See Essay on Collateral Consanguinity, in Law-tracts, 4to. Oxon. 1771.

<sup>f</sup> 4 Inst. 362.

<sup>g</sup> Lords' Journ. 24 Apr. 1760.

<sup>h</sup> *Ibid.* 10 Jan. 1765.

sit) next to his royal highness, the Duke of York.\* And in 1718, upon a question referred to all the judges by King George I, it was resolved by the opinion of ten against the other two, that the education and care of all the king's grandchildren while minors did belong of right to his majesty as king of this realm, even during their father's life.<sup>1</sup> But they all agreed, that the care and approbation of their marriages, when grown up, belonged to the king, their grandfather. And the judges have more recently concurred in opinion,<sup>k</sup> that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend they did not find precisely determined. The most frequent instances of the crown's interposition go no [226] further than nephews and nieces;<sup>1</sup> but examples are not wanting of its reaching to more distant collaterals.<sup>m</sup> And the statute 6 Henry VI (Queen Dowager, 1427) before mentioned, which prohibits the marriage of a queen dowager without the consent of the king, assigns this reason for it: "because the dis-

\* Ninth edition here inserts: "Therefore, after these degrees are past, peers or others of the *blood royal* are entitled to no place or precedence except what belongs to them by their personal rank or dignity, which made Sir Edward Walker complain [Tracts, p. 301], that by the hasty creation of Prince Rupert to be Duke of Cumberland, and of the Earl of Lenox to be duke of that name previous to the creation of King Charles' second son, James, to be Duke of York, it might happen that their grandsons would have precedence of the grandsons of the Duke of York. Indeed."

<sup>1</sup> Fortesc. Al. 401-440.

<sup>k</sup> Lords' Journ. 28 Feb. 1772.

<sup>l</sup> See (besides the instances cited in Fortescue Aland) for *brothers and sisters*; under King Edward III. 4 Rym. 392. 403. 411. 501. 508. 512. 549. 683:—under Henry V. 9 Rym. 710. 711. 741:—under Edward IV. 11 Rym. 564. 565. 590. 601:—under Henry VIII. 13 Rym. 249. 423:—under Edw. VI. 7 St. Tr. 3. 8. For *nephews and nieces*; under Henry III. 1 Rym. 852:—under Edward I. 2 Rym. 489:—under Edward III. 5 Rym. 561: under Richard II. 7 Rym. 264:—under Richard III. 12 Rym. 232. 244:—under Henry VIII. 15 Rym. 26. 31.

<sup>m</sup> To *great nieces*; under Edward II. 3 Rym. 575. 644. To *first cousins*; under Edward III. 5 Rym. 177. To *second, and third cousins*; under Edward III. 5 Rym. 729:—under Richard II. 7 Rym. 225:—under Henry VI. 10 Rym. 322:—under Henry VII. 12 Rym. 529:—under Queen Elizabeth, Camd. Ann. A. D. 1562. To *fourth cousins*; under Henry VII. 12 Rym. 329. To the *blood royal* in general; under Richard II. 7 Rym. 787.



paragement of the queen shall give greater comfort and example to other ladies of estate, who are of the *blood royal*, more lightly to disparage themselves.”<sup>n</sup> Therefore, by the statute 28 Hen. VIII, c. 18 (Treason, 1536) (repealed, among other statutes of treasons, by 1 Edw. VI, c. 12—Criminal Law, 1547), it was made high treason for any man to contract marriage with the king’s children or reputed children, his sisters or aunts *ex parte paterna* (by the father’s side), or the children of his brethren or sisters; being exactly the same degrees, to which precedence is allowed by the statute 31 Hen. VIII (Parliament (Precedence), 1539), before mentioned. And now, by statute 12 Geo. III, c. 11 (Royal Marriages, 1772), no descendant of the body of King George II (other than the issue of princesses married into foreign families), is capable of contracting matrimony, without the previous consent of the king signified under the great seal; and any marriage contracted without such consent is void. Provided, that such of the said descendants, as are above the age of twenty-five, may after a twelve months’ notice given to the king’s privy council, contract and solemnize marriage without the consent of the crown; unless both houses of parliament shall, before the expiration of the said year, expressly declare their disapprobation of such intended marriage. And all persons solemnizing, assisting, or being present at, any such prohibited marriage, shall incur the penalties of the statute of *præmunire*.\*

\* Previous to the sixth edition, “and the care and approbation of their marriages, when grown up, did belong of right to his majesty as king of this realm, during their father’s life [Fortesc. Al. 401–440]. And this may suffice for the notice, taken by law of his majesty’s royal family.”

<sup>n</sup> Ril. Plac. Parl. 672.

## CHAPTER THE FIFTH.

[227]

### OF THE COUNCILS BELONGING TO THE KING.

§ 316. Various councils of the king.—The third point of view, in which we are to consider the king, is with regard to his councils. For, in order to assist him in the discharge of his duties, the maintenance of his dignity, and the exertion of his prerogative, the law hath assigned him a diversity of councils to advise with.

§ 317. 1. Parliament.—The first of these is the high court of parliament, whereof we have already treated at large.

§ 318. 2. Peers of the realm.—Secondly, the peers of the realm are by their birth hereditary counselors of the crown, and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament, or, which hath been their principal use, when there is no parliament in being.<sup>a</sup> Accordingly Bracton,<sup>b</sup> speaking of the nobility of his time, says they might properly be called “*consules, a consulendo; reges enim tales sibi associant ad consulendum* (counselors, from consulting; for kings assemble such for consultation).” And in our law books<sup>c</sup> it is laid down, that peers are created for two reasons: 1. *Ad consulendum*, 2. *Ad defendendum regem* (for advising and defending the king); for which reasons the law gives them certain great and high privileges; such as freedom from arrests, etc., even when no parliament is sitting: because the law intends, that they are always assisting the king with their counsel for the commonwealth; or keeping the realm in safety by their prowess and valor.

§ 319. a. Older conventions of the peers.—[228] Instances of conventions of the peers, to advise the king, have been in former times very frequent; though now fallen into disuse, by reason of the more regular meetings of parliament. Sir Edward Coke<sup>d</sup>

<sup>a</sup> Co. Litt. 110.

<sup>c</sup> 7 Rep. 34. 9. Rep. 49. 12. Rep. 96.

<sup>b</sup> L. 1. c. 8.

<sup>d</sup> 1 Inst. 110.

gives us an extract of a record, 5 Hen. IV (1403), concerning an exchange of lands between the king and the Earl of Northumberland, wherein the value of each was agreed to be settled by advice of parliament (if any should be called before the feast of St. Lucia) or otherwise by advice of the grand council of peers which the king promises to assemble before the said feast, in case no parliament shall be called. Many other instances of this kind of meeting are to be found under our ancient kings: though the formal method of convoking them had been so long left off, that when King Charles I, in 1640, issued out writs under the great seal to call a great council of all the peers of England to meet and attend his majesty at York, previous to the meeting of the long parliament, the Earl of Clarendon<sup>e</sup> mentions it as a new invention, not before heard of; that is, as he explains himself, so old, that it had not been practiced in some hundreds of years. But, though there had not so long before been an instance, nor has there been any since, of assembling them in so solemn a manner, yet, in cases of emergency, our princes have at several times thought proper to call for and consult as many of the nobility as could easily be got together: as was particularly the case with King James the Second, after the landing of the Prince of Orange; and with the Prince of Orange himself, before he called that convention parliament, which afterwards called him to the throne.

§ 320. **b. A peer's right of audience.**—Besides this general meeting it is usually looked upon to be the right of each particular peer of the realm, to demand an audience of the king, and to lay before him, with decency and respect, such matters as he shall judge of importance to the public weal. And therefore, in the reign of Edward II, it was made an article of impeachment in parliament against <sup>[229]</sup> the two Hugh Spencers, father and son, for which they were banished the kingdom, “that they by their evil covin would not suffer the great men of the realm, the king's good counselors, to speak with the king, or to come near him; but only in the presence and hearing of the said Hugh the father and Hugh the son, or one of them, and at their will, and according to such things as pleased them.”<sup>f</sup>

<sup>e</sup> Hist. b. 2.

<sup>f</sup> 4 Inst. 53.

§ 321. 3. Judges of the courts of justice.—A third council belonging to the king, are, according to Sir Edward Coke,<sup>g</sup> his judges of the courts of law, for law matters. And this appears frequently in our statutes, particularly 14 Edw. III, c. 5 (Delays in Court, 1340), and in other books of law. So that when the king's council is mentioned generally, it must be defined, particularized, and understood, *secundum subjectam materiam* (according to the subject matter); and, if the subject be of a legal nature, then by the king's council is understood his council for matters of law; namely, his judges. Therefore, when by statute 16 Rich. II, c. 5 (*Præmunire*, 1392), it was made a high offense to import into this kingdom any papal bulls, or other processes from Rome; and it was enacted, that the offenders should be attached by their bodies, and brought before the king and his *council* to answer for such offense; here, by the expression of king's *council*, were understood the king's judges of his courts of justice, the subject matter being legal:<sup>1</sup> this being the general way of interpreting the word, *council*.<sup>h</sup>

§ 322. 4. Privy council.—But the principal council belonging to the king is his privy council, which is generally called, by way of eminence, *the council*. And this, according to Sir Edward Coke's description of it,<sup>i</sup> is a noble, honorable, and reverend assembly, of the king and such as he wills to be of his privy council, in the king's court or palace. The king's will is the sole constituent of a privy counselor; and this also regulates their number, which of ancient times was twelve or thereabouts. Afterwards it increased to so large a number, that it was found inconvenient for secrecy and dispatch: and [230] therefore King Charles the Sec-

<sup>g</sup> 1 Inst. 110.

<sup>i</sup> 4 Inst. 53.

<sup>h</sup> 3 Inst. 125.

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<sup>1</sup> Coke's interpretation is extremely doubtful. In Coleridge's *Blackstone* (vol. I, p. 229) it is suggested that the "council" referred to was a court of very extensive jurisdiction, both civil and criminal, and was the source from which the court of chancery and the star-chamber sprang. Hale omits the "council of the law" from his enumeration of royal councils; his *concilium ordinarium* being different from Coke's "council of the law."—STEPHEN, 2 Comm. (16th ed.), 575 n.

and in 1679 limited it to thirty: whereof fifteen were to be the principal officers of state, and those to be counselors, *virtute officii* (by virtue of their office); and the other fifteen were composed of ten lords and five commoners of the king's choosing.<sup>k</sup> But since that time the number has been much augmented, and now continues indefinite. At the same time also, the ancient office of lord president of the council was revived in the person of Anthony, Earl of Shaftsbury; an officer, that by the statute of 31 Hen. VIII, c. 10 (Parliament (Precedence), 1539), has precedence next after the lord chancellor and lord treasurer.<sup>2</sup>

§ 323. a. Appointment of privy counselors.—Privy counselors are *made* by the king's nomination, without either patent or grant; and, on taking the necessary oaths, they become immediately privy counselors during the life of the king that chooses them, but subject to removal at his discretion.

§ 324. b. Qualifications of privy counselors.—As to the *qualifications* of members to sit at this board: any natural-born subject of England is capable of being a member of the privy council; taking the proper oaths for security of the government, and the test for security of the church. But, in order to prevent any persons under foreign attachments from insinuating themselves

\* Temple's Mem. part 3.

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<sup>2</sup> **The Cabinet.**—The Cabinet is what in England gives name and character to the king's administration. It is perhaps the most significant feature of the government of Great Britain. The Cabinet consists of those privy counselors, who actually conduct the business of government. The members of the Cabinet are usually the principal officers of state, namely, the lord high chancellor, the prime minister, the lord president of the council, the first lord of the treasury, the first lord of the admiralty, the chancellor of the exchequer, and the five principal secretaries of state,—the secretary for the home department, for foreign affairs, for the colonies, for the war department, and for India. Until recently neither the prime minister nor the Cabinet was officially recognized by the constitution. In 1905, however, the office of prime minister was definitely established. Yet he ranks, although the leading governing authority of the United Kingdom, after the lord chancellor. The ministers who compose the Cabinet are regarded as "responsible" for the acts of the crown, and they hold office practically at the pleasure of the house of commons.



into this important trust, as happened in the reign of King William in many instances, it is enacted by the Act of Settlement,<sup>1</sup> that no person born out of the dominions of the crown of England, unless born of English parents, even though naturalized by parliament, shall be capable of being of the privy council.

§ 325. *c. Duties of privy counselors.*—The *duty* of a privy counselor appears from the oath of office,<sup>m</sup> which consists of seven articles: 1. To advise the king according to the best of his cunning and discretion. 2. To advise for the king's honor and good of the public, without partiality through affection, love, meed, doubt, or dread. 3. To keep the king's counsel secret. 4. To avoid corruption. 5. To help and strengthen the execution of what [231] shall be there resolved. 6. To withstand all persons who would attempt the contrary. And, lastly, in general, 7. To observe, keep and do all that a good and true counselor ought to do to his sovereign lord.

§ 326. *d. Jurisdiction of the privy council.*—The *power* of the privy council is to inquire into all offenses against the government, and to commit the offenders to safe custody, in order to take their trial in some of the courts of law.<sup>3</sup> But their jurisdiction herein is only to inquire, and not to punish: and the persons committed by them are entitled to their *habeas corpus* by statute 16 Car. I, c. 10 (Star-Chamber, 1640), as much as if committed by an ordinary justice of the peace. And, by the same statute, the court of star-chamber, and the court of requests, both of which consisted of privy counselors, were dissolved; and it was declared

<sup>1</sup> Stat. 12 & 13 Will. III, c. 2 (Act of Settlement, 1700).

<sup>m</sup> 4 Inst. 54.

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<sup>3</sup> For a great length of time this was the common course in regard to all political offenses, but now it is usual to send even political offenders before a magistrate to be dealt with in the ordinary way. When Oxford shot at the queen he was examined in the first instance before the privy council, but was afterwards sent before a police magistrate. Maclean, who committed the same offense in 1882, was not brought before the privy council at all, but was committed in the common way by the borough magistrates at Windsor.—STEPHEN, 1 Hist. Crim. Law, 183; Carter, Hist. Eng. Legal Institutions, 129.

illegal for them to take cognizance of any matter of property, belonging to the subjects of this kingdom. But, in plantation or admiralty causes, which arise out of the jurisdiction of this kingdom; and in matters of lunacy or idiocy,<sup>n</sup> being a special flower of the prerogative; with regard to these, although they may eventually involve questions of extensive property, the privy council continues to have cognizance, being the court of appeal in such cases: or, rather, the appeal lies to the king's majesty himself in council. Whenever also a question arises between two provinces in America or elsewhere, as concerning the extent of their charters and the like, the king in his council exercises *original* jurisdiction therein, upon the principles of feudal sovereignty. And so likewise when any person claims an island or a province, in the nature of a feudal principality, by grant from the king or his ancestors, the determination of that right belongs to his majesty in council; as was the case of the Earl of Derby with regard to the Isle of Man in the reign of Queen Elizabeth, and the Earl of Cardigan and others, as representatives of the Duke of Montague, with relation to the Island of St. Vincent in 1764. But from all the dominions of the crown, excepting Great Britain and Ireland, an *appellate* jurisdiction [<sup>232</sup>] (in the last resort) is vested in the same tribunal; which usually exercises its judicial authority in a committee of the whole privy council, who hear the allegations and proofs, and make their report to his majesty in council, by whom the judgment is finally given.<sup>4</sup>

§ 327. *e. Privileges of privy counselors.*—The *privileges* of privy counselors, as such, consist principally in the security which

<sup>n</sup> 3 P. Wms. 108.

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<sup>4</sup> *Jurisdiction of the privy council.*—The jurisdiction of the privy council is, for the most part, *appellate*; an appeal lying to it in the last resort from the judgment or sentence of nearly every court of justice in the colonies, dependencies, and all other British possessions (including the Channel Islands and the Isle of Man), as also from the judgment or sentence of the various courts established by virtue of the Foreign Jurisdiction Acts, e. g., the supreme court of China, at Shanghai, the supreme court of Cyprus, the supreme consular court for the dominions of the Sublime Ottoman Porte, and many others. Apart, however, from the case of courts established under the Foreign Juris-

the law has given them against attempts and conspiracies to destroy their lives. For, by statute 3 Hen. VII, c. 14 (King's Household, 1487), if any of the king's servants, of his household, conspire or imagine to take away the life of a privy counselor, it is felony, though nothing be done upon it. And the reason of making this statute, Sir Edward Coke<sup>o</sup> tells us, was because such servants have greater and readier means, either by night or by day, to destroy such as be of great authority, and near about the king: and such a conspiracy was, just before this parliament, made by some of King Henry the Seventh's household servants, and great mischief was like to have ensued thereupon. This extends only to the king's menial servants. But the statute 9 Ann., c. 16 (Assaulting a Privy Counselor, 1710), goes further, and enacts that *any person* that shall unlawfully attempt to kill, or shall unlawfully assault, and strike, or wound, any privy counselor in the execution of his office, shall be a felon without benefit of clergy.

• 3 Inst. 38.

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diction Acts, no appeal lies to his majesty in council from the judgments of courts situate within countries over which no territorial sovereignty has been authoritatively asserted; even where the judicial administration of any such country has itself been established by the British government.

Under the provisions of modern statutes, all the judicial authority of the privy council is now exercised by a select number of its members, called the judicial committee, who hear the allegations and proofs, and make their report thereon to his majesty in council; whose order in council finally determines the matter. \* \* \*

Another important committee of the privy council is the committee appointed for the consideration of matters relating to trade and foreign plantations, commonly called the board of trade. The board of trade is charged with many miscellaneous duties; among others, the supervision and regulation of railways, the superintendence of all matters relating to merchant ships and seamen, and the discharge of various functions under the acts for the formation of piers and harbors, and under divers acts relating to trading companies and other associations, and to the copyright in designs, and the like. \* \* \*

Like the board of trade, the local government board, the board of education, and the board of agriculture and fisheries, are in their origin committees of the privy council, though they have now become almost independent statutory bodies, each under a single responsible minister. Another committee, called the universities committee of the privy council, exercises certain powers with regard to the amendment or repeal of university statutes.—STEPHEN, 2 Comm. (16th ed.), 581-586.

This statute was made upon the daring attempt of the Sieur Guiscard, who stabbed Mr. Harley, afterwards Earl of Oxford, with a penknife, when under examination for high crimes in a committee of the privy council.

§ 328. f. **Dissolution of the privy council.**—The *dissolution* of the privy council depends upon the king's pleasure; and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. By the common law also it was dissolved *ipso facto* by the king's demise; as deriving all its authority from him. But now, to prevent the inconveniences of having no council in being at the accession of a new prince, it is enacted by statute 6 Ann., c. 7 (1706), that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.<sup>5</sup>

<sup>5</sup> By the Demise of the Crown Act, 1901, no fresh appointment to the office of privy councilor is rendered necessary by the demise of the crown.

## CHAPTER THE SIXTH.

[233]

### OF THE KING'S DUTIES.

§ 329. **Constitutional duties of the king.**—I proceed next to the duties, incumbent on the king by our constitution; in consideration of which duties his dignity and prerogative are established by the laws of the land: it being a maxim in the law, that protection and subjection are reciprocal.<sup>a</sup> And these reciprocal duties are what, I apprehend, were meant by the convention in 1688, when they declared that King James had broken the *original contract* between king and people. But, however, as the terms of that original contract were in some measure disputed, being alleged to exist principally in theory, and to be only deducible by reason and the rules of natural law; in which deduction different understandings might very considerably differ; it was, after the revolution, judged proper to declare these duties expressly, and to reduce that contract to a plain certainty. So that, whatever doubts might be formerly raised by weak and scrupulous minds about the existence of such an original contract, they must now entirely cease; especially with regard to every prince, who hath reigned since the year 1688.

§ 330. **King's duty to govern according to the law.**—The principal duty of the king is, to govern his people according to law. *Nec regibus infinita aut libera potestas* (the power of kings should be neither free nor unlimited), was the constitution of our German ancestors on the Continent.<sup>b</sup> And this is not only consonant to the principles of nature, of [234] liberty, of reason, and of society, but has always been esteemed an express part of the common law of England, even when prerogative was at the highest. “The king,” saith Bracton,<sup>c</sup> who wrote under Henry III, “ought not to be subject to man, but to God, and to the law; for the law maketh the king. Let the king therefore render to the law, what the law has invested in him with regard to others; dominion, and power: for he is not truly king, where will and pleasure rules, and

<sup>a</sup> 7 Rep. 5.

<sup>c</sup> L. 1. c. 8.

<sup>b</sup> Tac. de Mor. Germ. c. 7.



not the law." And again,<sup>d</sup> "the king also hath a superior, namely God, and also the law, by which he was made a king." Thus Bracton: and Fortescue also,<sup>e</sup> having first well distinguished between a monarchy absolutely and despotically regal, which is introduced by conquest and violence, and a political or civil monarchy, which arises from mutual consent (of which last species he asserts the government of England to be); immediately lays it down as a principle, that "the king of England must rule his people according to the decrees of the laws thereof: insomuch that he is bound by an oath at his coronation to the observance and keeping of his own laws." But, to obviate all doubts and difficulties concerning this matter, it is expressly declared by statute 12 & 13 W. III, c. 2 (Act of Settlement, 1700), "that the laws of England are the birthright of the people thereof; and all the kings and queens who shall ascend the throne of this realm ought to administer the government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same: and therefore all the laws and statutes of this realm, for securing the established religion, and the rights and liberties of the people thereof, and all other laws and statutes of the same now in force, are by his majesty, by and with the advice and consent of the lords spiritual and temporal and commons, and by authority of the same, ratified and confirmed accordingly."

§ 331. **The coronation oath.**—And, as to the terms of the original contract between king and people, these I apprehend to be now couched in the [235] coronation oath, which by the statute 1 W. & M., st. 1, c. 6 (Coronation Oath, 1688), is to be administered to every king and queen, who shall succeed to the imperial crown of these realms, by one of the archbishops or bishops of the realm, in the presence of all the people; who on their parts do reciprocally take the oath of allegiance to the crown. This coronation oath is conceived in the following terms:

*"The archbishop or bishop shall say, Will you solemnly promise and swear to govern the people of this kingdom of England, and the dominions thereto belonging, according to the statutes in parliament agreed on, and the laws and customs of the same? The king or queen shall say, I solemnly promise so to do.*

<sup>d</sup> L. 2. c. 16. § 3.

<sup>e</sup> C. 9. & 34.

*“Archbishop or bishop.* Will you to your power cause law and justice, in mercy, to be executed in all your judgments? *King or queen.* I will.

*“Archbishop or bishop.* Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the Protestant reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them, or any of them? *King or queen.* All this I promise to do.

*“After this the king or queen, laying his or her hand upon the holy gospels shall say,* The things which I have here before promised I will perform and keep: so help me God. *And then shall kiss the book.”*

This is the form of the coronation oath, as it is now prescribed by our laws; the principal articles of which appear to be at least as ancient as the mirror of justices,<sup>f</sup> and even as the time of Bracton:<sup>g</sup> but the wording of it was changed at the revolution, because (as the statute alleges) the oath itself [236] had been framed in doubtful words and expressions, with relation to ancient laws and constitutions at this time unknown.<sup>h</sup> However, in what form soever it be conceived, this is most indisputably a fundamental and original express contract; though doubtless the duty of protection is impliedly as much incumbent on the sovereign before

<sup>f</sup> Cap. 1. § 2.

<sup>g</sup> L. 2. tr. 1. c. 9.

<sup>h</sup> In the old folio abridgment of the statutes, printed by Lettoun and Machlinia in the reign of Edward IV. (*penes me*—in my possession) there is preserved a copy of the old coronation oath; which, as the book is extremely scarce, I will here transcribe. *Ceo est le serement que le roy jurre a soun coronement: que il gardera et mcintenera lez droitez et lez franchisez de seynt esglise grauntez auncienment dez droitez roys christiens dEngleterre, et quil gardera toutes sez terrez honoures et dignitees droiturelæ et franks del coron du roialme dEngleterre en tout maner dentiethe sanz null maner damenusement, et lez droitz dispergez dilapidez ou perduz de la corone a soun poiair reappeller en launcien estate, et quil gardera le peas de seynt esglise et al clergie et al people de bon accorde, et quil face faire en toutes sez jugementez ouel et droit justice oue discretion et misericorde, et quil grauntera a tenure lez leyes et custumez du roialme, et a soun poiair lez face garder et affirmer que lez gentez du people avont faitez et esliez, et les malreys leyz et custumes de tout oustera, et ferme peas et establie al people de soun roialme en ceo garde esgardera a soun poiair.*

coronation as after: in the same manner as allegiance to the king becomes the duty of the subject immediately on the descent of the crown, before he has taken the oath of allegiance, or whether he ever takes it at all. This reciprocal duty of the subject will be considered in its proper place. At present we are only to observe, that in the king's part of this original contract are expressed all the duties that a monarch can owe to his people: viz., to govern according to law; to execute judgment in mercy; and to maintain the established religion. And, with respect to the latter of these three branches, we may further remark, that by the act of union, 5 Ann., c. 8 (1705), two preceding statutes are recited and confirmed; the one of the parliament of Scotland, the other of the parliament of England: which enact; the former, that every king at his accession shall take and subscribe an oath, to preserve the Protestant religion and Presbyterian church government in Scotland; the latter, that at his coronation he shall take and subscribe a similar oath, to preserve the settlement of the church of England within England, Ireland, Wales, and Berwick, and the territories thereunto belonging.<sup>1</sup>

*come Dieu luy aide.* (This is the oath which the king swears at his coronation; that he will keep and maintain the rights and franchises of holy church granted anciently by the rightful Christian kings of England, and that he will keep all the lands, honors and dignities, rights and privileges, of the crown of the kingdom of England in all respects entire, without any kind of injury, and that he will recall to their ancient state, as far as in him lies, all the scattered, injured, or lost rights of the crown, and that he will keep the peace of holy church, and concord between the clergy and people; and that he will cause equal and true justice to be administered in all his judgments with discretion and mercy, and that he will cause to be maintained the laws and customs of the kingdom, and as far as in him lies will make those be confirmed and kept which the people have made and chosen, and will abolish entirely all bad laws and customs, and will, in all respects, as far as he can, maintain a firm and established peace for the people of his kingdom: So help him God.) (*Tit. sacramentum regis. fol. m. ij.*) Prynne has also given us a copy of the coronation oaths of Richard III. (*Signal Loyalty. II. 246.*) Edward VI. (*Ibid. 251.*) James I, and Charles I. (*Ibid. 269.*)

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<sup>1</sup> On the accession of George V, the anti-Catholic feature of the coronation oath, which had been required since 1679, was removed. The Accession Declaration Act, 1910, provides that the king or queen shall simply declare that he or she is a faithful Protestant, and that he or she will uphold and maintain the enactments which secure the Protestant succession to the throne.

## CHAPTER THE SEVENTH.

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### OF THE KING'S PREROGATIVE.

#### § 332. Constitutional limitations on the royal prerogative.—

It was observed in a former chapter,<sup>a</sup> that one of the principal bulwarks of civil liberty, or (in other words) of the British constitution, was the limitation of the king's prerogative by bounds so certain and notorious, that it is impossible he should ever exceed them, without the consent of the people, on the one hand; or without, on the other, a violation of that original contract, which in all states impliedly, and in ours most expressly, subsists between the prince and the subject. It will now be our business to consider this prerogative minutely; to demonstrate its necessity in general; and to mark out in the most important instances its particular extent and restrictions: from which considerations this conclusion will evidently follow, that the powers, which are vested in the crown by the laws of England, are necessary for the support of society; and do not entrench any further on our *natural* liberties, than is expedient for the maintenance of our *civil*.

§ 333. 1. Former pretensions.—There cannot be a stronger proof of that genuine freedom, which is the boast of this age and country, than the power of discussing and examining, with decency and respect, the limits of the king's prerogative. A topic, that in some former ages was thought too delicate and sacred to be profaned by the pen of a subject. It was ranked among the *arcana imperii* (secrets of the empire); and, like the mysteries of the *bona dea* (good goddess), was <sup>[238]</sup> not suffered to be pried into by any but such as were initiated in its service: because perhaps the exertion of the one, like the solemnities of the other, would not bear the inspection of a rational and sober inquiry. The glorious Queen Elizabeth herself made no scruple to direct her parliaments to abstain from discoursing of matters of state;<sup>b</sup> and it was the constant language of this favorite princess and her ministers, that even that august assembly “ought not to deal, to

<sup>a</sup> Chap. 1. page \*141.

<sup>b</sup> Dewes. 479.

judge, or to meddle, with her majesty's prerogative royal."<sup>c</sup> And her successor, King James the First, who had imbibed high notions of the divinity of regal sway, more than once laid it down in his speeches, that "as it is atheism and blasphemy in a creature to dispute what the Deity may do, so it is presumption and sedition in a subject to dispute what a king may do in the height of his power: good Christians, he adds, will be content with God's will, revealed in his His word; and good subjects will rest in the king's will, revealed in *his law*."<sup>d</sup>

§ 334. 2. **The king subject to the law.**—But, whatever might be the sentiments of some of our princes, this was never the language of our ancient constitution and laws. The limitation of the regal authority was a first and essential principle in all the Gothic systems of government established in Europe; though gradually driven out and overborne, by violence and chicane, in most of the kingdoms on the Continent. We have seen, in the preceding chapter, the sentiments of Bracton and Fortescue, at the distance of two centuries from each other. And Sir Henry Finch, under Charles the First, after the lapse of two centuries more, though he lays down the law of prerogative in very strong and emphatical terms, yet qualifies it with a general restriction, in regard to the liberties of the people. "The king hath a prerogative in all things, that are not injurious to the subject; for in them all it must be remembered, that the king's prerogative stretcheth not to the doing of any wrong."<sup>e</sup> *Nihil enim aliud potest rex, nisi id solum quod* [239] *de jure potest* (for the king can only act according to law).<sup>f</sup> And here it may be some satisfaction to remark, how widely the civil law differs from our own, with regard to the authority of the laws over the prince, or (as a civilian would rather have expressed it) the authority of the prince over the laws. It is a maxim of the English law, as we have seen from Bracton, that "*rex debet esse sub lege, quia lex facit regem* (the king should be subject to the law, because the law makes the king)": the imperial law will tell us, that "*in omnibus, imperatoris excipitur fortuna; cui ipsas leges Deus subjecit* (the interest of the emperor

<sup>c</sup> *Ibid.* 645.

<sup>e</sup> Finch. L. 84. 85.

<sup>d</sup> King James's Works, 557. 531.

<sup>f</sup> Bracton, l. 3. tr. 1. c. 9.



is in all things to be reserved; to whom God has made the laws themselves subject).’’<sup>g</sup> We shall not long hesitate to which of them to give the preference, as most conducive to those ends for which societies were framed, and are kept together; especially as the Roman lawyers themselves seem to be sensible of the unreasonableness of their own constitution. “*Decet tamen principem,*” says Paulus, “*servare leges, quibus ipse solutus est* (nevertheless it becomes a prince to protect those laws from which he is himself exempt).’’<sup>h</sup> This is at once laying down the principle of despotic power, and at the same time acknowledging its absurdity.

§ 335. Meaning of prerogative.—By the word “prerogative” we usually understand that special pre-eminence, which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity.<sup>1</sup> It signifies, in its etymology (from *præ*—before and *rogo*—to ask) something that is required or demanded before, or in preference to all others. And hence it follows, that it must be in its nature singular and eccentric; that it can only be applied to those rights and capacities which the king enjoys alone, in contradistinction to others, and not to those which he enjoys in common with any of his subjects: for if once any one prerogative of the crown could be held in common with the subject, it would cease to be prerogative any longer. And therefore Finch<sup>1</sup> lays it down as a maxim, that the prerogative is that law in case of the king, which is law in no case of the subject.<sup>2</sup>

<sup>g</sup> Nov. 105. § 2.

<sup>1</sup> Finch, L. 85.

<sup>h</sup> Ff. 32. 1. 23.

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<sup>1</sup> This definition has been called too vague; and it has been said that the prerogative may be more precisely defined as “the discretionary authority of the executive”; i. e., everything which the king, or his servants in his name, may do without the authority of an act of parliament. Anson, 2 Law and Custom, p. 2; and see Dicey, Law of the Constitution (6th ed.), p. 368.—STEPHEN, 2 Comm. (16th ed.), 588.

<sup>2</sup> Historical view of the king's prerogative.—“The position which the king and his prerogative hold in the full-grown common law is well summarized in Blackstone's Commentaries. Beginning with the statement that the king is subject to law, Blackstone proceeds to distinguish between his direct and

§ 336. **Classes of prerogative.**—Prerogatives are either *direct* or *incidental*. The *direct* are such positive substantial parts of the royal character and [240] authority, as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance; as, the right of sending ambassadors, of creating peers, and of making war or peace. But such prerogatives as are incidental bear always a relation to something else, distinct from the king's person; and are indeed only exceptions, in favor of the crown, to those general rules that are established for the rest of the community: such as, that no costs shall be recovered against the king; that the king can never be a joint tenant; and that his debt shall be preferred before a debt to any of his subjects. These and an infinite number of other instances will better be understood, when we come regularly to consider the rules themselves, to which these incidental prerogatives are exceptions. And therefore we will at present only dwell upon the king's substantive or direct prerogatives.

his incidental prerogatives. The direct prerogatives 'are such positive substantial parts of the royal character and authority as are rooted in and spring from the king's political person.' By virtue of these prerogatives he is personally sovereign, and has the pre-eminence over all within his realm; he can do no wrong; he can never die; he is the representative of the state in its dealings with foreign nations; he is a part of the legislature; the head of the army; the fountain of justice, always present in all his courts; the fountain of honor; the arbiter of commerce; the head of the church. The incidental prerogatives are, so Blackstone tells us, 'only exceptions in favor of the crown to those general rules that are established for the rest of the community.' Instances are the rules that no costs shall be recovered against the king, that he cannot be a joint tenant, that a debt due to him is preferred.

"We could have no better illustration of the gradual way in which the common law has been built up than these doctrines as to the meaning and extent of the king's prerogative. The department of law relating to the prerogative is the oldest part of our constitution and our law; and it bears upon it the marks of all the varied phases through which that constitution and that law have passed. It is this fact which gives to it its 'peculiar import,' and makes it impossible to define it completely 'by any theory of executive functions.' Taking a broad view of our legal and constitutionad history, we can see three distinct periods in its development. (1) The mediæval period. In this period the king is regarded indeed as the head and the representative of the state and the fountain of justice; but it is then that the doctrines as to those prerogatives which Blackstone calls 'incidental' were elaborated. The king is regarded quite as much as a superior feudal lord with special privileges as a

§ 337. 1. **Direct prerogatives.**—These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, the king's royal *character*; secondly, his royal *authority*; and, lastly, his royal *income*. These are necessary, to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government; without all of which it is impossible to maintain the executive power in due independence and vigor. Yet, in every branch of this large and extensive dominion, our free constitution has interposed such seasonable checks and restrictions, as may curb it from trampling on those liberties, which it was meant to secure and establish. The enormous weight of prerogative, if left to itself (as in arbitrary governments it is), spreads havoc and destruction among all the inferior movements: but, when balanced and regulated (as with us) by its proper counterpoise, timely and judiciously ap-

ruler entrusted with the executive powers of the state. (2) It is to the lawyers of the sixteenth and early seventeenth centuries that we owe those attributes of perfection and immortality with which the law still invests the king. They gave him a politic capacity, and they emphasized his powers in such a way that, through his prerogative, he was able to act as the executive of a modern state. What Blackstone calls the direct prerogatives of the crown were given their modern shape by lawyers who based their theories upon the achievements of the Tudor dynasty. (3) In the seventeenth century the controversy as to the relation of the prerogative to the law was fought out and decided. The events of that century decided that the prerogative was subject to law; and Blackstone prefaces his account of it by a clear statement to this effect. In this section we are concerned chiefly with the mediæval period and its influence upon the subsequent law.

"In this period the prerogative has, so to speak, a double aspect. The king is the head and the representative of the English state in a truer sense, perhaps, than any other ruler in Europe could claim to be the head and representative of his state. The strong centralized government which had given England a common law gave the king this position. But, for all that, men's legal and political ideas were cast in a feudal mold. Legal theories could not help being influenced by these ideas. They have exercised, as we have seen, an enduring influence upon the land law, and, they had some effect upon the law of treason. They exercised at this period a large influence upon the view which the law took of the king and his prerogative."—HOLDSWORTH, 3 Hist. Eng. Law, 350.

Professor Holdsworth continues, in the scholarly and interesting way characteristic of his work, to "say something, first, of the feudal ideas which colored men's conception of the prerogative at this period, and, secondly, of the national ideas."

plied, its operations are then equable and certain, it invigorates the whole machine, and enables every part to answer the end of its construction.

In the present chapter we shall only consider the two first of these divisions, which relate to the king's political <sup>[241]</sup> *character* and *authority*; or, in other words, his *dignity* and *regal power*; to which last the name of prerogative is frequently narrowed and confined. The other division, which forms the royal *revenue*, will require a distinct examination; according to the known distribution of the feudal writers, who distinguish the royal prerogatives into the *majora* and *minora regalia* (the greater and lesser regalia), in the latter of which classes the rights of the revenue are ranked. For, to use their own words, "*majora regalia imperii præ-eminentiam spectant; minora vero ad commodum pecuniarium immediate attinent; et hæc proprie fiscalia sunt, et ad jus fisci pertinent* (the greater royalties of the kingdom appertain to dignity of station; but the inferior immediately concern the acquisition of money; these are properly fiscal, and relate to the rights of the king's revenue)." <sup>k</sup>

§ 338. a. The royal dignity.—First, then, of the royal dignity. Under every monarchical establishment, it is necessary to distinguish the prince from his subjects, not only by the outward pomp and decorations of majesty, but also by ascribing to him certain qualities, as inherent in his royal capacity, distinct from and superior to those of any other individual in the nation. For, though a philosophical mind will consider the royal person merely as one man appointed by mutual consent to preside over many others, and will pay him that reverence and duty which the principles of society demand, yet the mass of mankind will be apt to grow insolent and refractory, if taught to consider their prince as a man of no greater perfection than themselves. The law therefore ascribes to the king, in his high political character, not only large powers and emoluments, which form his prerogative and revenue, but likewise certain attributes of a great and transcendent nature; by which the people are led to consider him in the light of a superior being, and to pay him that awful respect, which may

<sup>k</sup> Peregrin. de Jure Fisc. l. 1, c. 1. num. 9.

enable him with greater ease to carry on the business of government. This is what I understand by the royal dignity, the several branches of which we will now proceed to examine.

§ 339. (1) **Sovereignty.**—And, first, the law ascribes to the king the attribute of *sovereignty*, or pre-eminence. “*Rex est vicarius*,” says Bracton,<sup>1</sup> “*et minister Dei in terra: omnis quidem sub eo est, et ipse* [242] *sub nullo, nisi tantum sub Deo* (The king is the vicegerent and minister of God on earth: all are subject to him; and he is subject to none but to God alone).” He is said to have *imperial* dignity; and in charters before the Conquest is frequently styled *basileus* (king) and *imperator* (emperor), the titles respectively assumed by the emperors of the east and west.<sup>m</sup> His realm is declared to be an *empire*, and his crown *imperial*, by many acts of parliament, particularly the statutes 24 Hen. VIII, c. 12 (Appeals to Rome, 1532), and 25 Hen. VIII, c. 28 (Lady Dowager, 1533);<sup>n</sup> which at the same time declare the king to be the supreme head of the realm in matters both civil and ecclesiastical, and of consequence inferior to no man upon earth, dependent on no man, accountable to no man. Formerly, there prevailed a ridiculous notion, propagated by the German and Italian civilians, that an emperor could do many things which a king could not (as the creation of notaries and the like) and that all kings were in some degree subordinate and subject to the emperor of Germany or Rome.<sup>3</sup> The meaning, therefore, of the legislature, when it uses these terms of *empire* and *imperial*, and applies them to the realm and crown of England, is only to assert that our king is equally sovereign and independent within these his dominions, as any emperor is in his empire;<sup>o</sup> and owes no kind of subjection to any

<sup>1</sup> I. i. c. 8.

<sup>m</sup> Seld. Tit. of Hon. I. 2.

<sup>n</sup> See also 24 Geo. II. c. 24 (Minority of Successor to Crown, 1750). 5 Geo. III. c. 27 (Minority of Heir to the Crown, 1765).

<sup>o</sup> *Rex allegavit, quod ipse omnes libertates haberet in regno suo, quas imperator vendicabat in imperio.* (The king alleged that he should possess the same privileges in his kingdom as an emperor claimed in his empire.) (M. Paris, A. D. 1095.)

<sup>3</sup> Blackstone here refers to the head of the Holy Roman Empire, which was formally dissolved in 1806. Its history is given in a famous book, Bryce, *Holy Roman Empire*.



other potentate upon earth. Hence it is, that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him;<sup>4</sup> For all jurisdiction implies superiority of power: authority to try would be vain and idle, without an authority to redress; and the sentence of a court would be contemptible, unless that court had power to command the execution of it: but who, says Finch,<sup>p</sup> shall command the king? Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary: for no jurisdiction upon earth has power to try him in a criminal way; much less to condemn him to punishment. If any foreign jurisdiction had this power, as was formerly claimed by the pope, the independence of the kingdom would be no more: and, if such a power were vested in any domestic [243] tribunal, there would soon be an end of the constitution, by destroying the free agency of one of the constituent parts of the sovereign legislative power.

p Finch. L. 83.

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4 No action lies against the state.—For the same reason no action lies under a republican form of government against the state or nation, unless the legislature have authorized it: a principle recognized in the jurisprudence of the United States, and of the individual states. (Case v. Terrell, 11 Wall. 199, 20 L. Ed. 134; Hill v. United States, 9 How. 386, 13 L. Ed. 185; United States v. McLemore, 4 How. 286, 11 L. Ed. 977; Avery v. United States, 12 Wall. 304, 20 L. Ed. 405; People v. Dennison, 84 N. Y. 272, with many cases cited.) For the allowance of such an action implies the right to enforce the judgment rendered against any dissent or opposition made by the executive or legislative departments: and this would be inconsistent with the fundamental theory of our constitutions, which make one or the other of these independent and supreme in every matter that could properly be the subject of a judgment at law. It is not necessary, therefore, to derive the origin of this rule from the infallibility attributed to the king or the sacredness of his person, or to suppose that it is inconsistent with free government. The royal exemptions from the law of the land have no counterpart with us. The president or the governor of a state may be convicted of treason or other crimes as a man, and impeached and removed from office as a magistrate. (U. S. Const., arts. 1, 11, and the state constitutions, *passim*.)

Still less is it necessary to invoke as the foundation of this rule Mr. Austin's theory, that as all law is given by the sovereign, therefore no subject can have any rights against that sovereign. (Lectures on Jurisp. 1, 280, 292.) Even

§ 340. (a) **Protection of the subject.**—Are, then, it may be asked, the subjects of England totally destitute of remedy, in case the crown should invade their rights, either by private injuries, or public oppressions? To this we may answer, that the law has provided a remedy in both cases.

§ 341. (i) **In cases of private injuries.**—And, first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him to his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.<sup>a</sup> And this is entirely consonant to what is laid down by the writers on natural law. “A subject,” says Puffendorf,<sup>r</sup> “so long as he continues a subject,

<sup>a</sup> Finch. L. 255.

<sup>r</sup> Law of N. and N. b. 8. c. 10.

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in the establishment of the court of claims, Congress has adhered to this principle; for the judgments of that court only ascertain the amount justly due from the government to individuals, and leave to Congress the duty of appropriating funds for their payment. A suit in the court of claims is equivalent to a “petition of right” to the crown in England. (*United States v. O’Keefe*, 11 Wall. 178, 20 L. Ed. 131; *Carlisle v. United States*, 16 Wall. 147, 21 L. Ed. 426.) Some of the states have provided by general act that actions may be brought against the state or the people for the recovery of lands, or similar relief. Most of them, however, leave the matter as at common law. But the rule does not prevent the bringing of a writ of error or like proceeding in which the state may be named defendant, or the pleading by a defendant of a setoff or counterclaim against the state, legal or equitable, though in the latter case no recovery of a balance due from the state could follow. (*United States v. Eckford*, 6 Wall. 484, 18 L. Ed. 920; *People v. Dennison*, 84 N. Y. 272.)—HAMMOND.

<sup>5</sup> Cited and followed, 2 Dall. 437; 12 Peters, 750; 11 Allen, 171. Judge Wilson, in *Chisholm v. Georgia*, 2 Dall. 460, tries hard to show that Blackstone was wrong here, but his authorities are very weak. The doctrine that the king cannot be sued in his own courts is at least as old as Bracton, who states explicitly that he can only be besought by petition, since his writ does not run against himself. (Fols. 5, 171.) There are several passages in the Year-Books of the reign of Edward III, which state that in the reign of Henry III. the king could be sued as a private person, though the one in which Wilby, C. J., is said to have reported that he himself had seen such a writ, *Præcipe Henrico Regi*, etc., is not to be found in the common editions. But Staunforde, who quotes them (*Prærog. Regis* 42 a), notices their inconsistency with Bracton, and with good judgment doubts them, and they are refuted by cases in the recently published Note Book, ed. Maitland.—HAMMOND.

hath no way to *oblige* his prince to give him his due, when he refuses it; though no wise prince will ever refuse to stand to a lawful contract. And, if the prince gives the subject leave to enter an action against him, upon such contract, in his own courts, the action itself proceeds rather upon natural equity, than upon the municipal laws." For the end of such action is not to *compel* the prince to observe the contract, but to *persuade* him. And, as to personal wrongs; it is well observed by Mr. Locke,<sup>s</sup> "the harm which the sovereign can do in his own person not being likely to happen often, nor to extend itself far; nor being able by his single strength to subvert the laws, nor oppress the body of the people (should any prince have so much weakness and ill nature as to endeavor to do it),—the inconveniency, therefore, of some particular mischiefs, that may happen sometimes, when a heady prince comes to the throne, are well recompensed by the peace of the public and security of the government, in the person of the chief magistrate being thus set out of the reach of danger."

§ 342. (ii) In cases of public oppression—(aa) Responsibility of king's advisers.—[244] Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. For as a king cannot misuse his power, without the advice of evil counselors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of indictments, and parliamentary impeachments, that no man shall dare to assist the crown in contradiction to the laws of the land. But it is at the same time a maxim in those laws, that the king himself can do no wrong: since it would be a great weakness and absurdity in any system of positive law, to define any possible wrong, without any possible redress.

§ 343. (bb) Remedies for oppression.—For, as to such public oppressions as tend to dissolve the constitution, and subvert the fundamentals of government, they are cases, which the law will not, out of decency suppose: being incapable of distrusting those, whom it has invested with any part of the supreme power; since

<sup>s</sup> On Gov. p. 2. § 205.

such distrust would render the exercise of that power precarious and impracticable.<sup>t</sup> For, wherever the law expresses its distrust of abuse of power, it always vests a superior coercive authority in some other hand to correct it; the very notion of which destroys the idea of sovereignty. If, therefore (for example), the two houses of parliament, or either of them, had avowedly a right to animadvert on the king, or each other, or if the king had a right to animadvert on either of the houses, that branch of the legislature, so subject to animadversion, would instantly cease to be part of the supreme power; the balance of the constitution would be overturned; and that branch or branches, in which this jurisdiction resided, would be completely sovereign. The supposition of *law* therefore is, that neither the king nor either house of parliament (collectively taken) is capable of doing any wrong; since in such cases the law feels itself incapable of furnishing any adequate [245] remedy. For which reason all oppressions which may happen to spring from any branch of the sovereign power, must necessarily be out of the reach of any *stated rule*, or *express legal* provision: but, if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

§ 344. (cc) *Theory of the king's abdication.*—Indeed, it is found by experience, that whenever the unconstitutional oppressions, even of the sovereign power, advance with gigantic strides and threaten desolation to a state, mankind will not be reasoned out of the feelings of humanity; nor will sacrifice their liberty by a scrupulous adherence to those political maxims, which were originally established to preserve it. And therefore, though the positive laws are silent, experience will furnish us with a very remarkable case, wherein nature and reason prevailed. When King James the Second invaded the fundamental constitution of the realm, the convention declared an abdication, whereby the throne was rendered vacant, which induced a new settlement of the crown. And so far as this precedent leads, and no further,

<sup>t</sup> See these points more fully discussed in the *Considerations of the Law of Forfeiture*, 3d edit. pag. 109–126, wherein the very learned author has thrown many new and important lights on the texture of our happy constitution.

we may now be allowed to lay down the *law* of redress against public oppression. If, therefore, any future prince should endeavor to subvert the constitution by breaking the original contract between king and people, should violate the fundamental laws, and should withdraw himself out of the kingdom; we are now authorized to declare that this conjunction of circumstances would amount to an abdication, and the throne would be thereby vacant. But it is not for us to say that any one, or two, of these ingredients would amount to such a situation; for there our precedent would fail us. In these, therefore, or other circumstances, which a fertile imagination may furnish, since both law and history are silent, it becomes us to be silent too; leaving to future generations whenever necessity and the safety of the whole shall require it, the exertion of those inherent (though latent) powers of society, which no climate, no time, no constitution, no contract, can ever destroy or diminish.

§ 345. (2) The royal perfection: "The king can do no wrong."—[246] Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute *perfection*. The king can do no wrong.<sup>6</sup> Which ancient and fundamental maxim is not to be understood, as if everything transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people: for this doctrine would totally destroy that constitutional independence of the crown, which is necessary for the balance of power, in our free and active, and therefore compounded constitution. And, secondly, it means that the prerogative of the crown extends not to do any injury; it is

<sup>6</sup> In the second place, we are plunged into talk about kings who do not die, who are never under age, who are ubiquitous, who do no wrong and (says Blackstone) think no wrong; and such talk has not been innocuous. Readers of Kinglake's *Crimea* will not have forgotten the instructive and amusing account of "the two kings" who shared between them control of the British army: "the personal king" and "his constitutional rival."—MAITLAND, 3 Coll. Papers, 251. And see this interesting essay of Maitland's on "The Crown as Corporation." See, also, Maitland's remarks in his *Constitutional History of England*, 482.



created for the benefit of the people, and therefore cannot be exerted to their prejudice.<sup>a</sup>

§ 346. (a) **Corrective for royal mistakes.**—The king, moreover, is not only incapable of *doing* wrong, but even of *thinking* wrong; he can never mean to do an improper thing: in him is no folly or weakness. And therefore if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in anywise prejudicial to the commonwealth, or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant; and thereupon such grant is rendered void, merely upon the foundation of fraud and deception, either by or upon those agents, whom the crown has thought proper to employ. For the law will not cast an imputation on that magistrate whom it intrusts with the executive power, as if he was capable of intentionally disregarding his trust: but attributes to mere imposition (to which the most perfect of sublunary beings must still continue liable) those little inadvertencies, which, if charged on the will of the prince, might lessen him in the eyes of his subjects.

§ 347. (b) **Parliamentary right of remonstrance.**—[247] Yet still, notwithstanding this personal perfection, which the law attributes to the sovereign, the constitution has allowed a latitude of supposing the contrary, in respect to both houses of parliament; each of which, in its turn, hath exerted the right of remonstrating and complaining to the king even of those acts of royalty, which are most properly and personally his own; such as messages signed by himself, and speeches delivered from the throne. And yet, such is the reverence which is paid to the royal person, that though the two houses have an undoubted right to consider these acts of state in any light whatever, and accordingly treat them in their addresses as personally proceeding from the prince, yet among themselves (to preserve the more perfect decency, and for the greater freedom of debate), they usually suppose them to flow from the advice of the administration. But the privilege of canvassing thus freely the personal acts of the sovereign (either directly, or even

<sup>a</sup> Plowd. 487.

through the medium of his reputed advisers) belongs to no individual, but is confined to those august assemblies: and there, too, the objections must be proposed with the utmost respect and deference. One member was sent to the tower<sup>w</sup> for suggesting that his majesty's answer to the address of the commons contained "high words to fright the members out of their duty," and another,<sup>x</sup> for saying that a part of the king's speech "seemed rather to be calculated for the meridian of Germany than Great Britain, and that the king was a stranger to our language and constitution."

§ 348. (c) "Time runs not against the king."—In further pursuance of this principle, the law also determines that in the king can be no negligence, or *laches*, and therefore no delay will bar his right. *Nullum tempus occurrit regi* (no time runs against the king) is the standing maxim upon all occasions:<sup>7</sup> for the law

<sup>w</sup> Com. Journ. 18 Nov. 1685.

<sup>x</sup> *Ibid.* 4 Dec. 1717.

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<sup>7</sup> **Lapse of time does not bar the sovereign.**—From the doctrine embodied in the maxim, *nullum tempus occurrit regi*, it followed that not only the civil claims of the crown were not barred by lapse of time, but that criminal prosecutions might be commenced no matter how long after the commission of the offense. Except as modified by statute, this is still the law. But in modern times it has been largely qualified by acts of parliament. The Crown Suits Act, 1769, also known as the *Nullum Tempus* Act, as amended in 1861, the crown is now barred from its civil right in suits relating to landed property, after sixty years. By the Municipal Corporations Act, 1882, re-enacting provisions contained in the act of 1792 (32 Geo. III, c. 58), the crown is barred in informations for usurping corporate offices or franchises after the lapse of six years, or, in *quo warranto* against a municipal corporation, after one year. And in criminal matters, there are certain offenses which can be prosecuted only within a limited time after their commission. Thus, by the Treason Act of 1695, an indictment for treason, except for an attempt to assassinate the king, must be found within three years after the commission of the act of treason.—STEPHEN, 2 Comm. (16th ed.), 600; BROOM, Legal Maxims (8th ed.), 52.

The principle of the maxim applies equally in the United States, and consequently, statutes of limitation do not run against a state or the federal government, unless by express provision of the statute itself. Mr. Justice Story, in *United States v. Hoar*, 2 Mason, 311, Fed. Cas. No. 15,373, said: "The true reason, indeed, why the law has determined that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right (though sometimes asserted to be, because the king is always

intends that the king is always busied for the public good, and therefore has not leisure to assert his right within the times limited to subjects.<sup>v</sup> In the king also can be no stain or corruption of [248] blood: for if the heir to the crown were attainted of

<sup>v</sup> Finch. L. 82. Co. Litt. 90.

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busied for the public good, and, therefore, has not leisure to assert his right within the times limited to subjects, 1 Bl. Comm. 247), is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation or exception, introduced for the public benefit, and equally applicable to all governments. . . . But, independently of any doctrine founded on the notion of prerogative, the same construction of statutes of this sort ought to prevail, founded upon the legislative intention. Where the government is not expressly or by necessary implication included, it ought to be clear from the nature of the mischiefs to be redressed, or the language used, that the government itself was in contemplation of the legislature, before a court of law would be authorized to put such an interpretation upon any statute. In general, acts of the legislature are meant to regulate and direct the acts and rights of citizens; and in most cases, the reasoning applicable to them applies with very different, and often contrary force to the government itself." (Stanley v. Schwalby, 147 U. S. 508, 515, 37 L. Ed. 259, 13 Sup. Ct. Rep. 418.)

Judge Dillon has said that a careful examination of the decisions shows that the maxim, *nullum tempus occurrit regi*, is not restricted in its application to sovereign states or governments, but extends to public rights of all kinds. It protects municipal and other public corporations in all property held for or devoted to a public use, no matter how lax the municipal authorities may have been in asserting the rights of the public. Here, however, a distinction must be made between a municipality acting in a public or governmental capacity and a municipality acting in a private or proprietary capacity. It is only in the former capacity that it has the exemptions implied in the maxim; in the latter, it is subject to the general statute of limitations in force. Thus, it is widely held that no adverse possession, however long-continued, of a public street will suffice to destroy the rights of the public in such street. (Webb v. Demopolis, 95 Ala. 116, 21 L. R. A. 62, 13 South. 289; Brown v. Trustees of Schools, 224 Ill. 184, 115 Am. St. Rep. 146, 8 Ann. Cas. 96, 79 N. E. 579.) The rule is held to apply, also, to a suit by a state university (Cox v. Board of Trustees, 161 Ala. 639, 49 South. 814); to lands purchased for and used as a county hospital (Yolo County v. Barney, 79 Cal. 375, 12 Am. St. Rep. 152, 21 Pac. 833); and to lands held by a district agricultural society. (Sixth Dist. Agric. Assn. v. Wright, 154 Cal. 119, 97 Pac. 144.) But, generally, in actions on tort or contract, a municipal corporation may have the statute of limitations pleaded against it. (3 Dillon, Mun. Corp. (5th ed.), secs. 1193, 1194.)

treason or felony, and afterwards the crown should descend to him, this would purge the attainer *ipso facto*.<sup>2</sup> And therefore when Henry VII, who as Earl of Richmond stood attainted, came to the crown, it was not thought necessary to pass an act of parliament to reverse this attainer; because, as Lord Bacon, in his history of that prince, informs us, it was agreed that the assumption of the crown had at once purged all attainders. Neither can the king in judgment of law, as king, ever be a minor or under age; and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one.<sup>a</sup> By a statute indeed, 28 Hen. VIII, c. 17 (Repeal of Acts, 1536), power was given to future kings to rescind and revoke all acts of parliament that should be made while they were under the age of twenty-four: but this was repealed by the statute 1 Edw. VI, c. 11 (1547), so far as related to that prince; and both statutes are declared to be determined by 24 Geo. II, c. 24 (Minority of Successor to Crown, 1750). It hath also been usually thought prudent, when the heir apparent has been very young, to appoint a protector, guardian, or regent, for a limited time: but the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority; and therefore he hath no legal guardian.<sup>b</sup>

<sup>2</sup> Finch. L. 82.

<sup>a</sup> Co. Litt. 43. 2 Inst. Præm. 3.

<sup>b</sup> The methods of appointing this guardian or regent have been so various; and the duration of his power so uncertain, that from hence alone it may be collected that his office is unknown to the common law; and therefore (as Sir Edward Coke says, 4 Inst. 58), the surest way is to have him made by authority of the great council in parliament. The Earl of Pembroke, by his own authority, assumed in very troublesome times the regency of Henry III., who was then only nine years old; but was declared of full age by the pope at seventeen, confirmed the great charter at eighteen, and took upon him the administration of the government at twenty. A guardian and council of regency were named for Edward III., by the parliament, which deposed his father; the young king being then fifteen, and not assuming the government till three years after. When Richard II. succeeded at the age of eleven, the Duke of Lancaster took upon him the management of the kingdom, till the parliament met, which appointed a nominal council to assist him. Henry V. on his death-bed named a regent and a guardian for his infant son Henry VI.,

§ 349. (3) **The royal immortality.**—<sup>[249]</sup> A third attribute of the king's majesty is his *perpetuity*. The law ascribes to him, in his political capacity, an absolute immortality. The king never dies. Henry, Edward, or George may die; but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir; who is *eo instanti* (from that instant), king to all intents and purposes. And so tender is the law of supposing even a possibility of his death, that his natural dissolution is generally called his *demise*; *dimissio regis, vel coronæ* (the demise of the king or the crown): an expression which signifies merely a transfer of property; for, as is observed in Plowden,<sup>c</sup> when we say the demise of the crown, we mean only that in consequence of the disunion of the king's natural body from his body politic, the kingdom is transferred or demised to his successor; and so the royal dignity remains perpetual. Thus too, when Edward the Fourth, in the tenth year of his reign, was driven from his throne for a few months by the

then nine months old: but the parliament altered his disposition, and appointed a protector and council, with a special limited authority. Both these princes remained in a state of pupillage till the age of twenty-three. Edward V., at the age of thirteen, was recommended by his father, to the care of the Duke of Gloucester; who was declared protector by the privy council. The statutes 25 Hen. VIII. c. 12 (1533), and 28 Hen. VIII. c. 7 (Succession to the Crown, 1536), provided, that the successor, if a male, and under eighteen, or if a female and under sixteen, should be till such age in the governance of his or her natural mother (if approved by the king), and such other counselors as his majesty should by will or otherwise appoint: and he accordingly appointed his sixteen executors to have the government of his son Edward VI., and the kingdom, which executors elected the Earl of Hertford protector. The statute 24 Geo. II. c. 24 (Minority of Successor to Crown, 1750), in case the crown should descend to any of the children of Frederick, late Prince of Wales, under the age of eighteen, appointed the princess dowager;—and that of 5 Geo. III. c. 27 (Minority of Heir to the Crown, 1765), in case of a like descent to any of his present majesty's children, empowers the king to name either the queen, the princess dowager, or any descendant of King George II. residing in this kingdom;—to be guardian and regent, till the successor attains such age, assisted by a council of regency: the powers of them all being expressly defined and set down in the several acts. [On the accession of George V. the Regency Act, 1910, was passed to provide for the minority of the Prince of Wales, who was then only sixteen years of age.]

\* Plowd. 177. 234.



house of Lancaster, this temporary transfer of his dignity was denominated his *demise*; and all process was held to be discontinued, as upon a natural death of the king.<sup>d</sup>

§ 350. **Executive department of government.**—[250] We are next to consider those branches of the royal prerogative, which invest this our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers; in the exertion whereof consists the executive part of government. This is wisely placed in a single hand by the British constitution, for the sake of unanimity, strength, and dispatch. Were it placed in many hands, it would be subject to many wills: many wills, if disunited and drawing different ways, create weakness in a government; and to unite those several wills, and reduce them to one, is a work of more time and delay than the exigencies of state will afford. The king of England is therefore not only the chief, but properly the sole, magistrate of the nation; all others acting by commission from, and in due subordination to him: in like manner as, upon the great revolution in the Roman state, all the powers of the ancient magistracy of the commonwealth were concentrated in the new emperor: so that, as Gravina<sup>e</sup> expresses it, “*in ejus unius persona veteris rei publicæ vis atque majestas percumulatas magistratuum potestates exprimebatur* (all the power and majesty of the old commonwealth were concentrated in the person of that one man by the united powers of the magistrates).”<sup>8</sup>

<sup>d</sup> M. 49 Hen. VI. pl. 1-8 (1470).

<sup>e</sup> Orig. 1. § 103.

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<sup>8</sup> **Real character of the royal authority.**—“The language of this passage is impressive; it stands curtailed but in substance unaltered in Stephen’s Commentaries. It has but one fault; the statements it contains are the direct opposite of the truth. The executive of England is in fact placed in the hands of a committee called the cabinet. If there be any one person in whose single hand the power of the state is placed, that one person is not the queen but the chairman of the committee, known as the prime minister. Nor can it be urged that Blackstone’s description of the royal authority was a true account of the powers of the king at the time when Blackstone wrote. George the Third enjoyed far more real authority than has fallen to the share of any of his descendants. But it would be absurd to maintain that the language I have cited painted his true position. The terms used by the commentator were, when he used them, unreal, and known to be so. They have become only

§ 351. 1. **Absolute character of king's power.**—After what has been premised in this chapter, I shall not (I trust) be considered as an advocate for arbitrary power, when I lay it down as a principle, that in the exertion of lawful prerogative, the king is and ought to be absolute; that is, so far absolute, that there is no legal authority that can either delay or resist him. He may reject what bills, may make what treaties, may coin what money, may create what peers, may pardon what offenses he pleases: unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary; declaring, that thus far the prerogative shall go and no further. For otherwise the power of the crown would indeed be but a name and a shadow, insufficient for the ends of government, if, where its jurisdiction is clearly established and allowed, any man or body of men were permitted to disobey it, in the ordinary course of law: I say, in the *ordinary* course of law; for I do not [251] now speak of those *extraordinary* recourses to first principles, which are necessary when the contracts of society are in danger of dissolution, and the law proves too weak a defense against the violence of fraud or oppression. And yet the want of attending to this obvious distinction has occasioned these doctrines, of absolute power

a little more unreal during the century and more which has since elapsed.”—DICEY, *Law of the Constitution* (3 ed.), 8.

Professor Dicey, in a note to the above paragraph, quotes the following passage from Paley's *Moral Philosophy*, published in 1785, which as he says is full of instruction:

“In the British, and possibly in all other constitutions, there exists a wide difference between the actual state of the government and the theory. The one results from the other; but still they are different. When we contemplate the *theory* of the British government, we see the king invested with the most absolute personal impunity; with a power of rejecting laws, which have been resolved upon by both houses of parliament; of conferring by his charter, upon any set or succession of men he pleases, the privilege of sending representatives into one house of parliament, as by his immediate appointment he can place whom he will in the other. What is this, a foreigner might ask, but a more circuitous despotism? Yet, when we turn our attention from the legal existence to the actual exercise of royal authority in England, we see these formidable prerogatives dwindled into mere ceremonies; and in their stead, a sure and commanding influence, of which the constitution, it seems, is totally ignorant, growing out of that enormous patronage, which the increased extent and opulence of the empire has placed in the disposal of the executive magistrate.”

in the prince and of national resistance by the people, to be much misunderstood and perverted by the advocates for slavery on the one hand, and the demagogues of faction on the other. The former, observing the absolute sovereignty and transcendent dominion of the crown laid down (as it certainly is) most strongly and emphatically in our law books, as well as our homilies, have denied that any case can be excepted from so general and positive a rule; forgetting how impossible it is, in any practical system of laws, to point out beforehand those eccentric remedies, which the sudden emergence of national distress may dictate, and which that alone can justify. On the other hand, overzealous republicans, feeling the absurdity of unlimited passive obedience, have fancifully (or sometimes factiously) gone over to the other extreme: and, because resistance is justifiable to the person of the prince when the being of the state is endangered, and the public voice proclaims such resistance necessary, they have therefore allowed to every individual the right of determining this expedience, and of employing private force to resist even private oppression. A doctrine productive of anarchy, and (in consequence) equally fatal to civil liberty as tyranny itself. For civil liberty rightly understood, consists in protecting the rights of individuals by the united force of society: society cannot be maintained, and of course can exert no protection, without obedience to some sovereign power: and obedience is an empty name, if every individual has a right to decide how far he himself shall obey.

§ 352. a. Responsibility of king's advisers.—In the exertion, therefore, of those prerogatives, which the law has given him, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonor of the kingdom, the parliament will call his advisers <sup>[252]</sup> to a just and severe account. For prerogative consisting (as Mr. Locke<sup>f</sup> has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner. Thus the king may make a treaty with a for-

<sup>f</sup> On Gov. 2. § 166.

sign state, which shall irrevocably bind the nation; and yet, when such treaties have been judged pernicious, impeachments have pursued those ministers, by whose agency or advice they were concluded.

§ 353. 2. King's prerogative in (1) foreign relations; (2) domestic affairs.—The prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with sovereign nations, or its own domestic government and civil polity.

§ 354. a. The king, the national representative in foreign relations.—With regard to foreign concerns, the king is the delegate or representative of his people. It is impossible that the individuals of a state, in their collective capacity, can transact the affairs of that state with another community equally numerous as themselves. Unanimity must be wanting to their measures, and strength to the execution of their counsels. In the king, therefore, as in a center, all the rays of his people are united, and form by that union a consistency, splendor, and power, that make him feared and respected by foreign potentates; who would scruple to enter into any engagement, that must afterwards be revised and ratified by a popular assembly. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation: what is done without the king's concurrence is the act only of private men. And so far is this point carried by our law, that it hath been held,<sup>g</sup> that should all the subjects of England make war with a king in league with the king of England, without the royal assent, such war is no breach of the league. And, by the statute 2 Hen. V, c. 6 (Safe-Conducts, 1414), any subject committing acts of hostility upon any nation in league with the king was declared to be guilty of high treason: and, though that act was repealed by the statute 20 Hen. VI, c. 11 (1442), so far as [253] relates to the making this offense high treason, yet still it remains a very great offense against the law of nations, and punishable by our laws, either capitally or otherwise, according to the circumstances of the case.

<sup>g</sup> 4 Inst. 152.

§ 355. (1) **Ambassadors.**—The king, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states, and receiving ambassadors at home. This may lead us into a short inquiry, how far the municipal laws of England intermeddle with or protect the rights of these messengers from one potentate to another, whom we call ambassadors.

§ 356. (a) **Privileges of ambassadors.**—The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state, wherein they are appointed to reside. He that is subject to the coercion of laws is necessarily dependent on that power by whom those laws were made: but an ambassador ought to be independent of every power, except that by which he is sent; and of consequence ought not to be subject to the mere municipal laws of that nation, wherein he is to exercise his functions. If he grossly offends, or makes an ill use of his character, he may be sent home and accused before his master,<sup>b</sup> who is bound either to do justice upon him, or avow himself the accomplice of his crimes.<sup>1</sup>

§ 357. (i) **In criminal prosecutions.**—But there is great dispute among the writers on the laws of nations, whether this exemption of ambassadors extends to all crimes, as well natural as positive; or whether it only extends to such as are *mala prohibita* (crimes because forbidden), as coining, and not to those that are *mala in se* (crimes in themselves), as murder.<sup>k</sup> Our law seems to have formerly taken in the restriction, as well as the general exemption. [254] For it has been held, both by our common lawyers and civilians,<sup>1</sup> that an ambassador is privileged by the law of nature and nations; and yet, if he commits any offense against the law of

<sup>b</sup> As was done with Count Gyllenberg, the Swedish minister to Great Britain. A. D. 1716.

<sup>1</sup> Sp. L. 26. 21.

<sup>k</sup> Van Leeuwen in Ff. 50. 7. 17. Barbeyrac's Puff. l. 8. c. 9. § 9 & 17. Van Bynkershoek de Foro Legator. c. 17, 18, 19.

<sup>1</sup> 1 Roll. Rep. 175. 3 Bulstr. 27.



reason and nature, he shall lose his privilege:<sup>m</sup> and that therefore, if an ambassador conspires the death of the king in whose land he is, he may be condemned and executed for treason; but if he commits any other species of treason, it is otherwise, and he must be sent to his own kingdom.<sup>n 9</sup> And these positions seem to be built upon good appearance of reason. For since, as we have formerly shown, all municipal laws act in subordination to the primary law of nature, and, where they annex a punishment to natural crimes, are only declaratory of and auxiliary to that law; therefore to this natural, universal rule of justice ambassadors, as well as other men, are subject in all countries; and of consequence it is reasonable that, wherever they transgress it, there they shall be liable to make atonement.<sup>o</sup> But, however these principles might formerly obtain, the general practice of this country, as well as of the rest of Europe, seems now to pursue the sentiments of the learned Grotius, that the security of ambassadors is of more importance than the punishment of a particular crime.<sup>p</sup> And therefore few, if any, examples have happened within a century past, where an ambassador has been punished for any offense, however atrocious in its nature.

§ 358. (ii) *In civil suits.*—In respect to civil suits, all the foreign jurists agree, that neither an ambassador, nor any of his train or *comites*, can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside. Yet Sir Ed-

<sup>m</sup> 4 Inst. 153.

<sup>n</sup> 1 Roll. Rep. 185.

<sup>o</sup> Foster's Reports. 188.

<sup>p</sup> *Securitas legatorum utilitati quæ ex pæna est præponderat.* (De jure b. and p. 18. 4. 4.)

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<sup>9</sup> Sir James Stephen (2 Hist. Crim. Law, 4) remarks on these privileges of an ambassador as follows:

"Blackstone's language about the law of nature and nations and his reasoning appear to me weak, but I apprehend that if the question should ever arise how far an ambassador's privilege against the criminal law extends, the great question for the court to decide would be as to English usage and authority, and as to actual usages, as illustrated by historical facts, between other nations. Why an English court should be bound to attach special importance to the theories upon international law of foreign writers whose language is obviously rhetorical and inaccurate, and whose views do not agree, I am unable to understand."

ward Coke maintains, that, if an ambassador make a contract which is good *jure gentium* (by the law of nations), he shall answer for it here.<sup>a 10</sup> But the truth is, so few cases (if any) had arisen, wherein the privilege was either claimed or disputed, even with regard to civil suits, that our law books are silent upon it, previous to the [255] reign of Queen Anne; when an ambassador from Peter the Great, Czar of Muscovy, was actually arrested and taken out of his coach in London,<sup>r</sup> for a debt of fifty pounds, which he had there

<sup>a</sup> 4 Inst. 153.

<sup>r</sup> 21 July 1708. Boyer's Annals of Queen Anne.

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10 Jurisdiction over diplomatic agents.—Coke was reasoning on the principles which were then held to apply to foreigners, and especially foreign merchants, who were not bound by the municipal law or entitled to its privileges. (See 1 Comm. 260, 273.) But the exemption is now placed not on the nature of the duty or obligation to be enforced, but on the jurisdiction to enforce it. The ambassador "must be independent of the sovereign's authority, and of the jurisdiction of the country, both civil and criminal," says Vattel, book 4, chapter 7, section 92, in order that he may discharge his duties to his own government without interference or embarrassment. And the exemption includes his subordinates, attachés, and servants. Whether it includes his property, so far as the same can be reached, without assuming jurisdiction *in personam* (as by distress for rent, etc.) has been questioned, but the American state department maintained the affirmative in the case of its minister at Berlin. (Wheaton's International Law, p. 287; Felix, Revue du Droit Français et Etranger, vol. 2, 31.)

The rule extends to all diplomatic agents, whether ambassadors or of lower rank, and their domestics; but not to consuls, who do not come within the class, but are commercial agents, and may be (and often are), citizens of the country in which they exercise their functions. Jurisdiction of suits against consuls of foreign powers is reserved to courts of the United States by article III, section 2 of the Constitution, and made exclusive by Judiciary Act, section 9, and Rev. Stats., section 711. State courts, therefore, had no power over them. (Davis v. Packard, 7 Pet. 276, 8 L. Ed. 684.) But the repeal of part of Rev. Stats. of the United States, section 711, by Act of February 18, 1875, took away the exclusive character of such jurisdiction. (Bors v. Preston, 111 U. S. 252, 28 L. Ed. 419, 4 Sup. Ct. Rep. 407.) The distinction is now well marked by United States Rev. Stats., section 687, saying that the supreme court shall have *exclusively* all such jurisdiction of suits or proceedings against ambassadors or other public ministers, or their domestics, or domestic servants, *as a court of law can have consistently with the law of nations*, and original but *not exclusive* jurisdiction of all suits brought by ambassadors or other public ministers, or in which *a consul or vice-consul is a party*.—HAMMOND.

contracted. Instead of applying to be discharged upon his privilege, he gave bail to the action, and the next day complained to the queen. The persons who were concerned in the arrest were examined before the privy council (of which the Lord Chief Justice Holt was at the same time sworn a member<sup>s</sup>) and seventeen were committed to prison: <sup>t</sup> most of whom were prosecuted by information in the court of queen's bench, at the suit of the attorney general,<sup>u</sup> and at their trial before the lord chief justice were convicted of the facts by the jury,<sup>w</sup> reserving the question of law, how far those facts were criminal, to be afterwards argued before the judges; which question was never determined. In the meantime the czar resented this affront very highly, and demanded that the sheriff of Middlesex and all others concerned in the arrest should be punished with instant death.<sup>x</sup> But the queen (to the amazement of that despotic court) directed her secretary to inform him,<sup>\*</sup> "that she could inflict no punishment upon any, the meanest of her subjects, unless warranted by the law of the land: <sup>†</sup> and therefore was persuaded that he would not insist upon impossibilities."<sup>‡</sup> <sup>†</sup> To satisfy, however, the clamors of the foreign ministers (who made it a common cause) as well as to appease the wrath of Peter, a bill was brought into parliament,<sup>‡</sup> and afterwards passed into a law,<sup>a</sup> to prevent and to punish such outrageous insolence for the future. And with a copy of this act, elegantly engrossed and illuminated, accompanied by a letter from the queen, an ambassador extraordinary<sup>b</sup> was commissioned to appear at Moscow,<sup>c</sup> who declared "that

\* First edition contains the following in addition: "that the law of England had not yet protected ambassadors from the payment of their lawful debts; that therefore the arrest was no offense by the laws; and."

† First edition has following note here: "A copy of the act made upon this occasion, very elegantly engrossed and illuminated, was sent him to Moscow as a present."

<sup>s</sup> 25 July 1708. *Ibid.*

<sup>t</sup> 25, 29 Jul. 1708. *Ibid.*

<sup>u</sup> 23 Oct. 1708. *Ibid.*

<sup>w</sup> 14 Feb. 1708. *Ibid.*

<sup>x</sup> 17 Sept. 1708. *Ibid.*

<sup>‡</sup> 11 Jan. 1708. *Ibid.* Mod. Un. Hist. xxxv. 454.

<sup>‡</sup> Com. Journ. 23 Dec. 1708.

<sup>a</sup> 21 Apr. 1709. Boyer, *Ibid.*

<sup>b</sup> Mr. Whitworth.

<sup>c</sup> 8 Jan. 1709. Boyer, *Ibid.*

though her majesty could not inflict such punishment as was required, [256] because of the defect in that particular of the former established constitutions of her kingdom, yet, with the unanimous consent of the parliament, she had caused a new act to be passed to serve as a law for the future." This humiliating step was accepted as a full satisfaction by the czar; and the offenders, at his request, were discharged from all further prosecution.

§ 359. (iii) **The Diplomatic Privileges Act, 1708.**—This statute<sup>d</sup> recites the arrest which had been made, "in contempt of the protection granted by her majesty, contrary to the law of nations, and in prejudice of the rights and privileges, which ambassadors and other public ministers have at all times been thereby possessed of, and ought to be kept sacred and inviolable": wherefore it enacts, that for the future all process whereby the person of any ambassador, or of his domestic or domestic servant may be arrested, or his goods distrained or seized, shall be utterly null and void; and the persons prosecuting, soliciting, or executing such process shall be deemed violators of the law of nations, and disturbers of the public repose; and shall suffer such penalties and corporal punishment as the lord chancellor and the two chief justices, or any two of them, shall think fit. But it is expressly provided, that no trader, within the description of the bankrupt laws, who shall be in the service of any ambassador, shall be privileged or protected by this act; nor shall anyone be punished for arresting an ambassador's servant, unless his name be registered with the secretary of state, and by him transmitted to the sheriffs of London and Middlesex. Exceptions, that are strictly conformable to the rights of ambassadors,<sup>e</sup> as observed in the most civilized countries. And, in conse-

<sup>d</sup> 7 Ann. c. 12 (Diplomatic Privileges, 1708).

<sup>e</sup> *Sæpe quæsitum est an comitum numero et jure habendi sunt, qui legatum comitantur, non ut instructor fiat legatio, sed unice ut lucro suo consulant, institores forte et mercatores. Et, quamvis hos sæpe defenderint et comitum loco habere voluerint legati, apparet tamen satis eo non pertinere, qui in legati legationisve officio non sunt. Quum autem ea res nonnunquam turbas dederit, optimo exemplo in quibusdam aulis olim receptum fuit, ut legatus teneretur exhibere nomenclaturam comitum suorum.* (It was often a question whether they who accompanied the ambassador, not that the embassy might be better

quence of this statute, thus declaring and enforcing the law of nations, these privileges are <sup>[257]</sup> now held to be part of the law of the land, and are constantly allowed in the courts of common law.<sup>f</sup>

§ 360. (2) *Treaties*.—It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes. For it is by the law of nations essential to the goodness of a league, that it be made by the sovereign power;<sup>g</sup> and then it is binding upon the whole community: and in England the sovereign power, *quoad hoc* (as to this), is vested in the person of the king. Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist, or annul. And yet, lest this plenitude of authority should be abused to the detriment of the public, the constitution (as was hinted before) hath here interposed a check, by the means of parliamentary impeachment, for the punishment of such ministers as from criminal motives advise or conclude any treaty, which shall afterwards be judged to derogate from the honor and interest of the nation.<sup>11</sup>

appointed, but merely to consult their own advantage, perhaps as hucksters and merchants, should be reckoned in the number and enjoy the rights of his train. And although the ambassadors often protected them, and wished to reckon them in the number of their suite, yet it is evident that they who are neither in the office of ambassador, nor employed in the embassy, do not belong to it. But as this frequently caused disturbances, it was formerly adjudged in some courts the best mode of proceeding, that the ambassador should be bound to show a list of the names of his attendants.) Van Bynkersh. c. 15. *prope finem*.

<sup>f</sup> Fitzg. 200. Stra. 797.

<sup>g</sup> Puff. L. of N. b. 8. c. 9. § 6.

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<sup>11</sup> *Treaty-making and war-making authority*.—Maitland, in his *Const. Hist. of England*, p. 424, passes the following criticism upon Blackstone's statements: "Stephen (following Blackstone) says that to make a war completely effectual it is necessary that it be publicly declared, and duly proclaimed by the sovereign's authority. I believe that to be misleading, and that neither English law, nor what is called International Law, requires any formal declaration of war. I believe that an English court would hold that there was war so soon as the queen had authorized acts of hostility.

"Close to this power of making war and peace, Blackstone speaks of the power of making treaties, and says what seems to me very untrue. 'It is also the sovereign's prerogative to make treaties, leagues and alliances with foreign states and princes. For it is by the law of nations essential to the



§ 361. (3) **Power to make war.**—Upon the same principle the king has also the sole prerogative of making war and peace. For it is held by all the writers on the law of nature and nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into society, and is vested in the sovereign power:<sup>h</sup> and this right is given up, not only by individuals, but even by the entire body of people, that are under the dominion of a sovereign. It would indeed be extremely improper, that any number of subjects should have the power of binding the supreme magistrate, and putting him against his will in a state of war. Whatever hostilities, therefore, may be committed by private citizens, the state ought not to be affected thereby; unless that should justify their proceedings, and thereby become partner in the guilt. Such unauthorized volunteers in violence are not ranked among open enemies, but are treated like pirates and robbers: according to that rule of the civil law; <sup>i</sup> *hostes*

<sup>h</sup> Puff. b. 8. c. 6. § 8. and Barbeyr. in loc.

<sup>i</sup> Ff. 50. 16. 118.

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goodness of a league, that it be made by the sovereign power; and then it is binding upon the whole community; and in England the sovereign power, *quoad hoc*, is vested in the king. Whatever contracts, therefore, he engages in, no other power in the kingdom can legally delay, resist or annul.'

'Now, in contradiction to this we may, I believe, say that a treaty made by the king has in general no legal effect whatever. The king, as just said, can make peace and can make war, and the making of either will of course have important effects: whether an act be a laudable attack on a public enemy, or mere piracy, is one of the many questions that might thus be decided. Also it seems certain that as an incident to a treaty of peace, the king may cede territory, may at all events cede territory acquired by him during the war. Exactly how far this power extends is a somewhat debatable matter, and I think it very doubtful whether the queen can cede land subject to the British parliament, except in a treaty of peace; could she sell Jersey, Guernsey, or Kent to France? I much doubt it. When in 1782 it became necessary to recognize the independence of the American colonies, an act of parliament was passed authorizing the king to make peace and to repeal all statutes relating to those colonies. But as to the more general principle put forward by Blackstone and Stephen, its unsoundness can be easily proved by reference to the law about extradition. The common law of England, at least for a long time past, has been that though the king bound himself to surrender criminals, still the treaty could not be carried out, save by virtue of an act of parliament. Suppose that under such a treaty a person was arrested and brought before

*hi sunt qui nobis, aut quibus nos, publice bellum decrevimus: cæteri latrones aut pradones sunt* (those are enemies who have publicly declared war against us, or against whom we have publicly declared war; all others are thieves or robbers). And the reason which is given by [258] Grotius,<sup>1</sup> why according to the law of nations a denunciation of war ought always to precede the actual commencement of hostilities, is not so much that the enemy may be put upon his guard (which is matter rather of magnanimity than right), but that it may be certainly clear that the war is not undertaken by private persons, but by the will of the whole community; whose right of willing is in this case transferred to the supreme magistrate by the fundamental laws of society. So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and, then, all parts of both the contending nations, from the highest to the lowest, are bound by it. And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace. And the same check of

<sup>1</sup> De jur. b. and p. l. 3. c. 3. § 11.

one of the courts by *habeas corpus*; the treaty would have been treated as waste-paper—the king has no power to send men out of the country, and cannot give himself power by making a treaty. This has been law at least all through the nineteenth century. It is fair to Blackstone to say that the point was not so clear in his own day. The court of exchequer seems to have thought that the king might hand over fugitives. However, there is no doubt about the matter now. Our earliest extradition treaties were individually sanctioned by parliament. The general act, 1870 (33 & 34 Vict., c. 52), now in force, enables the queen, by Order in Council, to apply that act in the case of any foreign state with which she has made an arrangement for reciprocal extradition. This is a good instance of a power given to the queen by act of parliament, one of those royal powers which we do not usually call prerogatives. I take extradition as one example, but the general principle is quite unsound. Suppose the queen contracts with France that English iron or coal shall not be exported to France—until a statute has been passed forbidding exportation, one may export and laugh at the treaty. Still, though this is so, we must remark that the king has here a very substantial power, though it does not operate directly on the law. It would obviously be a serious step, were parliament to refuse to pass the laws necessary for carrying out a treaty already concluded. The honor of the nation might be already pledged. The interrogation of ministers in parliament, perhaps, is a sufficient guard against this danger."

parliamentary impeachment, for improper or inglorious conduct, in beginning, conducting, or concluding a national war, is in general sufficient to restrain the ministers of the crown from a wanton or injurious exertion of this great prerogative.

§ 362. (4) **Letters of marque and reprisal.**—But, as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative; by directing the ministers of the crown to issue letters of marque and reprisal upon due demand: the prerogative of granting which is nearly related to, and plainly derived from, that other of making war: this being indeed only an incomplete state of hostilities, and generally ending in a formal denunciation of war. These letters are grantable by the law of nations,<sup>k</sup> whenever the subjects of one state are oppressed and injured by those of another; and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonymous; and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking<sup>1</sup>) may be obtained, in order to seize the bodies or goods of the subjects of the offending state, until satisfaction [259] be made, wherever they happen to be found. And, indeed, this custom of reprisals seems dictated by nature herself; for which reason we find in the most ancient times very notable instances of it.<sup>m</sup> But here the necessity is obvious of calling in the sovereign power, to determine when reprisals may be made; else every private sufferer would be a judge in his own cause. In pursuance of which principle, it is with us declared by the statute 4 Hen. V, c. 7 (Letters of Marque, 1416), that, if any subjects of the realm are oppressed in time of truce by any foreigners, the king will grant marque in due form, to all that feel themselves

<sup>k</sup> *Ibid.* l. 3. c. 2. § 4 & 5.

<sup>1</sup> Dufresne. tit. Marca.

<sup>m</sup> See the account given by Nestor, in the eleventh book of the Iliad, of the reprisals made by himself on the Epeian nation; from whom he took a multitude of cattle, as a satisfaction for a prize won at the Elia games by his father Neleus, and for debts due to many private subjects of the Pylian kingdom; out of which booty the king took three hundred head of cattle for his own demand, and the rest were equitably divided among the other creditors.

grieved. Which form is thus directed to be observed: the sufferer must first apply to the lord privy seal, and he shall make out letters of request under the privy seal; and, if, after such request of satisfaction made, the party required do not within convenient time make due satisfaction or restitution to the party grieved, the lord chancellor shall make him out letters of marque under the great seal; and by virtue of these he may attack and seize the property of the aggressor nation, without hazard of being condemned as a robber or pirate.<sup>12</sup>

§ 363. (5) **Passports and safe-conducts.**—Upon exactly the same reason stands the prerogative of granting safe-conducts, without which by the law of nations no member of one society has a right to intrude into another.<sup>13</sup> And therefore Puffendorf very

<sup>12</sup> **Letters of marque.**—Letters of marque now mean a commission granted by the government to a private person to take the property of a foreign state, or of the citizens or subjects of such state, as a reparation for an injury committed by such state, or its citizens or subjects. The prizes so captured are divided between the owners of the privateer, the captain and the crew. By the United States constitution (art. 1, sec. 8), Congress is given power to grant letters of marque and reprisal. By the Declaration of Paris in 1856 privateering was condemned and declared to be abolished among the signatory powers. The United States was not a party to the declaration, but did not issue any letters of marque in the war with Spain in 1898.

<sup>13</sup> **Safe-conducts.**—This statement has been criticised by Professor Wooddesson (Lectures, vol. 1, p. 51, n. n), as if it were inconsistent with the doctrine that subjects of one state may come, without license, into any other in league or amity with it (Calvin's Case, 7 Coke, 21 b), or with Vattel's rule that, in Europe, the access is everywhere free to every person who is not an enemy to the state. (Book II, secs. 100, 123, 132.) But the whole passage of Blackstone shows that such is not his meaning; and certainly it would be incorrect to say that anyone has a right to intrude into the territories of a state of which he is not a member. Blackstone's meaning plainly was that the stranger could not claim admission as a *right*, contrary to express prohibition, individual or general, without such a safe-conduct from the sovereign. Upon this rule nations are acting at the present day, whenever occasion requires. A marked example of its application is in the legislation of Congress (1883), excluding the Chinese from the United States. Upon what grounds such exclusions may be enforced, and how general they may be made, each nation may determine for itself, without violating any right of foreigners. The example of Paraguay, during the long dictatorship of Francia, shows that even the entire exclusion of foreigners is not recognized by civilized nations

justly resolves," that it is left in the power of all states, to take such measures about the admission of strangers, as they think convenient; those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. Great tenderness is shown by our laws, not only to foreigners in distress (as will appear when we come to speak of shipwrecks) but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under <sup>[260]</sup> the king's protection; though liable to be sent home whenever the king sees occasion. But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe conduct; which by divers ancient statutes<sup>o</sup> must be granted under the king's great seal and enrolled in chancery, or else are of no effect: the king being supposed the best judge of such emergencies, as may deserve exception from the general law of arms. But passports under the king's sign-manual,<sup>14</sup> or licenses from his ambassadors abroad, are now more usually obtained, and are allowed to be of equal validity.

§ 364. (a) Protection of foreign merchants.—Indeed, the law of England, as a commercial country, pays a very particular regard

■ Law of N. and N. b. 3. c. 3. § 9.

• 15 Hen. VI. c. 3 (Safe-Conducts, 1436). 18 Hen. VI. c. 8 (Safe-Conducts, 1439). 20 Hen. VI. c. 1 (Safe-Conducts, 1442).

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as a cause of war. The interference of the United States to compel the opening of the ports of Japan was justified, at least in part, upon the barbarous treatment of shipwrecked strangers. This is a very different matter, since a nation has no more right than an individual to destroy the unfortunate beings whom accident or misfortune has thrown into its power. This, too, is the case referred to in the striking lines of Vergil, *Aen. I*, 542; where the poet makes Dido justify the treatment of the shipwrecked Trojans, by the necessities of self-defense in a new state, and Professor Wooddesson himself, in quoting the passage, has said that the sovereign may issue prohibition against entering his coast, where he thinks necessity requires it. (*Lectures*, vol. 1, lv.) Indeed, it is evident from this passage that the entire difference between Wooddesson and his great predecessor grew out of the ambiguous use of the word "right."—HAMMOND.

<sup>14</sup> Passports are now issued under the hand of the secretary of state.



to foreign merchants in innumerable instances. One I cannot omit to mention: that by *magna carta*<sup>p</sup> it is provided, that all merchants (unless publicly prohibited beforehand) shall have safe-conduct to depart from, to come into, to tarry in, and to go through England, for the exercise of merchandise, without any unreasonable imposts, except in time of war: and, if a war breaks out between us and their country, they shall be attached (if in England) without harm of body or goods, till the king or his chief justiciary be informed how our merchants are treated in the land with which we are at war; and, if ours be secure in that land, they shall be secure in ours. This seems to have been a common rule of equity among all the northern nations; for we learn from Stiernhook,<sup>q</sup> that it was a maxim among the Goths and Swedes, "*quam legem exteri nobis posuere, eandem illis ponemus* (we will impose the same law on foreign merchants that they have imposed on us)." But it is somewhat extraordinary, that it should have found a place in *magna carta*, a mere interior treaty between the king and his natural-born subjects: which occasions the learned Montesquieu to remark with a degree of admiration, "that the English have made [261] the protection of *foreign* merchants one of the articles of their *national* liberty."<sup>r</sup> But indeed it well justifies another observation which he has made,<sup>s</sup> "that the English know better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty, and commerce." Very different from the genius of the Roman people; who in their manners, their constitution, and even in their laws, treated commerce as a dishonorable employment,<sup>15</sup> and prohibited the exercise thereof to persons of

<sup>p</sup> C. 30.<sup>r</sup> Sp. L. 20. 13.<sup>q</sup> De Jure Sueon. l. 3. c. 4.<sup>s</sup> *Ibid.* 20. 6.

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<sup>15</sup> **Roman view of commerce.**—It is hardly fair to judge the manners, law, and constitution of the Roman people by the rescript of a Byzantine emperor, such as Blackstone cites for authority here. It proceeds from Honorius and Theodosius in the fifth century after Christ; and the kind of merchants against whom it is directed appears, in chapter 4 of the same title, a law of the same emperors. They were simply peddlers who hovered on the borders of the Roman and Persian empires and acted as spies, now for one side, now for the other. The fame of Rome in war and legislation long overshadowed the services it rendered to commerce and the peaceful intercourse of

birth, or rank, or fortune:† and equally different from the bigotry of the canonists, who looked on trade as inconsistent with Christianity,‡ and determined at the council of Melfi, under Pope Urban II, A. D. 1090, that it was impossible with a safe conscience to exercise any traffic, or follow the profession of the law.¶

§ 365. **b. King's prerogative in domestic affairs.**—These are the principal prerogatives of the king respecting this nation's intercourse with foreign nations; in all of which he is considered as the delegate or representative of his people. But in domestic affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

§ 366. (1) **King as part of legislature.**—First, he is a constituent part of the supreme legislative power; and, as such, has the prerogative of rejecting such provisions in parliament, as he judges improper to be passed. The expediency of which constitution has before been evinced at large.\* I shall only further remark, that the king is not bound by any act of parliament, unless he be named therein by special and particular words. The most general words that can be devised (“any person or persons, bodies politic, or corporate, etc.”) affect not him in the least, if [262] they may

† *Nobiliores natalibus, et honorum luce conspicuos, et patrimonio ditiores, perniciosum urbibus mercimonium exercere prohibemus.* (We forbid those who are noble by birth, conspicuous from the splendor of their honors, and wealthy in their patrimony, to exercise traffic, so pernicious to cities.) C. 4. 63. 3.

‡ *Homo mercator vix aut nunquam potest Deo placere: et ideo nullus christianus debet esse mercator; aut si voluerit esse, projiciatur de ecclesia Dei.* (A trader can seldom or never please God; therefore, no Christian ought to be a trader; or, if he will be one, he should be cast out from the church of God.) Decret. 1. 88. 11.

¶ *Falsa fit pœnitentia [laici] cum penitus ab officio curiali vel negotiali non recedit, quæ sine peccatis agi ulla ratione non prævalet.* (The repentance [of a layman] becomes fallacious if he quit not entirely the profession of law and traffic, which it is impossible to exercise in any manner without sin.) Act Concil. apud Baron. c. 16.

\* C. 2. page 154.

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nations; but it should not be forgotten that the very word “commerce” was first used to designate that right of such intercourse and mutual contracts which they introduced into the *jus gentium*.—HAMMOND.

tend to restrain or diminish any of his rights or interests.<sup>7</sup> For it would be of most mischievous consequence to the public, if the strength of the executive power were liable to be curtailed without its own express consent, by constructions and implications of the subject.<sup>16</sup> Yet, where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject:<sup>8</sup> and, likewise, the king may take the benefit of any particular act, though he be not especially named.<sup>9</sup>

§ 367. (2) **King as generalissimo.**—The king is considered, in the next place, as the generalissimo, or the first in military command, within the kingdom. The great end of society is to protect the weakness of individuals by the united strength of the community: and the principal use of government is to direct that united strength in the best and most effectual manner, to answer the end proposed. Monarchical government is allowed to be the fittest of any for this purpose; it follows, therefore, from the very end of its institution, that in a monarchy the military power must be trusted in the hands of the prince.

§ 368. (a) **The Militia Act, 1661.**—In this capacity, therefore, of general of the kingdom, the king has the sole power of raising and regulating fleets and armies. Of the manner in which they are raised and regulated I shall speak more, when I come to consider the military state. We are now only to consider the prerogative of enlisting and of governing them; which indeed was disputed and claimed, contrary to all reason and precedent, by the long parlia-

<sup>7</sup> 11 Rep. 74.

<sup>8</sup> 7 Rep. 32.

<sup>9</sup> *Ibid.* 71.

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<sup>16</sup> "This rule has been adapted to the requirements of the political system prevailing in this country, and is now universally recognized. Chancellor Kent states it as follows: 'It is likewise a general rule, in the interpretation of statutes limiting rights and interests, not to construe them to embrace the sovereign power or government, unless the same be expressly named therein, or intended by necessary implication.' 1 Kent, Comm., 460." *State v. American Book Co.*, 69 Kan. 1, 2 Ann. Cas. 56, 1 L. R. A. (N. S.) 1041, 76 Pac. 411, 418.

ment of King Charles I; but, upon the restoration of his son, was solemnly declared by the statute 13 Car. II. c. 6 (Militia, 1661), to be in the king alone: for that the sole supreme government and command of the militia within all his majesty's realms and dominions, and of all forces by sea and land, and of all forts and places of strength, ever was and is the <sup>[263]</sup> undoubted right of his majesty, and his royal predecessors, kings and queens of England; and that both or either house of parliament cannot, nor ought to, pretend to the same.

§ 369. (b) *Trinoda necessitas*.—This statute, it is obvious to observe, extends not only to fleets and armies, but also to forts, and other places of strength, within the realm: the sole prerogative, as well of erecting, as manning and governing of which, belongs to the king in his capacity of general of the kingdom:<sup>b</sup> and all lands were formerly subject to a tax, for building of castles wherever the king thought proper. This was one of the three things, from contributing to the performance of which no lands were exempted; and therefore called by our Saxon ancestors the *trinoda necessitas*: *sc. pontis reparatio, arcis constructio, et expeditio contra hostem* (the threefold obligation: that is, to repair bridges, to build towers, and to serve against the enemy).<sup>c</sup> <sup>17</sup> And this they were called upon to do so often, that, as Sir Edward Coke from M. Paris assures us,<sup>d</sup> there were in the time of Henry III, 1,115 castles subsisting in England. The inconvenience of which, when granted out to private subjects, the lordly barons of those times were severely felt by the whole kingdom; for, as William of Newburgh remarks in the reign of King Stephen, “*erant in Anglia quodam-*

<sup>b</sup> 2 Inst. 30.

<sup>c</sup> Cowel's Interpr. tit. Castellorum Operatio. Seld. Jan. Angl. 1. 42.

<sup>d</sup> 2 Inst. 31.

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<sup>17</sup> But, though the king, acting through his ministers, will undoubtedly be supreme commander of any forces which may be lawfully raised in or by the country, yet it must be remembered that, in time of peace, he cannot lawfully raise or keep a standing army within the kingdom without the consent of parliament, and that, whether in time of peace or in time of war, the issue of commissions for proceeding by martial law, unless under the express provisions of an act of parliament, is illegal.—STEPHEN, 2 Comm. (16th ed.), 611.

*medo tot reges vel potius tyranni, quot domini castellorum* (there were in England, in effect, as many kings, or rather tyrants, as there were lords of castles)": but it was felt by none more sensibly than by two succeeding princes, King John and King Henry III. And therefore, the greatest part of them being demolished in the barons' wars, the kings of after times have been very cautious of suffering them to be rebuilt in a fortified manner: and Sir Edward Coke lays it down,<sup>e</sup> that no subject can build a castle, or house of strength embattled, or other fortress, defensible, without the license of the king; for the danger which might ensue, if every man at his pleasure might do it.

§ 370. (c) Regulation of commerce and navigation.—It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that the king has the <sup>[264]</sup> prerogative of appointing *ports* and *havens*, or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom sees proper. By the feudal law all navigable rivers and havens were computed among the *regalia* (royalties),<sup>f</sup> and were subject to the sovereign of the state. And in England it hath always been held, that the king is lord of the whole shore,<sup>g</sup> and particularly is the guardian of the ports and havens, which are the inlets and gates of the realm:<sup>h</sup> and therefore, so early as the reign of King John, we find ships seized by the king's officers for putting in at a place that was not a legal port.<sup>i</sup> These legal ports were undoubtedly at first assigned by the crown; since to each of them a court of portmote is incident,<sup>k</sup> the jurisdiction of which must flow from the royal authority: the *great ports* of the sea are also referred to, as well known and established, by statute 4 Hen. IV, c. 20 (Customs and Excise, 1402), which prohibits the landing elsewhere under pain of confiscation: and the statute 1 Eliz., c. 11 (Customs, 1559), recites that the franchise of lading and discharging had been frequently granted by the crown.

<sup>e</sup> 1 Inst. 5.

<sup>f</sup> 2 Feud. t. 56. Grag. 1. 15. 15.

<sup>g</sup> F. N. B. 113.

<sup>h</sup> Dav. 9. 56.

<sup>i</sup> Madox. Hist. Exch. 530.

<sup>k</sup> 4 Inst. 148.



§ 371. (i) **Limitation of ports.**—But though the king had a power of granting the franchise of havens and ports, yet he had not the power of resumption, or of narrowing and confining their limits when once established; but any person had a right to load or discharge his merchandise in any part of the haven: whereby the revenue of the customs was much impaired and diminished, by fraudulent landings in obscure and private corners. This occasioned the statutes of 1 Eliz., c. 11 (Customs, 1559), and 13 & 14 Car. II, c. 11 (Customs, 1662), § 14, which enable the crown by commission to ascertain the limits of all ports, and to assign proper wharfs and quays in each port, for the exclusive landing and loading of merchandise.

§ 372. (ii) **Light-houses and buoys.**—The erection of beacons, light-houses, and sea-marks is also a branch of the royal prerogative: whereof the first was [265] anciently used in order to alarm the country, in case of the approach of an enemy; and all of them are signally useful in guiding and preserving vessels at sea by night as well as by day. For this purpose the king hath the exclusive power, by commission under his great seal,<sup>1</sup> to cause them to be erected in fit and convenient places,<sup>m</sup> as well upon the lands of the subject as upon the demesnes of the crown: which power is usually vested by letters patent in the office of lord high admiral.<sup>n</sup> And by statute 8 Eliz., c. 13 (Sea-marks, 1566), the corporation of the Trinity-House are empowered to set up any beacons or sea-marks wherever they shall think them necessary; and if the owner of the land or any other person shall destroy them, or shall take down any steeple, tree, or other known sea-mark, he shall forfeit 100*l.*, or in case of inability to pay it, shall be *ipso facto* outlawed.

§ 373. (iii) **Writ of ne exeat regno.**—To this branch of the prerogative may also be referred the power vested in his majesty, by statutes 12 Car. II, c. 4 (Subsidies, 1660), and 29 Geo. II, c. 16 (Exportation, 1755), of prohibiting the exportation of arms or

<sup>1</sup> 3 Inst. 204. 4 Inst. 148.

<sup>m</sup> Rot. Claus. 1 Rich. II. m. 42 (1377). Pryn' on 4 Inst. 136.

<sup>n</sup> Sid. 158. 4 Inst. 149.

ammunition out of this kingdom, under severe penalties: and likewise the right which the king has, whenever he sees proper, of confining his subjects to stay within the realm, or of recalling them when beyond the seas. By the common law,<sup>o</sup> every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave; provided he is under no injunction of staying at home (which liberty was expressly declared in King John's great charter, though left out in that of Henry III); but, because that every man ought of right to defend the king and his realm, therefore the king at his pleasure may command him by his writ that he go not beyond the seas, or out of the realm, without license; and, if he do the contrary he shall be punished for disobeying the king's command. Some persons there anciently were, that, by reason of their stations, were under a perpetual prohibition of going abroad without license obtained; among which were reckoned all peers, on account of their being counselors of [266] the crown; all knights, who were bound to defend the kingdom from invasions; all ecclesiastics, who were expressly confined by the fourth chapter of the constitutions of Clarendon, on account of their attachment in the times of popery to the See of Rome; all archers and other artificers, lest they should instruct foreigners to rival us in their several trades and manufactures. This was law in the times of Britton,<sup>p</sup> who wrote in the reign of Edward I: and Sir Edward Coke<sup>q</sup> gives us many instances to this effect in the time of Edward III. In the succeeding reign the affair of traveling wore a very different aspect: an act of parliament being made,<sup>r</sup> forbidding all persons whatever to go abroad without license; *except* only the lords and other great men of the realm; and true and notable merchants; and the king's soldiers. But this act was repealed by the statute 4 Jac. I, c. 1 (Union of England and Scotland, 1606). And at present everybody has, or at least assumes, the liberty of going abroad when he pleases. Yet undoubtedly if the king, by writ of *ne exeat regnum* (let him not leave the kingdom), under his great seal or privy seal, thinks proper to prohibit him from so doing; or if the king sends a writ to any man, when abroad, commanding his return; and in either case the subject disobeys; it is a high

<sup>o</sup> F. N. B. 85.<sup>q</sup> 3 Inst. 175.<sup>p</sup> C. 123.<sup>r</sup> 5 Rich. II, c. 2 (1381).

contempt of the king's prerogative, for which the offender's lands shall be seized till he return: and then he is liable to fine and imprisonment.<sup>\* 18</sup>

§ 374. (3) The king as fountain of justice.—(a) King erects courts of justice.—Another capacity, in which the king is considered in domestic affairs is as the fountain of justice and general conservator of the peace of the kingdom. By the fountain of justice the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the king, as from his *free gift*; but he is the steward of the public, to dispense it to whom it is *due*.<sup>†</sup> He is not the spring, but the reservoir; from whence right and equity are conducted, by a thousand channels, to every individual. The original power of judicature, by the fundamental principles of society, is [267] lodged in the society at large: but as it would be impracticable to render complete justice to every individual, by the people in their collective capacity, therefore every nation has committed that power to certain select magistrates, who with more ease and expedition can hear and determine complaints; and in England this authority has immemorially been exercised by the king or his substitutes. He therefore has alone the right of erecting courts of judicature: for, though the constitution of the kingdom hath entrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust: it is consequently necessary, that courts should be erected, to assist him in executing this power; and equally necessary, that,

▪ 1 Hawk. P. C. 22.

† *Ad hoc autem creatus est et electus, ut justitiam faciat universis.* (But he is created and chosen for the purpose of dispensing justice to all.) Bract. 1. 3. tr. 1. c. 9.

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<sup>18</sup> But, at the present day, everybody (other than the holder of the great seal and officers in the army) has, or at least assumes, the liberty of going abroad when he pleases, and without license; and the writ *ne exeat regno* is no longer resorted to for state purposes. It is now used only to prevent one of the parties to an action from withdrawing his person or property from the jurisdiction of the court by going abroad; unless he shall first give security for the satisfaction of such claim as the other party shall establish.—STEPHEN, 2 Comm. (16th ed.), 614.

if erected, they should be erected by his authority. And hence it is that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

§ 375. (b) *Tenure of judges.*—It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, our kings have delegated their whole judicial power to the judges of their several courts; which are the grand depositaries of the fundamental laws of the kingdom, and have gained a known and stated jurisdiction, regulated by certain and established rules, which the crown itself cannot now alter but by act of parliament.<sup>u</sup> And, in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III, c. 2 (Act of Settlement, 1700), that their commissions shall be made (not, as formerly, *durante bene placito*—during pleasure—but) *quamdiu bene se gesserint* (so long as they shall have conducted themselves uprightly), and their salaries ascertained and established; but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law in the statute of 1 Geo. III, c. 23 (Privileges of the Crown, 1760), enacted at the earnest recommendation of [268] the king himself from the throne, the judges are continued in their offices during their good behavior, notwithstanding any demise of the crown (which was formerly held<sup>w</sup> immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions; his majesty having been pleased to declare, that “he looked upon the independence and uprightness of the judges, as essential to the impartial administration of justice; as one of the best securities of the rights and liberties of his subjects; and as most conducive to the honor of the crown.”<sup>x</sup>

<sup>u</sup> 2 Hawk. P. C. 2.

<sup>x</sup> Com. Journ. 3 Mar. 1761.

<sup>w</sup> Lord Raym. 747.

§ 376. (c) **Criminal jurisdiction.**—In criminal proceedings, or prosecutions for offenses, it would still be a higher absurdity, if the king personally sat in judgment; because in regard to these he appears in another capacity, that of *prosecutor*. All offenses are either against the king's peace or his crown and dignity: and are so laid in every indictment. For though in their consequences they generally seem (except in the case of treason and a very few others) to be rather offenses against the kingdom than the king; yet, as the public, which is an invisible body, has delegated all its power and rights, with regard to the execution of the laws, to one visible magistrate, all affronts to that power, and breaches of those rights, are immediately offenses against him, to whom they are so delegated by the public. He is therefore the proper person to prosecute for all public offenses and breaches of the peace, being the person injured in the eye of the law. And this notion was carried so far in the old Gothic constitution (wherein the king was bound by his coronation oath to conserve the peace), that in case of any forcible injury offered to the person of a fellow-subject, the offender was accused of a kind of perjury, in having violated the king's coronation oath; *dicebatur fregisse juramentum regis juratum* (he was said to have broken the sworn oath of the king).<sup>†</sup>

§ 377. (d) **Pardoning power.**—And hence also arises another <sup>[269]</sup> branch of the prerogative, that of *pardoning* offenses; for it is reasonable that he only who is injured should have the power of forgiving.\* Of prosecutions and pardons I shall treat more at large hereafter; and only mention them here, in this cursory manner, to show the constitutional grounds of this power of the crown, and how regularly connected all the links are in this vast chain of prerogative.

\* First edition reads here in addition: "And therefore, in parliamentary impeachment, the king has no prerogative of pardoning: because there the commons of Great Britain are in their own names the prosecutors, and not the crown; the offense being for the most part avowedly taken to be done against the public."

† Stiernh. de Jure Goth. l. 3. c. 3. A notion somewhat similar to this may be found in the Mirror. c. l. § 5. And so also, when the Chief Justice Thorpe was condemned to be hanged for bribery, he was said *sacramentum domini regis fregisse* (to have broken the oath of the king). Rot. Parl. 25 Edw. III. (1350).



§ 378. (e) *Theory of separate departments.*—In this distinct and separate existence of the judicial power in a peculiar body of men, nominated indeed, but not removable at pleasure, by the crown, consists one main preservative of the public liberty; which cannot subsist long in any state, unless the administration of common justice be in some degree separated both from the legislative and also from the executive power. Were it joined with the legislative, the life, liberty, and property, of the subject would be in the hands of arbitrary judges, whose decisions would be then regulated only by their own opinions, and not by any fundamental principles of law; which, though legislators may depart from, yet judges are bound to observe. Were it joined with the executive, this union might soon be an over-balance for the legislative. For which reason, by the statute of 16 Car. I, c. 10 (Star-Chamber, 1640), which abolished the court of star-chamber, effectual care is taken to remove all judicial power out of the hands of the king's privy council; who, as then was evident from recent instances, might soon be inclined to pronounce that for law, which was most agreeable to the prince or his officers. Nothing, therefore, is more to be avoided, in a free constitution, than uniting the provinces of a judge and a minister of state. And indeed, that the absolute power, claimed and exercised in a neighboring nation, is more tolerable than that of the eastern empires, is in great measure owing to their having vested the judicial power in their parliaments, a body separate and distinct from both the legislative and executive: and, if ever that nation recovers its former liberty, it will owe it to the efforts of those assemblies. In Turkey, where everything is centered in the sultan or his ministers, [270] despotic power is in its meridian, and wears a more dreadful aspect.

§ 379. (f) *Legal ubiquity of the king.*—A consequence of this prerogative is the legal *ubiquity* of the king. His majesty, in the eye of the law, is always present in all his courts, though he cannot personally distribute justice.<sup>2</sup> His judges are the mirror by which the king's image is reflected. It is the regal office, and not the royal person, that is always present in court, always ready to undertake prosecutions, or pronounce judgment, for the benefit

<sup>2</sup> Fortesc. c. 8. 2 Inst. 186.

and protection of the subject. And from this ubiquity it follows that the king can never be nonsuit;<sup>a</sup> for a nonsuit is the desertion of the suit or action by the nonappearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the king is not said to appear *by his attorney*, as other men do; for in contemplation of law he is always present in court.<sup>b 19</sup>

§ 380. (g) **The king's proclamations.**—From the same original, of the king's being the fountain of justice, we may also deduce the prerogative of issuing proclamations, which is vested in the

<sup>a</sup> Co. Litt. 139.

<sup>b</sup> Finch. L. 81.

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<sup>19</sup> **Bentham's criticism on the king's "ubiquity."**—As an example of the style of Bentham's severe criticisms of Blackstone's laudatory exposition of the British constitution, the following passage is quoted: "In the Seventh Chapter of the First Book. The king has '*attributes*'; he possesses '*ubiquity*'; he is '*all-perfect and immortal*.' These childish paradoxes, begotten upon servility by false wit, are not more adverse to manly sentiment, than to accurate apprehension. Far from contributing to place the institutions they are applied to in any clear point of view, they serve but to dazzle and confound, by giving to Reality the air of Fable. It is true, they are not altogether of our Author's invention: it is he, however, that has revived them, and that with improvements and additions.

"One might be apt to suppose they were no more than so many transient flashes of ornament: it is quite otherwise. He dwells upon them in sober sadness. The attribute of '*ubiquity*,' in particular, he lays hold of, and makes it the basis of a chain of reasoning. He spins it out into consequences: He makes one thing '*follow*' from it, and another thing be so and so '*for the same reason*': and he uses emphatic terms, as if for fear he should not be thought to be in earnest. 'From the ubiquity,' says our author [1 Comm., p. 270], '*it follows*, that the king can never be nonsuit; *for* a nonsuit is the desertion of the suit or action by the nonappearance of the plaintiff in court.'—'For the same reason also the king is not said to appear by his attorney, as other men do; for he always appears in contemplation of law in his *own proper* person.'

"This is the case so soon as you come to this last sentence of the paragraph. For so long as you are at the last but two, '*it is the regal office, and not the royal person, that is always present*.' All this is so dryly and so strictly true, that it serves as the groundwork of a metaphor that is brought in to embellish and enliven it. The king, we see, *is*, that is to say is *not*, present in court. The king's judges are present too. So far is plain downright truth. These judges, then, speaking metaphorically, are so many looking-glasses, which have this singular property, that when a man looks at them, instead of seeing his own face in them, he sees the king's. 'His Judges,'

king alone.<sup>20</sup> These proclamations have then a binding force, when (as Sir Edward Coke observes<sup>c</sup>), they are grounded upon and enforce the laws of the realm. For, though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts, concerning these points, which we call proclamations, are binding upon the subject, where they do not either contradict the old laws, or tend to establish new ones; but only enforce the execution of such laws as are already in being, in such manner as the king shall judge necessary. Thus the established law is, that the king may prohibit any of his subjects from leaving the realm: a proclamation, therefore, forbidding this in general for three weeks, by laying <sup>[271]</sup> an embargo upon all shipping in time of war,<sup>d</sup> will be equally binding as an act of parliament, because founded upon a prior law. But a proclamation to lay an embargo in time of peace upon all vessels laden with wheat (though in the time of a public scarcity) being contrary to law, and particularly to statute, 22 Car. II, c. 13 (Tillage, 1670), the advisers of such a proclamation and all persons acting under it found it necessary to be indemnified by a special act of parliament, 7 Geo. III, c. 7 (Indemnity, 1766). A proclamation for disarming papists is also

<sup>c</sup> 3 Inst. 162.

<sup>d</sup> 4 Mod. 177. 179.

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says our author, 'are the mirror by which the king's image is reflected.'—BENTHAM, *Fragment on Government* (Montague's edition), 114 n.

**The king's ubiquity.**—*From this ubiquity, the king can never be nonsuit; . . . is not said to appear by attorney.*

The latter consequence seems rather fanciful, since the king's attorney general has been for centuries an established officer, the head of the practicing bar; and the former, though true in form is not so in substance. In this country a criminal prosecution may be dismissed on several grounds even against the wish of the state's representative; while here, as in England, it has long been customary for him to enter on proper occasions a *nolle prosequi*, which is a voluntary nonsuit.—HAMMOND.

<sup>20</sup> Cited, 17 Wall. 196. The definition of a proclamation (by the President) is very fully considered here. A proclamation by the President of the United States takes effect from the date of its signing and before publication. (Four judges dissenting. *Lapeyre v. United States*, 17 Wall. 191.)—HAMMOND.

binding, being only in execution of what the legislature has first ordained: but a proclamation for allowing arms to papists, or for disarming any Protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers. Indeed, by the statute 31 Hen. VIII, c. 8 (Crown Proclamations, 1539), it was enacted that the king's proclamations should have the force of acts of parliament: a statute, which was calculated to introduce the most despotic tyranny; and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after.\*

§ 381. (4) The king as fountain of honor, office, and privilege.

(a) Power to create honors and titles of nobility.—The king is likewise the fountain of honor, of office, and of privilege:<sup>21</sup> and this

\* Stat. 1 Edw. VI. c. 12 (Criminal Law, 1547).

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<sup>21</sup> The appointing power.—I mention this power of appointing and dismissing the high officers of state by itself because it is so very important, but of course the king has a very general power of appointing not only those whom we speak of as collectively forming the ministry, but all or almost all of those who hold public offices of first-rate importance. Blackstone calls him the fountain of honor, of office and of privilege. As regards mere honors, it were needless to say much; the making of knights and baronets, the invention of new orders of knighthood, the conferring of ceremonial precedence, is no very great matter; and as to the power of making peers, which is of considerable importance, we have already spoken. But look at the whole legal structure of society, and we shall generally find that the holders of important public offices are appointed by the king and very commonly hold their posts merely during his pleasure. I do not think it possible to lay down any sweeping principle about this matter: the terms and mode of appointment vary very greatly. Thus almost all persons who have any judicial duties to perform are appointed by the king, but that is not universally true; the county court judges are appointed by the lord chancellor under statutory power. Again, we may say that since 1700 it has been the general policy of the legislature to secure the independence of the judges by making their tenure of office tenure during good behavior. The judges of the superior courts hold during good behavior, but can be dismissed on an address presented by both houses of parliament. The tenure of the county court judges is rather different: they can be removed by the lord chancellor for inability or misbehavior. On the other hand, the justices of the

in a different sense from that wherein he is styled the fountain of justice; for here he is really the parent of them. It is impossible that government can be maintained without a due subordination of rank; that the people may know and distinguish such as are set over them, in order to yield them their due respect and obedience; and also that the officers themselves, being encouraged by emulation and the hopes of superiority, may the better discharge their functions: and the law supposes that no one can be so good a judge of their several merits and services as the king himself who employs them. It has therefore entrusted with him the sole power of conferring dignities and honors, in confidence that he will bestow them upon none, but such as deserve them. And therefore all degrees of <sup>[272]</sup> nobility, of knighthood, and other titles are received by immediate grant from the crown: either expressed in writing, by writs or letters patent, as in the creations of peers and baronets; or by corporeal investiture, as in the creation of a simple knight.

§ 382. (b) **Appointing power.**—From the same principle also arises the prerogative of erecting and disposing of offices: for honors and offices are in their nature convertible and synonymous. All offices under the crown carry in the eye of the law an honor along with them; because they imply a superiority of parts and

peace, whose duties may perhaps be said to be in part judicial, in part executive, hold only during good pleasure and can be dismissed without the assignment of any cause. It is, on the other hand, the general policy of our modern law that executive officers shall hold only during good pleasure, shall be dismissable without the assignment of any cause. But we must look to the statute-book about each office, and not rely very confidently on any general principle.—MAITLAND, *Const. Hist. of England*, 428.

“Can the power of appointing to office be said, in our government, to belong properly to the legislature, or to the governor, or to the courts, so that its exercise by any save one of these departments is prohibited? Under the English system of government, it might be said that in a sense the king was the depository of the power of appointing to public office—‘the fountain of honor, of office, and of privilege,’ as Blackstone calls him. (1 *Comm.* 271.) But in our system there appears no indication that any single department of the government can be deemed the king’s successor in this regard.” *Ross v. Board of Chosen Freeholders of the County of Essex*, 69 N. J. L. 291, 55 *Atl.* 310, 311.



abilities, being supposed to be always filled with those that are most able to execute them. And, on the other hand, all honors in their original had duties or offices annexed to them: an earl, *comes*, was the conservator or governor of a county; and a knight, *miles*, was bound to attend the king in his wars. For the same reason, therefore, that honors are in the disposal of the king, offices ought to be so likewise; and as the king may create new titles, so may he create new offices: but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices; for this would be a tax upon the subject, which cannot be imposed but by act of parliament.<sup>†</sup> Wherefore, in 13 Hen. IV (1411), a new office being created by the king's letters patent for measuring cloths, with a new fee for the same, the letters patent were, on account of the new fee, revoked and declared void in parliament.

§ 383. (c) **Special privileges, franchises, naturalization.**—Upon the same or a like reason the king has also the prerogative of conferring privileges upon private persons. Such as granting place or precedence to any of his subjects, as shall seem good to his royal wisdom;<sup>‡</sup> or such as converting aliens, or persons born out of the king's dominions, into denizens; whereby some very considerable privileges of natural-born subjects are conferred upon them. Such also is the prerogative of erecting corporations; whereby a number of private persons are united and knit together, and enjoy many liberties, powers, and immunities in their politic [273] capacity, which they were utterly incapable of in their natural. Of aliens, denizens, natural-born, and naturalized subjects, I shall speak more largely in a subsequent chapter; as also of corporations at the close of this book of our Commentaries. I now only mention them incidentally, in order to remark the king's prerogative of making them; which is grounded upon this foundation, that the king, having the sole administration of the government in his hands, is the best and the only judge, in what capacities, with what privileges, and under what distinctions, his people are the best qualified to serve, and to act under him. A principle, which was carried so far by the imperial law, that it was deter-

† 2 Inst. 533.

‡ 4 Inst. 361.

mined to be the crime of sacrilege, even to doubt whether the prince had appointed proper officers in the state.<sup>b</sup>

§ 384. (5) The king as arbiter of commerce.—Another light, in which the laws of England consider the king with regard to domestic concerns, is as the arbiter of commerce. By commerce, I at present mean domestic commerce only. It would lead me into too large a field if I were to attempt to enter upon the nature of foreign trade, its privileges, regulations, and restrictions; and would be also quite beside the purpose of these Commentaries, which are confined to the laws of England. Whereas no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise: neither can they have a proper authority for this purpose. For, as these are transactions carried on between subjects of independent states, the municipal laws of one will not be regarded by the other. For which reason the affairs of commerce are regulated by a law of their own, called the law-merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular \*it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries; and that often even in matters relating to domestic trade, as, for instance, with regard to the drawing, the acceptance, and the transfer, of inland bills of exchange.\*<sup>1</sup>

[274] With us in England, the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles.

§ 385. (a) Markets and fairs.—First, the establishment of public marts, or places of buying and selling, such as markets and

\* First edition reads: "the law of England does in many cases refer itself to it, and leaves the causes of merchants to be tried by their own peculiar customs; and that often even in matters relating to inland trade, as for instance with regard to the drawing, the acceptance, and the transfer, of bills of exchange."

<sup>b</sup> *Disputare de principali judicio non oportet: sacrilegii enim instar est, dubitare an is dignus sit, quem elegerit imperator.* (It is not fit to dispute concerning the judgment of the prince; for it is a kind of sacrilege to doubt the eligibility of him whom the emperor shall have chosen.) C. 9. 29. 3.

<sup>1</sup> Co. Litt. 172. Raym. Ld. 181. 1542.

fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant, or by long and immemorial usage and prescription, which presupposes such a grant.<sup>k 22</sup> The limitation of these public resorts, to such time and such place as may be most convenient for the neighborhood, forms a part of economics, or domestic polity; which, considering the kingdom as a large family, and the king as the master of it, he clearly has a right to dispose and order as he pleases.<sup>23</sup>

<sup>k</sup> 2 Inst. 220.

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<sup>22</sup> Or by act of parliament. *Manchester Corporation v. Lyons*, 22 Ch. Div. 287.

<sup>23</sup> "On the argument, much was said by the plaintiffs of the importance of public markets, and the case was argued as if the right to maintain a market-house or to hold a market in Pennsylvania was a prerogative vested exclusively in the state, and one which no one can exercise without a grant from the commonwealth. At common law, in England, the establishment of public markets was no doubt a part of the king's prerogative, and no one could get up a market without a grant from him. Such grants were doubtless at one time fruitful sources of revenue to the royal exchequer. Their establishment was, as Blackstone says, 'a part of the economics or domestic polity, which, considering the kingdom as a large family and the king as master of it, he had the right to dispose of as he pleased.' (1 Bl. Comm. \*274.) These English markets, with their stewards, their toll, their courts of piepoudre, in which all disputes originating in them must be decided before the setting of the sun, their special privileges and peculiar customs, constituted an important feature in the domestic economy of every English neighborhood. They were a part of the royal prerogative, undoubtedly, but they never crossed the seas to this country in that capacity, any more than did the right to all royal fish, such as the whale and the sturgeon, the right to corodies, to wrecks, to treasure-trove, or to *bona waviata*. Our ancestors, when they transplanted on these shores the principles of English freedom, left behind them all royal prerogatives except such as were to be, in the hands of the people, the necessary instruments of the free government which they here established. I am not aware that it has ever been supposed or maintained in Pennsylvania that no man or association of men could set up a market-house or establish a market without a grant from the legislature. The right to be a corporation and to carry on any business in a corporate capacity is a right derived from the commonwealth. The right to maintain a market-house or to carry on the business of a market is not a right so derived, but is a right belonging to all citizens of the commonwealth alike, and which any citizen or any association of citizens may exercise without any grant or any warrant whatever from the commonwealth." *Twelfth St. Market Co. v. Philadelphia etc. R. Co.*, 142 Pa. 580, 21 Atl. 989, 993.

§ 386. (b) **Weights and measures.**—Secondly, the regulation of weights and measures. These, for the advantage of the public, ought to be universally the same throughout the kingdom; being the general criterions which reduce all things to the same or an equivalent value. But, as weight and measure are things in their nature arbitrary and uncertain, it is therefore expedient that they be reduced to some fixed rule or standard: which standard it is impossible to fix by any written law or oral proclamation; for no man can, by words only, give another an adequate idea of a foot-rule, or a pound-weight. It is therefore necessary to have recourse to some visible, palpable, material standard; by forming a comparison with which, all weights and measures may be reduced to one uniform size: and the prerogative of fixing this standard, our ancient law vested in the crown; as in Normandy it belonged to the duke.<sup>1</sup> This standard was originally kept at Winchester; and we find in the laws of King Edgar,<sup>m</sup> near a century before the Conquest, an injunction that the one measure, which was kept at Winchester, should be observed throughout the realm. Most nations have regulated the standard of measures of length by [275] comparison with the parts of the human body; as the palm, the hand, the span, the foot, the cubit, the ell (*ulna*, or arm), the pace, and the fathom. But, as these are of different dimensions in men of different proportions, our ancient historians<sup>n</sup> inform us, that a new standard of longitudinal measure was ascertained by King Henry the First; who commanded that the *ulna* or ancient ell, which answers to the modern yard, should be made of the exact length of his own arm. And, one standard of measures of length being gained, all others are easily derived from thence; those of greater length by multiplying, those of less by subdividing, that original standard. Thus, by the statute called *compositio ulnarum et perticarum* (composition of yards and perches), five yards and a half make a perch; and the yard is subdivided into three feet, and each foot into twelve inches; which inches will be each of the length of three grains of barley. Superficial measures are

<sup>1</sup> Gr. Coustum. c. 16.

<sup>m</sup> Cap. 8.

<sup>n</sup> Will. Malmsb. in Vita Hen. I. Spelm. Hen. I. apud Wilkins. 299.

derived by squaring those of length; and measures of capacity by cubing them. The standard of weights was originally taken from corns of wheat, whence the lowest denomination of weights we have is still called a grain; thirty-two of which are directed, by the statute called *compositio mensurarum* (the composition of measures), to compose a penny-weight, whereof twenty make an ounce, twelve ounces a pound, and so upwards. And upon these principles the first standards were made; which, being originally so fixed by the crown, their subsequent regulations have been generally made by the king in parliament. Thus, under King Richard I, in his parliament holden at Westminster, A. D. 1197, it was ordained that there should be only one weight and one measure throughout the kingdom, and that the custody of the assize or standard of weights and measures should be committed to certain persons in every city and borough;<sup>o</sup> from whence the ancient office of the king's alnager seems to have been derived, whose duty it was, for a certain fee, to measure all cloths made for sale, till the office was abolished by the statute 11 and 12 W. III, c. 20 (Taxation, 1700). In King John's time this ordinance of King Richard was [276] frequently dispensed with for money;<sup>p</sup> which occasioned a provision to be made for enforcing it, in the great charters of King John and his son.<sup>q</sup> These original standards were called *pondus regis* (the king's weight),<sup>r</sup> and *mensura domini regis* (the king's measure);<sup>s</sup> and are directed by a variety of subsequent statutes to be kept in the exchequer, and all weights and measures to be made conformable thereto.<sup>t</sup> But, as Sir Edward Coke observes,<sup>u</sup> though this hath so often by authority of parlia-

<sup>o</sup> Hoved. Matth. Paris.

<sup>p</sup> Hoved. A. D. 1201.

<sup>q</sup> 9 Hen. III. c. 25 (1225).

<sup>r</sup> Plac. 35 Edw. I. (1306) apud Cowel's Interpr. tit. *Pondus Regis*.

<sup>s</sup> Flet. 2. 12.

<sup>t</sup> 14 Edw. III. st. 1. c. 12 (Measures and Weights, 1340). 25 Edw. III. st. 5. c. 10 (Measures, 1351). 16 Rich. II. c. 3 (Weights and Measures, 1392). 8 Hen. VI. c. 5 (Weights, 1429). 11 Hen. VI. c. 8 (Weights and Measures, 1433). 11 Hen. VII. c. 4 (Weights and Measures, 1495). 22 Car. II. c. 8 (Measures of Corn and Salt, 1670).

<sup>u</sup> Inst. 41.



ment been enacted, yet it could never be effected; so forcible is custom with the multitude.<sup>24</sup>

§ 387. (c) **Coining money.**—Thirdly, as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current. Money is an universal medium, or common standard, by comparison with which the value of all merchandise may be ascertained: or it is a sign, which represents the respective values of all commodities. Metals are well calculated for this sign, because they are durable and are capable of many subdivisions: and a precious metal is still better calculated for this purpose, because it is the most portable. A metal is also the most proper for a common measure, because it can easily be reduced to the same standard in all nations: and every particular nation fixes on it its own impression, that the weight and standard (wherein consists the intrinsic value) may both be known by inspection only.

As the quantity of precious metals increases, that is, the more of them there is extracted from the mine this universal medium or common sign will sink in value, and grow less precious. Above a thousand millions of bullion are calculated to have been imported into Europe from America within less than three centuries; and the quantity is daily increasing. The consequence is, that more money must be given now for <sup>[277]</sup> the same commodity than was given an hundred years ago. And, if any accident was to diminish the quantity of gold and silver, their value would proportionately rise. A horse, that was formerly worth ten pounds, is now perhaps worth twenty; and, by any failure of current specie, the price may be reduced to what it was. Yet is the horse in reality neither dearer nor cheaper at one time than another: for, if the metal which constitutes the coin was formerly twice as scarce as at present, the commodity was then as dear at half the price, as now it is at the whole.

<sup>24</sup> The Weights and Measures Act, 1878, abolished most of the previous statutes on the subject, and has regulated the whole matter in the interest of simplicity and uniformity. The metric system of weights and measures is legalized by this act but not made compulsory. An act of 1897 contains other provisions in the same direction.

§ 388. (i) **Essentials of coinage.**—The coining of money is in all states the act of the sovereign power; for the reason just mentioned, that its value may be known on inspection. And with respect to coinage in general, there are three things to be considered therein; the materials, the impression, and the denomination.

§ 389. (aa) **Coin must be metal.**—With regard to the materials, Sir Edward Coke lays it down,<sup>v</sup> that the money of England must either be of gold or silver: and none other was ever issued by the royal authority till 1672, when copper farthings and half-pence were coined by King Charles the Second, and ordered by proclamation to be current in all payments, under the value of six-pence, and not otherwise. But this copper coin is not upon the same footing with the other in many respects, particularly with regard to the offense of counterfeiting it. And (as to the silver coin, it is enacted by statute 14 Geo. III, c. 42—Light Silver Coin, 1774), that no tender of payment in silver money, exceeding twenty-five pounds at one time, shall be a sufficient tender in law, for more than its value by weight, at the rate of 5s. 2d. an ounce.<sup>25</sup>

§ 390. (bb) **Coin must be stamped.**—As to the impression, the stamping thereof is the unquestionable prerogative of the crown: for, though divers bishops and monasteries had formerly the privilege of coining money, yet, as Sir Matthew Hale observes,<sup>w</sup> this was usually done by special grant from the king, or by prescription which [<sup>278</sup>] supposes one; and therefore was derived from, and not in derogation of, the royal prerogative. Besides that they had only the profit of the coinage, and not the power of instituting either the impression or denomination; but had usually the stamp sent them from the exchequer.

§ 391. (cc) **Value of coin must be fixed.**—The denomination, or the value for which the coin is to pass current, is likewise in

<sup>v</sup> 2 Inst. 577.

<sup>w</sup> 1 Hist. P. C. 191.

<sup>25</sup> The Coinage Act, 1870, now regulates the legal tender relations of gold, silver, and bronze (which has been substituted for copper). By an act of 1833, Bank of England notes, payable to bearer on demand, are legal tender, except by the bank itself.

the breast of the king; and, if any unusual pieces are coined, that value must be ascertained by proclamation. In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard,<sup>x</sup> and called sterling metal; a name for which there are various reasons given,<sup>y</sup> but none of them entirely satisfactory. And of this sterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III, c. 13 (Coinage, 1351). So that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value:<sup>z</sup> though Sir Matthew Hale<sup>a</sup> appears to be of another opinion. The king may also, by his proclamation, legitimate foreign coin, and make it current here; declaring at what value it shall be taken in payments.<sup>b</sup> But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. There is at present no such legitimated money; Portugal coin being only current by private consent, so that anyone who pleases may refuse to take it in payment. The king may also at any time decri, or cry down, any coin of the kingdom, and make it no longer current.<sup>c</sup> <sup>26</sup>

<sup>x</sup> This standard hath been frequently varied in former times; but hath for many years past been thus invariably settled. The pound troy of gold, consisting of twenty-two carats (or twenty-fourth parts) fine, and two of alloy, is divided into forty-four guineas, and an half of the present value of 21s. each. And the pound troy of silver, consisting of eleven ounces and two pennyweights pure, and eighteen pennyweights alloy, is divided into sixty-two shillings. (See Folkes on English Coins.)

<sup>y</sup> Spelm. Gloss. 203. (The ninth edition adds here, "Dufresne III. 165. The most plausible opinion seems to be that adopted by those two etymologists, that the name was derived from the *Esterlingi* or Easterlings; as those Saxons were anciently called, who inhabited that district of Germany, now occupied by the Hansetowns and their appendages; the earliest traders in modern Europe.")

<sup>z</sup> 2 Inst. 577.

<sup>a</sup> 1 Hal. P. C. 194.

<sup>b</sup> *Ibid.* 197.

<sup>c</sup> *Ibid.*

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<sup>26</sup> Parliament has, in fact, for over two hundred years regulated the coinage.

§ 392. (6) **The king as head of the church.**—<sup>[279]</sup> The king is, lastly, considered by the laws of England as the head and supreme governor of the national church.

To enter into the reasons upon which this prerogative is founded is matter rather of divinity than of law. I shall therefore only observe that by statute 26 Hen. VIII, c. 1 (Act of Supremacy, 1534) (reciting that the king's majesty justly and rightfully is and ought to be the supreme head of the church of England; and so had been recognized by the clergy of this kingdom in their convocation), it is enacted, that the king shall be reputed the only supreme head in earth of the church of England, and shall have, annexed to the imperial crown of this realm, as well the title and style thereof, as all jurisdictions, authorities, and commodities, to the said dignity of supreme head of the church appertaining. And another statute to the same purport was made, 1 Eliz., c. 1 (Act of Supremacy, 1558).

§ 393. (a) **The convocation.**—In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. This was an inherent prerogative of the crown, long before the time of Henry VIII, as appears by the statute 8 Hen. VI, c. 1 (Convocation, 1429), and the many authors, both lawyers and historians, vouched by Sir Edward Coke.<sup>d</sup> So that the statute 25 Hen. VIII, c. 19 (Crown, 1533), which restrains the convocation from making or putting in execution any canons repugnant to the king's prerogative, or the laws, customs, and statutes of the realm, was merely declaratory of the old common law:<sup>e</sup> that part of it only being new, which makes the king's royal assent actually necessary to the validity of every canon. The convocation or ecclesiastical synod, in England, differs considerably in its constitution from the synods of other Christian kingdoms: those consisting wholly of bishops; whereas with us the convocation is the miniature of a parliament, wherein the archbishop presides with regal state; the upper house of bishops represents the house of lords; and the lower house, composed of representatives of the several dioceses at large, and of each particular chapter therein, <sup>[280]</sup> resembles the house of commons

<sup>d</sup> 4 Inst. 322, 323.

<sup>e</sup> 12 Rep. 72.

with its knights of the shire and burgesses.<sup>†27</sup> This constitution is said to be owing to the policy of Edward I; who thereby at one and the same time let in the inferior clergy to the privileges of forming ecclesiastical canons (which before they had not), and also introduced a method of taxing ecclesiastical benefices, by consent of convocation.<sup>‡</sup>

§ 394. (b) **Nomination of bishops.**—From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishoprics, and certain other ecclesiastical preferments; which will more properly be considered when we come to treat of the clergy. I shall only here observe that this is now done in consequence of the statute 25 Hen. VIII, c. 20 (Annates, 1534).

§ 395. (c) **Appeals in ecclesiastical causes.**—As head of the church, the king is likewise the *dernier resort* (court of ultimate appeal) in all ecclesiastical causes; an appeal lying ultimately to him in chancery from the sentence of every ecclesiastical judge: which right was restored to the crown by statute 25 Hen. VIII, c. 19 (Crown, 1533), as will more fully be shown hereafter.<sup>28</sup>

<sup>†</sup> In the diet of Sweden, where the ecclesiastics form one of the branches of the legislature, the chamber of the clergy resembles the convocation of England. It is composed of the bishops and superintendents; and also of deputies, one of which is chosen by every ten parishes or rural deanery. *Mod. Un. Hist.* xxxiii. 18.

<sup>‡</sup> *Gilb. Hist. of Exch.* c. 4.

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<sup>27</sup> There are two convocations, one for the province of Canterbury, the other for the province of York.

<sup>28</sup> Appeals in ecclesiastical causes are now heard by the judicial committee of the privy council.



## CHAPTER THE EIGHTH.

## OF THE KING'S REVENUE.

§ 396. **The king's fiscal prerogatives.**—Having, in the preceding chapter, considered at large, those branches of the king's prerogative, which contribute to his royal dignity, and constitute the executive power of the government, we proceed now to examine the king's *fiscal* prerogatives, or such as regard his *revenue*; which the British constitution hath vested in the royal person, in order to support his dignity and maintain his power: being a portion which each subject contributes of his property, in order to secure the remainder.<sup>1</sup>

§ 397. **1. The king's ordinary revenue.**—This revenue is either ordinary or extraordinary. The king's ordinary revenue is such, as has either subsisted time out of mind in the crown; or else has been granted by parliament, by way of purchase or exchange for such of the king's inherent hereditary revenues, as were found inconvenient to the subject.

<sup>1</sup> It is an interesting and important fact, that, in spite of the great attention given to financial matters in the course of English constitutional development, and the early pre-eminence of parliament in questions of taxation, yet there is not, and never has been, legally speaking, any national revenue. In the early days of our history, the defense of the realm, and the other duties of government, were performed by the king with the aid of such funds as he could claim by conquest, inheritance, tradition or gift; supplemented occasionally, and with considerable difficulty, by the results of national taxation. In later days, the recurrence of taxes became regular and frequent; and, after much disputing, the respective rights of the crown and the parliament in the matter of taxation were settled. Moreover, though not until much later, a definite distinction began to be drawn between such of the royal expenditure as was concerned with the king's private and domestic life, and such of it as was devoted to strictly public objects. But still, the legal doctrine, that all public revenue is the revenue of the crown, that it can only be granted to, and on the request of, the crown, and that it can only be expended by the crown, remains a fundamental principle of our fiscal system. Wherefore, though the right of levying taxation has, of course, long since ceased, if it ever existed, to be part of the royal prerogative, it is strictly correct to treat of the revenue as a branch of the royal prerogative.—STEPHEN, 2 Comm. (16th ed.), 635.

When I say that it has subsisted time out of mind in the crown, I do not mean that the king is at present in the actual possession of the whole of this revenue. Much (nay, the greatest part) of it is at this day in the hands of subjects; to whom it has been granted out from time to time by the kings of England: which has rendered the crown in some measure dependent on the people for its ordinary support and subsistence. So that I must be obliged to recount, as part of the royal revenue, what lords of manors and other subjects [282] frequently look upon to be their own absolute right; because they are and have been vested in them and their ancestors for ages, though in reality originally derived from the grants of our ancient princes.

§ 398. a. Ecclesiastical revenues—(1) **Temporalities of bishops.**—The first of the king's ordinary revenues, which I shall take notice of, is of an ecclesiastical kind (as are also the three succeeding ones); viz., the custody of the temporalities of bishops: by which are meant all the lay revenues, lands, and tenements (in which is included his barony) which belong to an archbishop's or bishop's see. And these upon the vacancy of the bishopric are immediately the right of the king, as a consequence of his prerogative in church matters; whereby he is considered as the founder of all archbishoprics and bishoprics, to whom during the vacancy they revert. And for the same reason, before the dissolution of abbeys, the king had the custody of the temporalities of all such abbeys and priories as were of royal foundation (but not of those founded by subjects) on the death of the abbot or prior.<sup>a</sup> Another reason may also be given, why the policy of the law hath vested this custody in the king; because as the successor is not known, the lands and possessions of the see would be liable to spoil and devastation, if no one had a property therein. Therefore the law has given the king, not the temporalities themselves, but the *custody* of the temporalities, till such time as a successor is appointed; with power of taking to himself all the intermediate profits, without any account of the successor; and with the right of presenting (which the crown very frequently exercises) to such benefices and other preferments as fall within the time of vaca-

<sup>a</sup> 2 Inst. 15.

tion.<sup>b</sup> This revenue is of so high a nature, that it could not be granted out to a subject, before or even after, it accrued: but now by the statute 15 Edw. III, st. 4, c. 4 & 5 (1341), the king may, after the vacancy, lease the temporalities to the dean and chapter; saving to himself all advowsons, escheats, and the like. Our ancient kings, and particularly William Rufus, were not only remarkable for keeping the bishoprics a long time [283] vacant, for the sake of enjoying the temporalities, but also committed horrible waste on the woods and other parts of the estate; and to crown all, would never, when the see was filled up, restore to the bishop his temporalities again, unless he purchased them at an exorbitant price. To remedy which, King Henry the First<sup>c</sup> granted a charter at the beginning of his reign, promising neither to sell, nor let to farm, nor take anything from, the domains of the church, till the successor was installed. And it was made one of the articles of the great charter,<sup>d</sup> that no waste should be committed in the temporalities of bishoprics, neither should the custody of them be sold. The same is ordained by the statute of Westminster the First;<sup>e</sup> and the statute 14 Edw. III, st. 4, c. 4 (Episcopal Temporalities, 1340) (which permits, as we have seen, a lease to the dean and chapter), is still more explicit in prohibiting the other exactions. It was also a frequent abuse that the king would for trifling, or no causes, seize the temporalities of bishops, even during their lives, into his own hands: but this is guarded against by statute 1 Edw. III, st. 2, c. 2 (1326).

This revenue of the king, which was formerly very considerable, is now by a customary indulgence almost reduced to nothing: for at present, as soon as the new bishop is consecrated and confirmed, he usually receives the restitution of his temporalities quite entire, and untouched, from the king; and at the same time does homage to his sovereign: and then, and not sooner, he has a fee simple in his bishopric, and may maintain an action for the profits.<sup>f</sup>

<sup>b</sup> Stat. 17 Edw. II. c. 14 (1324). F. N. B. 32.

<sup>c</sup> Matt. Paris.

<sup>d</sup> 9 Hen. III. c. 5 (1225).

<sup>e</sup> 3 Edw. I. c. 21 (Lands in Ward, 1275).

<sup>f</sup> Co. Litt. 67. 341.

§ 399. (2) **Corodies.**—The king is entitled to a corody, as the law calls it, out of every bishopric, that is, to send one of his chaplains to be maintained by the bishop, or to have a pension allowed him till the bishop promotes him to a benefice.<sup>g</sup> This is also in the nature of an acknowledgment to the king, as founder of the see, since he had formerly the same corody or pension from every abbey or priory of royal foundation. It is, I [<sup>284</sup>] apprehend, now fallen into total disuse; though Sir Matthew Hale says,<sup>h</sup> that it is due of common right, and that no prescription will discharge it.

§ 400. (3) **Tithes.**—The king also (as was formerly observed<sup>i</sup>) is entitled to all the tithes arising in extraparochial places;<sup>k</sup> though perhaps it may be doubted how far this article, as well as the last, can be properly reckoned a part of the king's own royal revenue; since a corody supports only his chaplains, and these extraparochial tithes are held under an implied trust, that the king will distribute them for the good of the clergy in general.

§ 401. (4) **First-fruits and tenths.**—The next branch consists in the first-fruits, and tenths, of all spiritual preferments in the kingdom; both of which I shall consider together.

These were originally a part of the papal usurpations over the clergy of this kingdom; first introduced by Pandulph, the pope's legate, during the reigns of King John and Henry the Third, in the see of Norwich; and afterwards attempted to be made universal by the Popes Clement V and John XXII, about the beginning of the fourteenth century. The first-fruits, *primitiæ*, or *annates*, were the first year's whole profits of the spiritual preferment, according to a rate or *valor* made under the direction of Pope Innocent IV by Walter bishop of Norwich in 38 Hen. III (1253), and afterwards advanced in value by commission from Pope Nicholas III, A. D. 1292, 20 Edw. I;<sup>l</sup> which valuation of Pope Nicholas is still preserved in the exchequer.<sup>m</sup> The tenths, or *decimæ* were

<sup>g</sup> F. N. B. 230.

<sup>k</sup> 2 Inst. 647.

<sup>h</sup> Notes on F. N. B. above cited.

<sup>i</sup> F. N. B. 176.

<sup>l</sup> Page 113.

<sup>m</sup> 3 Inst. 154.

the tenth part of the annual profit of each living by the same valuation; which was also claimed by the holy see, under no better pretense than a strange misapplication of that precept of the Levitical law, which directs,<sup>a</sup> that the Levites, "should offer the tenth part of their tithes as a heave-offering to the Lord, and give it to Aaron the *high* priest." But [285] this claim of the pope met with a vigorous resistance from the English parliament; and a variety of acts were passed to prevent and restrain it, particularly the statute 6 Hen. IV, c. 1 (First-fruits, 1404), which calls it a horrible mischief and damnable custom. But the popish clergy, blindly devoted to the will of a foreign master, still kept it on foot; sometimes more secretly, sometimes more openly and avowedly; so that in the reign of Henry VIII, it was computed, that in the compass of fifty years 800,000 ducats had been sent to Rome for first-fruits only. And, as the clergy expressed this willingness to contribute so much of their income to the head of the church, it was thought proper (when in the same reign the papal power was abolished, and the king was declared the head of the church of England) to annex this revenue to the crown; which was done by statute 26 Hen. VIII, c. 3 (First-fruits, 1534), (confirmed by statute 1 Eliz., c. 4 (First-fruits, 1558), and a new *valor beneficiorum* (value of benefices) was then made, by which the clergy are at present rated.

By these last-mentioned statutes all vicarages under ten pounds a year, and all rectories under ten marks, are discharged from the payment of first-fruits: and if, in such livings as continue chargeable with this payment, the incumbent lives but half a year, he shall pay only one-quarter of his first-fruits; if but one whole year, then half of them; if a year and a half, three-quarters: and if two years, then the whole; and not otherwise. Likewise by the statute 27 Hen. VIII, c. 8 (First-fruits, 1535), no tenths are to be paid for the first year, for then the first-fruits are due: and by other statutes of Queen Anne, in the fifth and sixth years of her reign, if a benefice be under fifty pounds *per annum* clear yearly value, it shall be discharged of the payment of first-fruits and tenths.

<sup>a</sup> Numb. xviii. 26.



§ 402. (a) **Queen Anne's bounty.**—Thus the richer clergy, being, by the criminal bigotry of their popish predecessors, subjected at first to a foreign exaction, were afterwards, when that yoke was shaken off, liable to a like misapplication of their revenues, through the rapacious disposition of the then reigning monarch: till at length the piety of Queen Anne restored to the church what had been <sup>[286]</sup> thus indirectly taken from it. This she did, not by remitting the tenths and first-fruits entirely, but, in a spirit of the truest equity, by applying these superfluities of the larger benefices to make up the deficiencies of the smaller. And to this end she granted her royal charter, which was confirmed by the statute 2 Ann., c. 11 (Queen Anne's Bounty, 1703), whereby all the revenue of first-fruits and tenths is vested in trustees forever, to form a perpetual fund for the augmentation of poor livings. This is usually called Queen Anne's bounty; which has been still further regulated by subsequent statutes.<sup>o</sup>

§ 403. b. **Rents from the crown lands.**—The next branch of the king's ordinary revenue (which, as well as the subsequent branches, is of a lay or temporal nature) consists in the rents and profits of the demesne lands of the crown. These demesne lands, *terræ dominicales regis*, being either the share reserved to the crown at the original distribution of landed property, or such as came to it afterwards by forfeitures or other means, were anciently very large and extensive; comprising divers manors, honors, and lordships; the tenants of which had very peculiar privileges, as will be shown in the second book of these Commentaries, when we speak of the tenure in ancient demesne. At present they are contracted within a very narrow compass, having been almost entirely granted away to private subjects. This has occasioned the parliament frequently to interpose; and, particularly, after King William III had greatly impoverished the crown, an act passed,<sup>p</sup> whereby all future grants or leases from the crown for any longer term than thirty-one years or three lives are declared to be void; except with regard to houses, which may be granted for fifty years.

<sup>o</sup> 5 Ann. c. 24 (1705). 6 Ann. c. 27 (Taxation, 1706). 1 Geo. I. st. 2. c. 10 (Queen Anne's Bounty, 1714). 3 Geo. I. c. 10 (First Fruits, 1716).

<sup>p</sup> 1 Ann. st. 1. c. 7 (Crown Lands, 1702).

And no reversionary lease can be made, so as to exceed together with the estate in being, the same term of three lives or thirty-one years: that is, where there is a subsisting lease, of which there are twenty years still to come, the king cannot grant a future interest, to commence after the expiration of the former, for any longer term than eleven years. The tenant must also be made liable to be punished for committing waste; [287] and the usual rent must be reserved, or, where there has usually been no rent, one third of the clear yearly value.<sup>1</sup> The misfortune is, that this act was made too late, after almost every valuable possession of the crown had been granted away forever, or else upon very long leases; but may be of some benefit to posterity, when those leases come to expire.<sup>2</sup>

§ 404. c. Prerogative of purveyance.—Hither might have been referred the advantages which used to arise to the king from the profits of his military tenures, to which most lands in the kingdom were subject, till the statute 12 Car. II, c. 24 (Military Tenures, 1660), which in great measure abolished them all: the explanation of the nature of which tenures must be referred to the second book of these Commentaries. Hither also might have been referred the profitable prerogative of purveyance and pre-emption: which was a right enjoyed by the crown of buying up provisions and other necessities, by the intervention of the king's purveyors, for the use of his royal household, at an appraised valuation, in preference to all others, and even without consent of the owner: and also of forcibly impressing the carriages and horses of the subject, to do the king's business on the public roads, in the conveyance of timber, baggage, and the like, however inconvenient to the proprietor, upon paying him a settled price. A prerogative, which prevailed pretty generally throughout Europe, during the

<sup>1</sup> In like manner by the civil law, the inheritances or *fundi patrimoniales* (lands of inheritance) of the imperial crown could not be alienated, but only let to farm. Cod. l. 11. t. 61.

<sup>2</sup> Cited, 1 Halst. 80. In the American colonies grants of royal franchises in navigable waters, etc., to the original patentees vested to them in their public, not in their private capacity, and the rights are now vested in the people of the respective states. (Arnold v. Mundy, 1 Halst. 80.)—HAMMOND.

scarcity of gold and silver, and the high valuation of money consequential thereupon. In those early times the king's household (as well as those of inferior lords) were supported by specific renders of corn, and other victuals, from the tenants of the respective demesnes; and there was also a continual market kept at the palace gate to furnish viands for the royal use.\* And this answered all purposes, in those ages of simplicity, so long as the king's court continued in any certain place. But when it removed from one part of the kingdom to another (as was formerly very frequently done) it was found necessary to send [288] purveyors beforehand, to get together a sufficient quantity of provisions and other necessities for the household: and, lest the unusual demand should raise them to an exorbitant price, the powers before mentioned were vested in these purveyors: who in process of time very greatly abused their authority, and became a great oppression to the subject, though of little advantage to the crown; ready money in open market (when the royal residence was more permanent, and specie began to be plenty) being found upon experience to be the best proveditor of any. Wherefore by degrees the powers of purveyance have declined, in foreign countries as well as our own: and particularly were abolished in Sweden by Gustavus Adolphus, towards the beginning of the last century.<sup>s</sup> And, with us in England, having fallen into disuse during the suspension of monarchy, King Charles at his restoration consented, by the same statute, to resign entirely these branches of his revenue and power: and the parliament, in part of recompense, settled on him, his heirs, and successors, forever, the hereditary excise of fifteen pence *per* barrel on all beer and ale sold in the kingdom, and a proportionable sum for certain other liquors. So that this hereditary excise, the nature of which shall be further explained in the subsequent part of this chapter, now forms the sixth branch of his majesty's ordinary revenue.

§ 405. *d. Wine licenses.*—A seventh branch might also be computed to have arisen from wine licenses; or the rents payable to the crown by such persons as are licensed to sell wine by retail throughout England, except in a few privileged places. These

\* 4 Inst. 273.

<sup>s</sup> Mod. Un. Hist. xxxiii. 220.

were first settled on the crown by the statute 12 Car. II, c. 25 (Wine, 1660), and, together with the hereditary excise, made up the equivalent in value for the loss sustained by the prerogative in the abolition of the military tenures, and the right of pre-emption and purveyance: but this revenue was abolished by the statute 30 Geo. II, c. 19 (National Debt, 1756), and an annual sum of upwards of 7,000*l. per annum*, issuing out of the new stamp duties imposed on wine licenses, was settled on the crown in its stead.

§ 406. e. **Profits from the forests.**—<sup>[289]</sup> An eighth branch of the king's ordinary revenue is usually reckoned to consist in the profits arising from his forests. Forests are waste grounds belonging to the king, replenished with all manner of beasts of chase or venary; which are under the king's protection, for the sake of his royal recreation and delight: and, to that end, and for preservation of the king's game, there are particular laws, privileges, courts and officers belonging to the king's forests; all which will be, in their turns, explained in the subsequent books of these Commentaries. What we are now to consider are only the profits arising to the king from hence, which consist principally in amercements or fines levied for offenses against the forest laws. But as few, if any, courts of this kind for levying amercements<sup>ss</sup> have been held since 1632, 8 Car. I, and as, from the accounts given of the proceedings in that court by our histories and law books,<sup>†</sup> nobody would now wish to see them again revived, it is needless (at least in this place) to pursue this inquiry any further.

§ 407. f. **Judicial fines and fees.**—The profits arising from the king's ordinary courts of justice make a ninth branch of his revenue. And these consist not only in fines imposed upon offenders, forfeitures of recognizances, and amercements levied upon defaulters; but also in certain fees due to the crown in a variety of legal matters, as, for setting the great seal to charters, original writs, and other forensic proceedings, and for permitting fines to

<sup>ss</sup> Roger North, in his *Life of Lord Keeper North* (43, 44). mentions an *eyre*, or *iter*, to have been held south of Trent soon after the restoration; but I have met with no report to its proceedings.

<sup>†</sup> 1 Jones. 267, 298.

be levied of lands in order to bar entails, or otherwise to insure their title. As none of these can be done without the immediate intervention of the king, by himself or his officers, the law allows him certain perquisites and profits, as a recompense for the trouble he undertakes for the public. These, in process of time, have been almost all granted out to private persons, or else appropriated to certain particular uses: so that, though our law proceedings are still loaded with their payment, very little of them is now returned into the king's [290] exchequer; for a part of whose royal maintenance they were originally intended. All future grants of them, however, by the statute 1 Ann., st. 2, c. 7 (1702), are to endure for no longer time than the prince's life who grants them.<sup>3</sup>

§ 408. g. Royal fish.—A tenth branch of the king's ordinary revenue, said to be grounded on the consideration of his guarding and protecting the seas from pirates and robbers, is the right to *royal fish*, which are whale and sturgeon: and these, when either thrown ashore, or caught near the coasts, are the property of the king, on account<sup>v</sup> of their superior excellence. Indeed, our ancestors seem to have entertained a very high notion of the importance of this right; it being the prerogative of the kings of Denmark and the dukes of Normandy;<sup>u</sup> and from one of these it was probably derived to our princes. It is expressly claimed and allowed in the statute *de prerogativa regis* (of the king's prerogative):<sup>w</sup> and the most ancient treatises of law now extant make mention of it;<sup>x</sup> though they seem to have made a distinction

<sup>v</sup> Plowd. 315.

<sup>u</sup> Stiernh. de Jure Sueconum. 1, 2. c. 8. Gr. Coustum. cap. 17.

<sup>w</sup> 17 Edw. II c. 11 (1324).

<sup>x</sup> Bracton l. 3. c. 3. Britton. c. 17. Fleta. l. 1. c. 45 & 46. Memorand. Scacch. H. 24 Edw. I. 37 (1296), prefixed to Maynard's Year-Book of Edward II.

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<sup>3</sup> The fees formerly due to the crown in legal matters have been greatly reduced through improvements in the administration of justice, and are, for the most part, prepaid by way of stamps affixed to legal documents.

<sup>4</sup> Pollock and Maitland, Hist. of Eng. Law (2d ed.), I, 336, repudiate the idea that there was any statute of this name, speaking of it as the "apocryphal statute of *Prærogativa Regis*, which may represent the practice of the earlier years of Edward I."



between whale and sturgeon, as was incidentally observed in a former chapter.<sup>7</sup>

§ 409. *h. Wrecks.*—Another maritime revenue, and founded partly upon the same reason, is that of shipwrecks: which are also declared to be the king's property by the same prerogative statute 17 Edw. II, c. 11 (1324), and were so, long before, at the common law. It is worthy observation, how greatly the law of wrecks has been altered, and the rigor of it gradually softened in favor of the distressed proprietors. Wreck, by the ancient common law, was where any ship was lost at sea, and the goods or cargo were thrown upon the land; in which case these goods, so wrecked, were adjudged to belong to the king: for it was held, that, by the loss of the ship, all property was gone out of the original owner.<sup>2</sup> But this was undoubtedly adding sorrow to sorrow, and was consonant neither to reason nor humanity. Wherefore it was first [291] ordained by King Henry I, that if any person escaped alive out of the ship it should be no wreck; <sup>a</sup> and afterwards King Henry II, by his charter,<sup>b</sup> declared, that if on the coasts of either England, Poictou, Oleron, or Gascony, any ship should be distressed, and either man or beast should escape or be found therein alive, the goods should remain to the owners, if they claimed them within three months; but otherwise should be esteemed a wreck, and should belong to the king, or other lord of the franchise. This was again confirmed with improvements by King Richard the First; who, in the second year of his reign,<sup>c</sup> not only established these concessions, by ordaining that the owner, if he was shipwrecked and escaped, "*omnes res suas liberas et quietas haberet* (that he should have all his goods free and undisturbed)," but also, that if he perished, his children, or in default of them his brethren and sisters, should retain the property; and, in default of brother or sister, then the goods should remain to the king.<sup>d</sup> And the law,

<sup>7</sup> C. 4, page \*223.

<sup>2</sup> Dr. & St. d. 2, c. 51.

<sup>a</sup> Spelm. Cod. apud Wilkins. 305.

<sup>b</sup> 26 May, A. D. 1174. 1 Rym. Fœd. 36.

<sup>c</sup> Rog. Hoved. in Rich. I.

<sup>d</sup> In like manner Constantine the Great, finding that by the imperial law the revenue of wrecks was given to the prince's treasury or *fiscus*, restrained it

as laid down by Bracton in the reign of Henry III, seems still to have improved in its equity. For then, if not only a dog (for instance) escaped, by which the owner might be discovered, but if any certain mark were set on the goods, by which they might be known again, it was held to be no wreck.\* And this is certainly most agreeable to reason; the rational claim of the king being only founded upon this, that the true owner cannot be ascertained.

\*Afterwards, in the statute of Westminster the First,<sup>f</sup> the time of limitation of claims, given by the charter of Henry II, is extended to a year and a day, according to the usage of Normandy:<sup>g</sup> and it enacts; that if a man, a dog, or a cat, escape alive, the vessel shall not be adjudged a wreck. These animals, as in Bracton, are only put for example;<sup>h</sup> for it is now held,<sup>i</sup> that not only if any live thing escape, but if proof can be made of the [292] property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. The statute further ordains, that the sheriff of the county shall be\* bound to keep the goods a year and a day (as in France for one year, agreeably to the maritime laws of Oleron,<sup>j</sup> and in Holland for a year and a half) that if any man can prove a property in them, either in his own right or by right of representation,<sup>k</sup> they shall be restored to him without delay; but, if no such property be proved within that time, they then shall

\* Previously, "But afterwards in the statute of Westminster the First, the law is laid down more agreeable to the charter of King Henry the Second: and upon that statute hath stood the legal doctrine of wrecks to the present time. It enacts that if any live thing escape (a man, a cat, or a dog; which, as in Bracton, are only put for examples) in this case, and, as it seems in this case only, it is clearly not a legal wreck; but the sheriff of the county is."

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by an edict (Cod. 11. 5. 1.) and ordered them to remain to the owners; adding this humane expostulation, "*Quod enim jus habet fiscus in aliena calamitate, ut de re tam luctuosa compendium sectetur?*" (For what right has the exchequer in other men's misfortunes, that it should seek gain from so lamentable a source?)"

e Bract. 1. 3. c. 3.

f 3 Edw. I. c. 4 (Wreckage, 1275).

g Gr. Coustum. c. 17.

h Flet. 1. 1. c. 44. 2 Inst. 167. 5 Rep. 107.

i Hamillon v. Davies, Trin. 11 Geo. III. (1771) B. R.

j § 28.

k 2 Inst. 168.

be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead.<sup>1</sup> This revenue of wrecks is frequently granted out to lords of manors, as a royal franchise; and if anyone be thus entitled to wrecks in his own land, and the king's goods are wrecked thereon, the king may claim them at any time, even after the year and day.<sup>m 5</sup>

§ 410. (1) *Jetsam, flotsam, and ligan*.—It is to be observed, that, in order to constitute a legal *wreck*, the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan*. *Jetsam* is where goods are cast into the sea, and there sink and remain under water: *flotsam* is where they continue swimming on the surface of the waves: *ligan* is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again.<sup>n</sup> These are also the king's if no owner appears to claim them; but, if any owner appears, he is entitled to recover the possession. For even if they be cast overboard, without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property:<sup>o</sup> much less can things *ligan* be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the [293]

<sup>1</sup> Plowd. 166.

<sup>m</sup> 2 Inst. 168. Bro. Abr. tit. Wreck.

<sup>n</sup> 5 Rep. 106.

<sup>o</sup> *Quæ enim res in tempestate, levandæ navis causa, ejiciuntur, hæ dominorum permanent. Quia palam est, eas non eo animo ejici, quod quis habere nolit.* (Those things which are cast overboard for the sake of lightening the ship still belong to the owners. For it is clear that they were not thrown away as relinquished on any other account.) Inst. 2. 1. § 48.

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<sup>5</sup> *Wreck of the sea*, in this the purely technical sense of the common law, by which it constitutes a royal franchise, and is excluded from admiralty jurisdiction, is entirely different from "wreck" or shipwrecked property, in the sense of the maritime and commercial law. The latter is *flotsam, jetsam, or ligan*: only that which is cast upon the land is *wreck*. (See 3 Comm. 106; 1 Hagg. Adm. 17; U. S. v. Coombs, 12 Pet. 72, 77, where the text is cited; Garner's Case, 3 Gratt. 761.)—HAMMOND.

king's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass.<sup>p</sup>

§ 411. (2) Statutes protecting wrecks; salvage.—Wrecks, in their legal acceptation, are at present not very frequent: for, if any goods come to land, it rarely happens, since the improvement of commerce, navigation, and correspondence, that the owner is not able to assert his property within the year and day limited by law. And in order to preserve this property entire for him, and if possible to prevent wrecks at all, our laws have made many very humane regulations; in a spirit quite opposite to those savage laws, which formerly prevailed in all the northern regions of Europe, and a few years ago were still said to subsist on the coasts of the Baltic sea, permitting the inhabitants to seize on whatever they could get as lawful prize; or, as an author of their own expresses it, “*in naufragorum miseria et calamitate tanquam vultures ad prædam currere* (to run like vultures to their prey, amidst the misery and calamity of shipwrecked sufferers).”<sup>q</sup> For by the statute 27 Edw. III, c. 13 (Goods Stolen at Sea, 1353), if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck), they shall be presently delivered to the merchants, paying only a reasonable reward to those that saved and preserved them, which is entitled *salvage*. Also by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution.<sup>r</sup> And by statute 12 Ann., st. 2, c. 18 (Relief of the Poor, 1713), confirmed by 4 Geo. I, c. 12 (Stranded Ships, 1717), in order to assist the distressed, and prevent the scandalous illegal practices on some of our sea coasts (too similar to those on the Baltic), it is enacted, that all head officers and others of towns near the sea shall, upon application made to them, summon as many hands as are necessary, and send them to the relief of any ship in distress, on forfeiture of 100*l.*, and, in case of assistance given, salvage shall be paid by the owners, to be assessed by three neighboring justices. All persons that

<sup>p</sup> 5 Rep. 108.

<sup>r</sup> F. N. B. 112.

<sup>q</sup> Stiernh. de Jure Sueon, 1. 3. c. 5.

secrete any goods shall forfeit their treble value: and if they willfully do any act whereby the ship is lost or destroyed, [294] by making holes in her, stealing her pumps, or otherwise, they are guilty of felony, without benefit of clergy. Lastly, by the statute 26 Geo. II, c. 19 (Stealing Shipwrecked Goods, 1753), plundering any vessel either in distress, or wrecked, and whether any living creature be on board, or not (for, whether wreck or otherwise, it is clearly not the property of the populace), such plundering, I say, or preventing the escape of any person that endeavors to save his life, or wounding him with intent to destroy him, or putting out false lights in order to bring any vessel into danger, are all declared to be capital felonies in like manner as the destroying of trees, steeples, or other stated sea-marks, is punished by the statute 8 Eliz., c. 13 (Sea-marks and Mariners, 1566), with a forfeiture of 100*l.* or outlawry. Moreover, by the statute of George II, pilfering any goods cast ashore is declared to be petty larceny; and many other salutary regulations are made, for the more effectually preserving ships of any nation in distress.<sup>s 6</sup>

§ 412. **i. Royal mines.**—A twelfth branch of the royal revenue, the right to mines, has its original from the king's prerogative of coinage, in order to supply him with materials; and therefore those mines, which are properly royal, and to which the king is entitled when found, are only those of silver and gold.<sup>ss</sup> By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some the whole was a royal mine, and belonged to the king; though others held that it only did so, if the

<sup>s</sup> By the civil law, to destroy persons shipwrecked, or prevent their saving the ship, is capital. And to steal even a plank from a vessel in distress, or wrecked, makes the party liable to answer for the whole ship and cargo. (Ff. 47. 9. 3.) The laws also of the Wisigoths, and the most early Neapolitan constitutions, punished with the utmost severity all those who neglected to assist any ship in distress, or plundered any goods cast on shore. (Lindenbrog. Cod. LL. Antiqu. 146. 715.)

<sup>ss</sup> 2 Inst. 577.

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<sup>6</sup> The law of wreck and salvage is now governed by the Merchant Shipping Act, 1894, and the acts amendatory thereof. The general superintendence of all matters relating to wreck is in the hands of the board of trade.



quantity of gold or silver was of greater value than the quantity of base metal.<sup>t</sup> But now by the statutes 1 W. & M., st. 1, c. 30 (Crown Mines, 1689), and 5 W. & M., c. 6 (Crown Mines, 1693), this difference is made immaterial; it being enacted, that no mines of copper, tin, iron, or lead, shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities: but that the king, or [295] persons claiming royal mines under his authority, may have the ore (other than tin-ore in the counties of Devon and Cornwall), paying for the same a price stated in the act. This was an extremely reasonable law: for now private owners are not discouraged from working mines, through a fear that they may be claimed as royal ones: neither does the king depart from the just rights of his revenue, since he may have all the precious metal contained in the ore, paying no more for it than the value of the base metal which it is supposed to be; to which base metal the land owner is by reason and law entitled.

§ 413. j. **Treasure-trove.**—To the same original may in part be referred the revenue of treasure-trove (derived from the French word, *trover*, to find), called in Latin *thesaurus inventus*, which is where any money or coin, gold, silver, plate, or bullion, is found hidden in the earth, or other private place, the owner thereof being unknown; in which case the treasure belongs to the king:<sup>7</sup> but if he that hid it be known, or afterwards found out, the owner and

<sup>t</sup> Plowd. 336. (Previous to fourth edition, "366.")

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<sup>7</sup> "Lost property was such as was found on the surface of the earth, and with which the owner had involuntarily parted. The presumption arising from the place of finding was that the owner had intended to abandon his property, and that it had gone back to the original stock, and therefore belonged to the finder or first taker until the owner appeared and showed that its losing was accidental, or without an intention to abandon the property. Treasure-trove, on the other hand, was money or coin found hidden or secreted in the earth or other private place, the owner being unknown. It originally belonged to the finder if the owner was not discovered; but Blackstone says it was afterward adjudged expedient, for the purposes of state, and particularly for the coinage, that it should go to the king; and so the rule was promulgated that property found on the surface of the earth belonged to the finder until the owner appeared, but that found hidden in the earth belonged to the king. 1 Bl. Comm. \*295. In this country the law relating to treasure-trove has

not the king is entitled to it." Also if it be found in the sea, or upon the earth, it doth not belong to the king, but the finder, if no owner appears.<sup>w</sup> So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property: Bracton<sup>x</sup> defining it, in the words of the civilians, to be "*vetus depositio pecuniæ* (the previous concealment of the money)."<sup>8</sup> This difference clearly arises from the different intentions which the law implies in the owner. A man that hides his treasure in a secret place, evidently does not mean to relinquish his property; but reserves a right of claiming it again, when he sees occasion: and, if he dies and the secret also dies with him, the law gives it the king, in part of his royal revenue. But a man that scatters his treasure into the sea, or upon the public surface of the earth, is construed to have absolutely abandoned his property, and returned it into the common stock, without any intention of reclaiming it; and therefore it belongs, as in a state of nature, to the first occupant, or finder; unless the owner appear and assert his right, which [296] then proves that the loss was by accident, and not with an intent to renounce his property.

Formerly all treasure-trove belonged to the finder;<sup>y</sup> as was also the rule of the civil law.<sup>z</sup> Afterwards it was judged expedient for the purposes of the state, and particularly for the coinage, to allow part of what was so found to the king; which part was assigned to be all *hidden* treasure; such as is *casually lost* and unclaimed, and also such as is *designedly abandoned*, still remaining the right of the fortunate finder. And that the prince shall be entitled to this hidden treasure is now grown to be, according to Grotius,<sup>a</sup>

u 3 Inst. 132. Dalt. of Sheriffs. c. 16.

w Britt. c. 17. Finch. L. 177.

x 1. 3. c. 3. § 4.

y Bracton. 1. 3. c. 3. 3 Inst. 133.

z Ff. 41. 1. 31.

a De jur. b. & p. 1. 2. c. 8. § 7.

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generally been merged into the law of the finder of lost property, and it is said that the question as to whether the English law of treasure-trove obtains in any state has never been decided in America. 2 Kent, \*357." Danielson v. Roberts, 44 Or. 108, 102 Am. St. Rep. 627, 65 L. R. A. 526, 74 Pac. 913, 914.

<sup>8</sup> For a recent instance of treasure-trove, see the case of A.-G. v. Trustees of British Museum, [1903] 2 Ch. 598.

“*jus commune, et quasi gentium* (the common law, and, as it were, the law of nations)”: for it is not only observed, he adds, in England, but in Germany, France, Spain, and Denmark. The finding of deposited treasure was much more frequent, and the treasures themselves more considerable, in the infancy of our constitution than at present. When the Romans, and other inhabitants of the respective countries which composed their empire were driven out by the northern nations, they concealed their money underground: with a view of resorting to it again when the heat of the irruption should be over, and the invaders driven back to their deserts. But, as this never happened, the treasures were never claimed; and on the death of the owners the secret also died along with them. The conquering generals, being aware of the value of these hidden mines, made it highly penal to secrete them from the public service. In England, therefore, as among the feudists,<sup>b</sup> the punishment of such as concealed from the king the finding of hidden treasure was formerly no less than death; but now it is only fine and imprisonment.<sup>c</sup>

§ 414. k. Waifs.—Waifs, *bona wariata*, are goods stolen, and waived or thrown away by the thief in his flight, for fear of being apprehended. These are given to the king by the law, as a punishment upon the owner, for not himself pursuing the felon, and taking away his goods from him.<sup>d</sup> And therefore [297] if the party robbed do his diligence immediately to follow and apprehend the thief (which is called making fresh *suit*), or do convict him afterwards, or procure evidence to convict him, he shall have his goods again.<sup>e</sup> Waived goods do also not belong to the king, till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the king shall never have them.<sup>f</sup> If the goods are hid by the thief, or left anywhere by him, so that he had them not about him, when he fled, and therefore did not throw them away in his flight; these also are not *bona wariata*, but the owner may have them again when he pleases.<sup>g</sup> The goods of a foreign merchant, though stolen and

<sup>b</sup> Glanv. l. 1. c. 2. Crag. l. 16. 40.

<sup>c</sup> 3 Inst. 133.

<sup>d</sup> Cro. Eliz. 694.

<sup>e</sup> Finch. L. 212.

<sup>f</sup> *Ibid.*

<sup>g</sup> 5 Rep. 109.

thrown away in flight, shall never be waifs:<sup>h</sup> the reason whereof may be, not only for the encouragement of trade, but also because there is no willful default in the foreign merchant's not pursuing the thief, he being generally a stranger to our laws, our usages, and our language.

§ 415. 1. Estrays.—Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them; in which case the law gives them to the king as the general owner and lord paramount of the soil, in recompense for the damage which they may have done therein: and they now most commonly belong to the lord of the manor, by special grant from the crown. But, in order to vest an absolute property in the king, or his grantees, they must be proclaimed in the church and two market towns next adjoining to the place where they are found: and then, if no man claims them, after proclamation and a year and a day passed, they belong to the king or his substitute without redemption;<sup>i</sup> even though the owner were a minor, or under any other legal incapacity.<sup>k</sup> A provision similar to which obtained in the old Gothic constitution, with regard to all things that were found, which were to be thrice proclaimed; *primum coram comitibus et viatoribus obviis, deinde in proxima* [298] *villa vel pago, postremo coram ecclesia vel judicio* (first before the inhabitants of the place and passing travelers, then in the next town or village, lastly before the church, or judgment court): and the space of a year was allowed for the owner to reclaim his property.<sup>l</sup> If the owner claims them within the year and day, he must pay the charges of finding, keeping, and proclaiming them.<sup>m</sup> The king or lord has no property till the year and day passed: for if a lord keepeth an estray three-quarters of a year, and within the year it strayeth again, and another lord getteth it, the first lord cannot take it again.<sup>n</sup> Any beast may be an estray, that is by nature

<sup>h</sup> Fitzh. Abr. tit. Estray. 1. 3 Bulstr. 19.

<sup>i</sup> Mirr. c. 3. § 19.

<sup>k</sup> 5 Rep. 108. Bro. Abr. tit. Estray. Cro. Eliz. 716.

<sup>l</sup> Stiernh. de Jur. Gothor. 1, 3. c. 5.

<sup>m</sup> Dalt. Sh. 79.

<sup>n</sup> Finch. L. 177.

tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle;<sup>9</sup> and so Fleta<sup>o</sup> defines it, *pecus vagans, quod nullus petit, sequitur vel advocat* (wandering cattle, which no one seeks, follows, or calls to). For animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ* (wild by nature), as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl;<sup>p</sup> whence they are said to be royal fowl. The reason of which distinction seems to be, that, cattle and swans being of a reclaimed nature, the owner's property in them is not lost merely by their temporary escape; and they also, from their intrinsic value, are a sufficient pledge for the expense of the lord of the franchise in keeping them the year and day. For he that takes an estray is found so long as he keeps it to find it in provisions and keep it from damage;<sup>q</sup> and may not use it by way of labor, but is liable to an action for so doing.<sup>r</sup> Yet he may milk a cow, or the like; for that tends to the preservation, and is for the benefit, of the animal.<sup>s 10</sup>

§ 416. (1) *Bona vacantia*.—Besides the particular reasons before given why the king should have the several revenues of royal fish, shipwrecks, treasure-trove, waifs, and estrays, there is also one general reason which holds for them all; and that is, because they are *bona vacantia*, or goods in which no one else can claim a property. And therefore by the law of nature they belonged to the first occupant or finder; and so continued under the [299] imperial law. But, in settling the modern constitutions of most of the governments in Europe, it was thought proper (to pre-

<sup>o</sup> 1. 1. c. 43.

<sup>r</sup> Cro. Jac. 147.

<sup>p</sup> 7 Rep. 17.

<sup>s</sup> Cro. Jac. 148. Noy. 119.

<sup>q</sup> 1 Roll. Abr. 889.

<sup>9</sup> "Blackstone uses the term 'cattle' as a general one, comprehending sheep, oxen, swine, and horses. 1 Bl. Comm. 298. It may comprehend any livestock kept for use or profit; animals useful for food or labor. And. Law Dict., p. 155." *Haigh v. Bell*, 41 W. Va. 19, 31 L. R. A. 131, 23 S. E. 666, 667.

<sup>10</sup> Cited, 30 Mich. 211; Walk. (Miss.) 294; 14 Tex. 430; 2 Gall. 388. Whether the owner must be unknown in all cases to constitute an estray is doubted in *State v. Apel*, 14 Tex. 428, 430.—HAMMOND.



vent that strife and contention, which the mere title of occupancy is apt to create and continue, and to provide for the support of public authority in a manner the least burdensome to individuals) that these rights should be annexed to the supreme power by the positive laws of the state. And so it came to pass that, as Bracton expresses it,<sup>†</sup> *hæc quæ nullius in bonis sunt, et olim fuerunt inventoris de jure naturali, jam efficiuntur principis de jure gentium* (those things which are no man's property and formerly belonged to the finder as by natural right, become now the property of the king by the law of nations).

§ 417. **m. Forfeitures.**—The next branch of the king's ordinary revenue consists in forfeitures of lands and goods for offenses; *bona confiscata*, as they are called by the civilians, because they belonged to the *fiscus* or imperial treasury; or, as our lawyers term them, *forisfacta*, that is, such whereof the property is gone away or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom, which every man must sacrifice when he enters into social communities. If, therefore, a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offense of an atrocious kind, the laws of England have exacted a total confiscation of the movables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immovables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemeanors.<sup>11</sup> I therefore only mention

<sup>†</sup> l. 1. c. 12.

<sup>11</sup> No forfeiture of property now takes place, under the law of England, on conviction of its owner for felony.

them here, for [300] the sake of regularity, as a part of the *census regalis* (the royal revenue); and shall postpone for the present the further consideration of all forfeitures, excepting one species only, which arises from the misfortune rather than the crime of the owner, and is called a *deodand*.<sup>12</sup>

<sup>12</sup> **Theory of the deodand.**—In English men called the deodand, the *bane*, that is, the slayer. In accordance with ancient ideas this bane, we take it, would have gone to the kinsmen of the slain; the owner would have purchased his peace by a surrender of the noxal thing; but what we have said above about intestacy [p. 356] will prepare us to see that in the thirteenth century the claim of a soul which has been hurried out of this world outweighs the claim of the dead man's kinsfolk, and in the past they will have received the bane, not as a compensation for the loss that they suffered, but rather as an object upon which their vengeance must be wreaked before the dead man will lie in peace. Even therefore when, as was commonly the case, the bane was a thing that belonged to the dead man, none the less it was deodand. The deodand may warn us that in ancient criminal law there was a sacral element which Christianity could not wholly suppress, especially when what might otherwise have been esteemed a heathenry was in harmony with some of those strange old dooms that lie embodied in the holy books of the Christian. Also it is hard for us to acquit ancient law of that unreasoning instinct that impels the civilized man to kick, or consign to eternal perdition, the chair over which he has stumbled. (Holmes, Common Law, p. 11; Wigmore, Harvard Law Rev. vii, p. 317, n. 8.)—POLLOCK & MAITLAND, 2 Hist. Eng. Law (2d ed.), 473.

The instinct which leads the golfer to break his club so that it shall bring no more woes upon the human race, is inherited from his ancestors, who if death was caused by animals or inanimate objects took vengeance on the offending object. The manslaying ox in Exodus, xxi, 28, is to be stoned; the Athenians banished the *ax* (Aeschines, *κατὰ Κτησίφ*, 244, 245). In the second century after Christ, Pausanias notes that they still sat in judgment on inanimate things in the Prytaneum (i. 28 (ii)). Mr. Tylor tells us that "if a tiger killed a Kuki (Southern Asia), his family were in disgrace till they had retaliated by killing and eating the tiger or another; but further, if a man was killed by a fall from a tree, his relatives would take their vengeance by cutting the tree down and scattering it in chips."

"Thus too by an ancient law," says Blackstone, "a well in which a person was drowned was ordered to be filled up under the inspection of the coroner" (Fleta, 1, 1, c. 25, sec. 10).

The same underlying feeling explains the *noxæ datio* of the Roman law. The thing is guilty; it, and not its owner, is to be punished. It is to be handed over to the relatives of the dead man to do what they please to it.

So in our law in death by misadventure, the thing causing the death was forfeited, according to the laws of Ine and Alfred, to the kindred, but later

§ 418. (1) **Deodands.**—By this is meant whatever personal chattel is the immediate occasion of the death of any reasonable creature: which is forfeited to the king, to be applied to pious uses, and distributed in alms by his high almoner;<sup>u</sup> though formerly destined to a more superstitious purpose. It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church:<sup>w</sup> in the same manner, as the apparel of a stranger who was found dead was applied to purchase masses for the good of his soul. And this may account for that rule of law, that no deodand is due where an infant under the age of discretion is killed by a fall *from* a cart, or horse, or the like, not being in motion;<sup>x</sup> whereas, if an adult person falls from thence and is killed, the thing is certainly forfeited. For the reason given by Sir Matthew

<sup>u</sup> 1 Hal. P. C. 419. Fleta l. 1. c. 25.

<sup>w</sup> Fitzh. Abr. tit. Enditement. pl. 27. Staunf. P. C. 20, 21.

<sup>x</sup> 3 Inst. 57. 1 Hal. P. C. 422.

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in Bracton's time to God *pro rege*. In the thirteenth century the thing was taken by the sheriff or coroner or other officer and sold, and at the next eyre an order was made for him to account for its value. The justices could direct for what specific purposes the money should be applied, charitable or public, *pro deo*. Thus, when in 1221 some persons fell out of a boat on the Severn and were drowned, the record says, "value of boat eighteen pence, *dentur deo ad pontem*," i. e., to build a bridge (Select Pleas of County of Gloucester, 55). The church seems to have seen an opportunity of making a claim on the ground that as the person died unconfessed in actual sin, the thing should be devoted to buying masses for his soul, in the same way as the apparel of a stranger found dead was applied to that purpose.—CARTER, History of English Legal Institutions, (3d ed.) 198n.

Mr. Justice Holmes brings forward a mass of curious evidence, beginning with Exodus, xxi, 28, to show that the remedy was in early times against the immediate cause of damage, even inanimate, the owner of which was therefore bound to surrender it ("*noxæ deditio*"), though in later times he was allowed to redeem the offending property by a money payment. Common Law, pp. 7-35. Cf. Fitz. Abr. "Barre," 290. On the connected institution of the "Deodand," see 1 Comm. 300. A steam-engine which had caused death was forfeited to the crown by way of deodand as lately as 1842 (Reg. v. Eastern Counties Ry. Co., 10 M. & W. 58); but deodands were abolished by 9 & 10 Vict., c. 62 (1846). See Holmes, J., in Harvard L. B., xii, p. 445.—HOLLAND, Jurisprudence (11th ed.), 154 n.

Hale seems to be very inadequate, viz., because an infant is not able to take care of himself; for why should the owner save his forfeiture, on account of the imbecility of the child, which ought rather to have made him more cautious to prevent any accident of mischief? The true ground of this rule seems rather to be, that the child, by reason of its want of discretion, is presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses: but every adult, who dies in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.

Thus stands the law if a person be killed by a fall from a thing standing still. But if a horse, or ox, or other animal, [301] of his own motion, kill as well an infant as an adult, or if a cart run over him, they shall in either case be forfeited as deodands;<sup>γ</sup> which is grounded upon this additional reason, that such misfortunes are in part owing to the negligence of the owner, and therefore he is properly punished by such forfeiture. A like punishment is in like cases inflicted by the mosaical law:<sup>z</sup> "if an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten." And, among the Athenians,<sup>a</sup> whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic. Where a thing, not in motion, is the occasion of a man's death, that part only which is the immediate cause is forfeited; as if a man be climbing up the wheel of a cart, and is killed by falling from it, the wheel alone is a deodand:<sup>b</sup> but, wherever the thing is in motion, not only that part which immediately gives the wound (as the wheel, which runs over his body), but all things which move with it and help to make the wound more dangerous (as the cart and loading, which increase the pressure of the wheel) are forfeited.<sup>c</sup> It matters not whether the owner were concerned in the killing or not; for, if a man kills

<sup>γ</sup> *Omnia, quæ movent ad mortem, sunt Deo danda.* Bracton, 1. 3. c. 5. (What moves to death we understand is forfeit as a deodand.) Cowell, Tit. Deodand.

<sup>z</sup> Exod. xxi. 28.

<sup>a</sup> Æschin. contr. Ctesiph.

<sup>b</sup> 1 Hal. P. C. 422.

<sup>c</sup> 1 Hawk. P. C. c. 26.

another with my sword the sword is forfeited<sup>d</sup> as an accursed thing.<sup>e</sup> And therefore, in all indictments for homicide, the instrument of death and the value are presented and found by the grand jury (as, that the stroke was given by a certain penknife, value sixpence) that the king or his grantee may claim the deodand: for it is no deodand, unless it be presented as such by a jury of twelve men.<sup>f</sup> No deodands are due for accidents happening upon the high sea, that being out of the jurisdiction of the common law: but if a [302] man falls from a boat or ship in fresh water, and is drowned, it hath been said, that the vessel and cargo are in strictness of law a deodand.<sup>g</sup> But juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death. And in such cases, although the finding by the jury be hardly warrantable by law, the court of king's bench hath generally refused to interfere on behalf of the lord of the franchise, to assist so odious a claim.<sup>h</sup>

Deodands, and forfeitures in general, as well as wrecks, treasure-trove, royal fish, mines, waifs, and estrays, may be granted by the king to particular subjects, as a royal franchise: and indeed they are for the most part granted out to the lords of manors, or other liberties: to the perversion of their original design.

§ 419. **n. Escheats.**—Another branch of the king's ordinary revenue arises from escheats of lands, which happen upon the

<sup>d</sup> A similar rule obtained among the ancient Goths. *Si quis, me nesciente, quocunque meo telo vel instrumento in perniciem suam abutatur; vel ex ædibus meis cadat, vel incidat in puteum meum, quantumvis tectum et munitum, vel in cataractam, et sub molendino meo confringatur, ipse aliqua mulcta plectar; ut in parte infelicitatis meæ numeretur, habuisse vel ædificasse aliquod quo homo periret.* (If anyone, without my knowledge, use any weapon or instrument of mine for his own destruction; or fall from my house, or into my well, however securely covered or fenced, or into my mill-stream, or be crushed in my mill, let me suffer by some fine; as the misfortune may be reckoned in part mine, to have built or possessed anything by which a man should perish.) Stiernhook de jure Goth. l. 3. c. 4.

<sup>e</sup> Dr. & St. d. 2. c. 51.

<sup>f</sup> 3 Inst. 57.

<sup>g</sup> 3 Inst. 58. 1 Hal. P. C. 423. Molloy de Jur. Maritim. 2. 225.

<sup>h</sup> Foster of Homicide, 266.



defect of heirs to succeed to the inheritance; whereupon they in general revert to and vest in the king, who is esteemed, in the eye of the law, the original proprietor of all the lands in the kingdom. But the discussion of this topic more properly belongs to the second book of these Commentaries, wherein we shall particularly consider the manner in which lands may be acquired or lost by escheat.

§ 420. o. Custody of idiots and lunatics.—I proceed, therefore, to the eighteenth and last branch of the king's ordinary revenue; which consists in the custody of idiots, from whence we shall be naturally led to consider also the custody of lunatics.<sup>13</sup>

§ 421. (1) Idiots.—An idiot, or natural fool, is one that hath had no understanding from his nativity; and therefore is by law presumed never likely to attain any. For which reason the custody of [303] him and of his lands was formerly vested in the lord of the fee<sup>1</sup> (and therefore still, by special custom, in some

<sup>1</sup> Flet. l. 1. c. 11. § 10.

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<sup>13</sup> The king's wardship of an idiot's lands.—Among the insane our law draws a marked distinction; it separates the lunatic from the idiot or born fool. About the latter there is a curious story to be told. In Edward I's day the king claims a wardship of the lands of all natural fools, no matter of whom such lands may be holden. He is morally bound to maintain the idiots out of the income of their estates, but still the right is a profitable right analogous to the lord's wardship of an infant tenant. But there is reason to believe that this is a new right, or that at any rate there has been a struggle for it between the lords and the king. If idiocy be treated as similar to infancy, this analogy is in favor of the lords; at all events, if the idiot be a military tenant, feudal principles would give the custody of his land not to the king, but to the lord, while of socage land some kinsman of the fool might naturally claim a wardship. Edward I was told that by the law of Scotland the lord had the wardship of an idiot's land. But in England a different rule had been established, and this, as we think, by some statute or ordinance made in the last days of Henry III. If we have rightly read an obscure tale, Robert Walerand, a minister, justice and favorite of the king, procured this ordinance foreseeing that he must leave an idiot as his heir and desirous that his land should fall rather into the king's hand than into the hands of his lords. The king's right is distinctly stated in the document known as *Prærogativa Regis*, which we believe to come from the early years of Edward I.—POLLOCK & MAITLAND, Hist. Eng. Law (2d ed.), 481.

manors the lord shall have the ordering of idiot and lunatic copyholders<sup>1</sup>); but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent that it should be given to the king, as the general conservator of his people; in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress.<sup>k</sup> This fiscal prerogative of the king is declared in parliament by statute 17 Edw. II, c. 9 (1324), which directs (in affirmance of the common law<sup>1</sup>) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessities; and after the death of such idiots he shall render the estate to the heirs: in order to prevent such idiots from aliening their lands, and their heirs from being disinherited.

§ 422. (a) Inquest of idiocy.—By the old common law there is a writ *de idiota inquirendo* (of inquisition concerning an idiot), to inquire whether a man be an idiot or not:<sup>m</sup> which must be tried by a jury of twelve men;<sup>14</sup> and, if they find him *purus idiota* (an absolute idiot), the profits of his lands, and the custody of his person may be granted by the king to some subject, who has interest enough to obtain them.<sup>n</sup> This branch of the revenue hath been long considered as a hardship upon private families: and so long ago as in the 8 Jac. I (1610), it was under the consideration of parliament, to vest this custody in the relations of the party, and to settle an equivalent on the crown in lieu of it; it being then

<sup>1</sup> Dyer. 302. Hutt. 17. Noy. 27.

<sup>k</sup> F. N. B. 232.

<sup>1</sup> 4 Rep. 126 Memorand' Ccece' 20 Edw. I. (1292) (prefixed to Maynard's Year-Book of Edw. II.) fol. 20. 24.

<sup>m</sup> F. N. B. 232.

<sup>n</sup> This power, though of late very rarely exerted, is still alluded to in common speech, by that usual expression of *begging* a man for a fool.

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<sup>14</sup> "It will be noticed that in reference to the writ *de idiota inquirendo*, Blackstone states that it must be tried by a jury of twelve men. In another place, however, where he is discussing inquisitions of office as one of the common forms of suits by the crown, he says that such inquiries concerning any matter that entitled the king to the possession of lands or tenements, goods or chattels, 'is done by a jury of any determinate number, being either twelve or less or more.' 3 Bl. Comm. 258." *Sporza v. German Savings Bank*, 192 N. Y. 8, 84 N. E. 406, 412.

proposed to share the same fate with the slavery of the feudal tenures, which has been since abolished.<sup>o</sup> Yet few instances can be given of the oppressive exertion of it, since it seldom happens that a jury finds a man an idiot *a nativitate* (from his birth), but only *non compos mentis* (not in his right mind) from some particular time; which has an operation very different in point of law.

[304] A man is not an idiot,<sup>p</sup> if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. But a man who is born deaf, dumb, and blind,<sup>15</sup> is looked upon by the law as in the same state with an idiot;<sup>q</sup> he being supposed incapable of any understanding, as wanting all those senses which furnish the human mind with ideas.

§ 423. (2) Lunatics, or persons *non compos mentis*.—A lunatic, or *non compos mentis*, is one who hath had understanding, but by disease, grief, or other accident hath lost the use of his reason.<sup>r</sup> A lunatic is indeed properly one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But under the general name of *non compos mentis* (which Sir Edward Coke says is the most legal name<sup>s</sup>) are comprised not only lunatics, but persons under frenzies; or who lose their intellects by disease; those that

<sup>o</sup> 4 Inst. 203. Com. Journ. 1610.

<sup>p</sup> F. N. B. 333.

<sup>q</sup> Co. Litt. 42. Fleta. l. 6. c. 40.

<sup>r</sup> *Idiota a casu et infirmitate*. (An idiot by accident and infirmity.) (Mem. Scacch. 20 Edw. I. in Maynard's Year-Book of Edw. II. 20.)

<sup>s</sup> 1 Inst. 246.

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<sup>15</sup> While some courts may hold that there is a presumption of lunacy or even idiocy in the case of a deaf mute, or a person both deaf and blind (Com. v. Hill, 14 Mass. 207), the correct statement is doubtless that "the presumption that a person deaf and dumb from birth should be deemed an idiot does not obtain in modern practice, at least in the United States." *State v. Howard*, 118 Mo. 127, 24 S. W. 41, 45; *Alexier v. Matzke*, 151 Mich. 36, 123 Am. St. Rep. 255, 14 Ann. Cas. 52, 115 N. W. 251. At any rate, it is only a presumption which may be rebutted. The great success achieved in the education of Laura Bridgman and Helen Keller is sufficient to cast doubt upon even a rule of presumption against the mental capacity of persons deaf and blind.

*grow* deaf, dumb, and blind, not being *born* so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. To these also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines that these accidental misfortunes may be removed; and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property, and to account to them for all profits received, if they recover, or after their decease to their representatives. And therefore it is declared by the statute 17 Edw. II, c. 10 (1324), that the king shall provide for the custody and sustentation of lunatics, and preserve their lands and the profits of them for their use, when they come to their right mind; and the king shall take nothing to his own use: and if the parties die in such estate, the residue shall be distributed for their souls by the advice of the ordinary, and of course (by the subsequent amendments of the law of administrations) shall now go to their executors or administrators.<sup>16</sup>

[305] On the first attack of lunacy, or other occasional insanity, while there may be hopes of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations: and the legislature, to prevent all abuses incident to such private custody, hath thought proper to interpose its authority by 14 Geo. III, c. 49 (Madhouses, 1774), for regulating private madhouses. But, when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.

§ 424. (a) *Inquest of lunacy*.—The method of proving a person *non compos* is very similar to that of proving him an idiot. The lord chancellor, to whom, by special authority from the king, the custody of idiots and lunatics is entrusted,<sup>ss</sup> upon petition or informa-

<sup>ss</sup> 3 P. Wms. 108.

<sup>16</sup> Cited, 10 R. I. 41; 2 Johns. Ch. 237; 4 Stew. (N. J. Eq.) 204; 4 Dana, 344. All the cases agree that the stat. 17 Edw. II, c. 10 (1324), committing to the king the case of the persons and estates of idiots and lunatics, was not introductory of a new right, but only went to regulate a right pre-existing in the crown. (4 Coke, 126; Amb. 707; 2 Ves. Jr. 21, 25; Chancellor Kent, in *Matter of Barker*, 2 Johns. Ch. 232, 237.)—HAMMOND.

tion, grants a commission in nature of the writ *de idiota inquirendo*, to inquire into the party's state of mind; and if he be found *non compos*, he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, who is then called his committee.<sup>17</sup> However, to prevent sinister practices, the next heir is seldom permitted to be this committee of the person; because it is his interest that the party should die. But, it hath been said, there lies not the same objection against his next of kin, provided he be not his heir; for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings, which he or his family may hereafter be entitled to enjoy.<sup>t</sup> The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition: accountable, however, to the court of chancery, and to the *non compos* himself, if he recovers; or otherwise, to his administrators.

§ 425. (3) **Spendthrifts.**—In this care of idiots and lunatics the civil law agrees with ours: by assigning them tutors to protect their persons, and curators to manage their estates. But in another instance the Roman law goes much beyond the English. For, if a man [306] by notorious prodigality was in danger of wasting his estate, he was looked upon as *non compos*, and committed to the care of curators or tutors by the prætor.<sup>u</sup> And by the laws of Solon such prodigals were branded with perpetual infamy.<sup>w</sup> But with us, when a man on an inquest of idiocy hath been returned an *unthrift* and not an *idiot*,<sup>x</sup> no further proceedings have been had.

<sup>t</sup> 2 P. Wms. 638.

<sup>u</sup> *Solent prætores, si talem hominem invenerint, qui neque tempus neque finem expensarum habet, sed bona sua dilacerando et dissipando profundit, curatorem ei dare, exemplo furiosi: et tamdiu erunt ambo in curatione, quamdiu vel furiosus sanitatem, vel ille bonos mores, receperit.* (The prætors are accustomed, when they find a man who sets no bounds to his expenses, but lavishes his fortune in acts of dissipation, to appoint him a guardian as though he were a madman; and as the madman so the spendthrift shall be in wardship until the one be restored unto a sanity of mind and the other to reformed manners.) Ff. 27. 10. 1.

<sup>w</sup> Potter Antiqu. b. 1. c. 26.

<sup>x</sup> Bro. Abr. tit. Idiot. 4.

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<sup>17</sup> The proceedings to determine whether a person is *non compos* are now governed by the provisions of the Lunacy Act, 1890, and the acts amendatory thereof.



And the propriety of the practice itself seems to be very questionable. It was doubtless an excellent method of benefiting the individual, and of preserving estates in families; but it hardly seems calculated for the genius of a free nation, who claim and exercise the liberty of using their own property as they please. "*Sic utere tuo, ut alienum non ladas* (use your property in such a manner that you injure not that of another)," is the only restriction our laws have given with regard to economical prudence. And the frequent circulation and transfer of lands and other property, which cannot be effected without extravagance somewhere, are perhaps not a little conducive towards keeping our mixed constitution in its due health and vigor.

§ 426. p. Decline of the king's ordinary revenue.—This may suffice for a short view of the king's *ordinary* revenue, or the proper patrimony of the crown; which was very large formerly, and capable of being increased to a magnitude truly formidable: for there are very few estates in the kingdom that have not, at some period or other since the Norman Conquest, been vested in the hands of the king by forfeiture, escheat, or otherwise. But fortunately for the liberty of the subject, this hereditary landed revenue, by a series of improvident management, is sunk almost to nothing; and the casual profits, arising from the other branches of the *census regalis*, are likewise almost all of them alienated from the crown.<sup>18</sup> In order to supply the deficiencies of which we are now obliged to have recourse to new methods of raising money, unknown to our early ancestors; which methods constitute the king's *extraordinary* revenue.

§ 427. 2. The king's extraordinary revenue: taxes.—For the public patrimony being got into the hands of private subjects, it is but [307] reasonable that private contributions should supply the public service. Which, though it may perhaps fall harder upon some individuals whose ancestors have had no share in the general plunder than upon others, yet, taking the nation throughout, it amounts to nearly the same; provided the gain by the extraordinary, should appear to be no greater than the loss by the ordinary,

<sup>18</sup> The ordinary revenue of the crown is now, by arrangement with the monarch on his accession, surrendered to parliament in return for a Civil List (see *post*, \*333.)

revenue. And perhaps, if every gentleman in the kingdom was to be stripped of such of his lands, as were formerly the property of the crown; was to be again subject to the inconveniencies of purveyance and pre-emption, the oppression of forest laws, and the slavery of feudal tenures; and was to resign into the king's hands all his royal franchises of waifs, wrecks, estrays, treasure-trove, mines, deodands, forfeitures, and the like; he would find himself a greater loser, than by paying his *quota* to such taxes as are necessary to the support of the government. The thing therefore to be wished and aimed at in a land of liberty is by no means the total abolition of taxes, which would draw after it very pernicious consequences, and the very supposition of which is the height of political absurdity. For as the true idea of government and magistracy will be found to consist in this, that some few men are deputed by many others to preside over public affairs, so that individuals may the better be enabled to attend their private concerns; it is necessary that those individuals should be bound to contribute a portion of their private gains, in order to support that government, and reward that magistracy, which protects them in the enjoyment of their respective properties. But the things to be aimed at are wisdom and moderation, not only in granting, but also in the method of raising, the necessary supplies; by contriving to do both in such a manner as may be most conducive to the national welfare, and at the same time most consistent with economy and the liberty of the subject; who, when properly taxed, contributes only, as was before observed,<sup>r</sup> some part of his property, in order to enjoy the rest.

§ 428. a. Taxes granted by parliament.—These extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies; and are granted, we have formerly seen,<sup>r</sup> by the commons of Great [308] Britain in parliament assembled: who, when they have voted a supply to his majesty, and settled the *quantum* of that supply usually resolve themselves into what is called a committee of ways and means, to consider the ways and means of raising the supply so voted. And in this committee every member (though it is looked upon as the peculiar province of the chancellor of the exchequer) may propose such scheme of taxation

<sup>r</sup> Pag. 281.

\* Pag. 169.

as he thinks will be least detrimental to the public. The resolutions of this committee (when approved by a vote of the house) are in general esteemed to be (as it were) final and conclusive. For, though the supply cannot be actually raised upon the subject till directed by an act of the whole parliament, yet no moneyed man will scruple to advance to the government any quantity of ready cash, on the credit of a bare vote of the house of commons, though no law be yet passed to establish it.

§ 429. **b. Kinds of taxes — (1) Annual taxes.**—The taxes, which are raised upon the subject, are either annual or perpetual. The usual annual taxes are those upon land and malt.

§ 430. **(a) Land tax.**—The land tax in its modern shape has superseded all the former methods of rating either property, or persons in respect of their property, whether by tenths or fifteenths, subsidies on land, hydages, scutages, or talliages; a short explication of which will, however, greatly assist us in understanding our ancient laws and history.

§ 431. **(b) Ancient levies — (i) Tenths and fifteenths.**—Tenths, and fifteenths,<sup>a</sup> were temporary aids issuing out of personal property, and granted to the king by parliament. They were formerly the real tenth or fifteenth part of all the movables belonging to the subject; when such movables, or personal estates, were a very different and a much less considerable thing than what they usually are at this day. Tenths are said to have been first granted under Henry the Second, who took advantage of the fashionable zeal for crusades to introduce this new taxation, in order to defray the expense of a pious expedition to Palestine, which he really or seemingly had projected against Saladine, Emperor of the [309] Saracens; whence it was originally denominated the Saladine tenth.<sup>b</sup> But afterwards fifteenths were more usually granted than tenths. Originally the amount of these taxes was uncertain, being levied by assessments new-made at every fresh grant of the commons, a commission for which is preserved by Matthew Paris;<sup>c</sup> but it was at length reduced to a certainty in

<sup>a</sup> 2 Inst. 77. 4 Inst. 34.

<sup>b</sup> Hoved. A. D. 1188. Carte. i. 719. Hume. i. 329.

<sup>c</sup> A. D. 1232.

the eighth year of Edward III (1334), when by virtue of the king's commission new taxations were made of every township, borough, and city in the kingdom, and recorded in the exchequer; which rate was, at the time, the fifteenth part of the value of every township, the whole amounting to about 29,000*l.*,<sup>19</sup> and therefore it still kept up the name of a fifteenth, when, by the alteration of the value of money and the increase of personal property, things came to be in a very different situation. So that when, of later years, the commons granted the king a fifteenth, every parish in England immediately knew their proportion of it; that is, the same identical sum that was assessed by the same aid in the eighth of Edward III (1334): and then raised it by a rate among themselves, and returned it into the royal exchequer.

§ 432. (ii) *Scutages*.—The other ancient levies were in the nature of a modern land tax: for we may trace up the original of that charge as high as to the introduction of our military tenures;<sup>d</sup> when every tenant of a knight's fee was bound, if called upon, to attend the king in his army for forty days in every year. But this personal attendance growing troublesome in many respects, the tenants found means of compounding for it, by first sending others in their stead, and in process of time by making a pecuniary satisfaction to the crown in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, under the name of *scutages*; which appear to have been levied for the first time in the fifth year of Henry the Second, on account of his expedition to Toulouse, and were then (I apprehend) mere arbitrary compositions, as the king and the subject could agree. [310] But this precedent being afterwards abused into a means of oppression (by levying *scutages* on the landholders by the royal authority only, whenever our kings went to war, in order to hire mercenary troops and pay their contingent expenses) it became thereupon a matter of national complaint; and King John was obliged to promise in his *magna carta*,<sup>e</sup> that no *scutage* should be imposed without the consent of the common council of the realm.

<sup>d</sup> See the second book of these Commentaries.

<sup>e</sup> Cap. 14.

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<sup>19</sup> This is Blackstone's estimate. Later researches tend to show that it is too small. See 2 Stubbs (4th ed.), 579.

This clause was indeed omitted in the charters of Henry III,<sup>f</sup> where we only find it stipulated, that scutages should be taken as they were used to be in the time of King Henry the Second. Yet afterwards, by a variety of statutes under Edward I and his grandson,<sup>g</sup> it was provided that the king shall not take any aids or tasks, any talliage or tax, but by the common assent of the great men and commons in parliament.

§ 433. (iii) **Hydage and talliage; subsidies.**—Of the same nature with scutages upon knight's fees were the assessments of hydage upon all other lands, and of talliage upon cities and burghs.<sup>h</sup> But they all gradually fell into disuse upon the introduction of subsidies, about the time of King Richard II and King Henry IV. These were a tax, not immediately imposed upon property, but upon persons in respect of their reputed estates, after the nominal rate of 4s. in the pound for lands, and 2s. 6d. for goods; and for those of aliens in a double proportion. But this assessment was also made according to an ancient valuation; wherein the computation was so very moderate, and the rental of the kingdom was supposed to be so exceeding low, that one subsidy of this sort did not, according to Sir Edward Coke,<sup>i</sup> amount to more than 70,000*l.*, whereas a modern land tax at the same rate produces two millions. It was anciently the rule never to grant more than one subsidy, and two-fifteenths at a time: but this rule was broke through for the first time on a very pressing occasion, the Spanish invasion in 1588; when the parliament gave Queen Elizabeth two subsidies and four fifteenths. Afterwards, as money sunk in value, more subsidies [311] were given; and we have an instance in the first parliament of 1640 of the king's desiring twelve subsidies of the commons, to be levied in three years; which was looked upon as a startling proposal: though Lord Clarendon tells us,<sup>k</sup> that the speaker, Serjeant Glanvill, made it manifest to the house, how very inconsiderable a sum twelve subsidies amounted to by telling them he had computed what he was to pay for them; and when he named the sum,

<sup>f</sup> 9 Hen. III. c. 37 (1225).

<sup>g</sup> 25 Edw. I. c. 5 & 6 (Taxation, 1297). 34 Edw. I. st. 4. c. 1 (Taxation, 1306). 14 Edw. III. st. 2. c. 1 (Taxation, 1340).

<sup>h</sup> Madox. Hist. Exch. 480.

<sup>i</sup> 4 Inst. 33.

<sup>k</sup> Hist. b. 2.



he being known to be possessed of a great estate, it seemed not worth any further deliberation. And indeed, upon calculation, we shall find that the total amount of these twelve subsidies, to be raised in three years, is less than what is now raised in one year, by a land tax of two shillings in the pound.

§ 434. (iv) **Ecclesiastical subsidies.**—The grant of scutages, talliages, or subsidies by the commons did not extend to spiritual preferments; those being usually taxed at the same time by the clergy themselves in convocation: which grants of the clergy were confirmed in parliament, otherwise they were illegal, and not binding; as the same noble writer observes of the subsidies granted by the convocation, which continued sitting after the dissolution of the first parliament in 1640. A subsidy granted by the clergy was after the rate of 4s. in the pound according to the valuation of their livings in the king's books; and amounted, as Sir Edward Coke tells us,<sup>1</sup> to about 20,000*l*. While this custom continued, convocations were wont to sit as frequently as parliaments: but the last subsidies, thus given by the clergy, were those confirmed by statute 15 Car. II, cap. 10 (Taxation, 1663), since which another method of taxation has generally prevailed, which takes in the clergy as well as the laity: in recompense for which the beneficed clergy have from that period been allowed to vote at the election of knights of the shire;<sup>m</sup> and thenceforward also the practice of giving ecclesiastical subsidies hath fallen into total disuse.

§ 435. (v) **Lay subsidies equivalent to a land tax.**—The lay subsidy was usually raised by commissioners appointed by the crown, or the great officers of state: and therefore [<sup>312</sup>] in the beginning of the civil wars between Charles I and his parliament, the latter, having no other sufficient revenue to support themselves and their measures, introduced the practice of laying weekly and monthly assessments<sup>n</sup> of a specific sum upon the several counties of the kingdom; to be levied by a pound rate on lands and personal estates: which were occasionally continued during the whole usurpation, sometimes at the rate of 120,000*l*. a month, sometimes

<sup>1</sup> 4 Inst. 33.

<sup>m</sup> Dalt. of Sheriffs, 418. Gilb. Hist. of Exch. c. 4.

<sup>n</sup> 29 Nov. 4 Mar. 1642.

at inferior rates.\* After the restoration the ancient method of granting subsidies, instead of such monthly assessments, was twice, and twice only, renewed; viz., in 1663, when four subsidies were granted by the temporality, and four by the clergy; and in 1670, when 800,000*l.* was raised by way of subsidy, which was the last time of raising supplies in that manner. For, the monthly assessments being now established by custom, being raised by commissioners named by parliament, and producing a more certain revenue; from that time forwards we hear no more of subsidies, but occasional assessments were granted as the national emergencies required. These periodical assessments, the subsidies which preceded them, and the more ancient scutage, hydag, and talliage, were to all intents and purposes a land tax; and the assessments were sometimes expressly called so.<sup>p</sup> Yet a popular opinion has prevailed that the land tax was first introduced in the reign of King William III; because in the year 1692 a new assessment or valuation of estates was made throughout the kingdom: which, though by no means a perfect one, had this effect, that a supply of 500,000*l.* was equal to 1*s.* in the pound of the value of the estates given in. And, according to this enhanced valuation from the year 1693 to the present, a period of above fourscore years, the land tax has continued an annual charge upon the subject; about half the time at 4*s.* in the pound, sometimes at 3*s.*, sometimes at 2*s.*, twice<sup>q</sup> at 1*s.*, but without any total intermission. The medium has been 3*s.* 3*d.* in the pound; being equivalent with twenty-three ancient subsidies, and amounting annually to [313] more than a million and a half of money. The method of raising it is by charging a particular sum upon each county, according to the valuation given in, A. D. 1692: and this sum is assessed and raised upon individuals (their personal estates, as well as real, being liable thereto) by commissioners appointed in the act, being the principal landholders of the county, and their officers.<sup>20</sup>

\* One of these bills of assessment, in 1656, is preserved in Scobell's Collection, 400.

<sup>p</sup> Com. Journ. 26 Jun. 9 Dec. 1678.

<sup>q</sup> In the years 1732 and 1733.

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<sup>20</sup> The land tax is now, in the main, regulated by the Land Tax Perpetuation Act, 1798, and the Finance Acts, 1896, 1898 and 1910.

§ 436. (c) **Malt tax.**—The other annual tax is the malt tax; which is a sum of 750,000*l.* raised every year by parliament, ever since 1697, by a duty of 6*d.* in the bushel on malt, and a proportionable sum on certain liquors, such as cider and perry, which might otherwise prevent the consumption of malt. This is under the management of the commissioners of the excise; and is indeed itself no other than an annual excise, the nature of which species of taxation I shall presently explain: only premising at present, that in the year 1760 an additional perpetual excise of 3*d.* per bushel was laid upon malt; and in 1763 a proportionable excise was laid upon cider and perry, but new-modeled in 1766.

The perpetual taxes are,

§ 437. (2) **Perpetual taxes**—(a) **Customs.**—The customs; or the duties, toll, tribute, or tariff, payable upon merchandise exported and imported. The considerations upon which this revenue (or the more ancient part of it, which arose only from exports) was invested in the king, were said to be two;<sup>r</sup> 1. Because he gave the subject leave to depart the kingdom, and to carry his goods along with him. 2. Because the king was bound of common right to maintain and keep up the ports and havens, and to protect the merchant from pirates. Some have imagined they are called with us customs, because they were the inheritance of the king by immemorial usage and the common law, and not granted him by any statute:<sup>s</sup> but Sir Edward Coke hath clearly shown,<sup>t</sup> that the king's first claim to them was by [314] grant of parliament 3 Edw. I (1275), though the record thereof is not now extant. And indeed this is in express words confessed by statute 25 Edw. I, c. 7 (Toll on Wool, 1297), wherein the king promises to take no customs from merchants, without the common assent of the realm, "saving to us and our heirs, the customs on wool, skins, and leather, formerly granted to us by the commonalty aforesaid." These were formerly called hereditary customs of the crown; and were due on the exportation only of the said three commodities, and of none other: which were styled the *staple* commodities of the kingdom, because they were obliged to be brought to those ports where the king's staple was established, in order to be there first rated, and then

<sup>r</sup> Dyer. 165.

<sup>t</sup> 2 Inst. 58, 59.

<sup>s</sup> Dyer. 43. pl. 24.

exported.<sup>u</sup> They were denominated in the barbarous Latin of our ancient records, *custuma* (customs):<sup>v</sup> not *consuetudines* (customs, i. e., usages), which is the language of our law whenever it means merely usages. The duties on wool, sheepskins, or woolfells, and leather, exported, were called *custuma antiqua sive magna* (ancient or great customs): and were payable by every merchant, as well native as stranger; with this difference, that merchant strangers paid an additional toll, viz., half as much again as was paid by natives. The *custuma parva et nova* (small and new customs) were an impost of 3*d.* in the pound, due from merchant strangers only, for all commodities as well imported as exported; which was usually called the alien's duty, and was first granted in 31 Edw. I (1303).<sup>w</sup> But these ancient hereditary customs, especially those on wool and woolfells, came to be of little account, when the nation became sensible of the advantages of a home manufacture, and prohibited the exportation of wool by statute 11 Edw. III, c. 1 (1337).

§ 438. (i) *Prisage of wines.*—There is also another very ancient hereditary duty belonging to the crown, called the *prisage* or *butlerage* of wines; which is considerably older than the customs, being taken notice of in the great roll of the exchequer, 8 Rich. I (1196), still extant.<sup>x</sup> *Prisage* was a right of *taking* two tons of wine from <sup>[315]</sup> every ship importing into England twenty tons or more; which by Edward I was exchanged into a duty of 2*s.* for every ton imported by merchant-strangers, and called *butlerage*, because paid to the king's butler.<sup>y</sup>

§ 439. (ii) *Subsidies, tonnage, poundage, and other imposts.* Other customs payable upon exports and imports were distinguished into subsidies, tonnage, poundage, and other imposts. Subsidies, were such as were imposed by parliament upon any of the staple commodities before mentioned, over and above the *custuma antiqua et magna*: tonnage was a duty upon all wines imported, over and

<sup>u</sup> Dav. 9.

<sup>v</sup> This appellation seems to be derived from the French word *coustum*, or *coutum*, which signifies toll or tribute, and owes its own etymology to the word *cost*, which signifies price, charge, or, as we have adopted it in English, *cost*.

<sup>w</sup> 4 Inst. 29.

<sup>x</sup> Madox. Hist. Exch. 526. 532.

<sup>y</sup> Dav. 8. 2 Bulst. 254. (Ninth edition adds here, "Stat. Estr. 16 Edw. II (1323). Com. Journ. 27 Apr. 1689.")

above the prisage and butlerage aforesaid: poundage was a duty imposed *ad valorem* (according to the value), at the rate of 12*d.* in the pound, on all other merchandise whatsoever; and the other imposts were such as were occasionally laid on by parliament, as circumstances and times required.<sup>a</sup> These distinctions are now in a manner forgotten, except by the officers immediately concerned in this department; their produce being in effect all blended together, under the one denomination of the customs.

By these we understand, at present, a duty or subsidy paid by the merchant, at the quay, upon all imported as well as exported commodities, by authority of parliament; unless where, for particular national reasons, certain rewards, bounties, or drawbacks, are allowed for particular exports or imports. Those of tonnage and poundage, in particular, were, at first, granted, as the old statutes (and particularly 1 Eliz., c. 19—1559) express it, for the defense of the realm, and the keeping and safeguard of the seas, and for the intercourse of merchandise safely to come into and pass out of the same. They were at first usually granted only for a stated term of years, as, for two years in 5 Rich. II (1381);<sup>a</sup> but in Henry the Sixth's time, they were granted him for life by a statute in the thirty-first year of his reign (1452); and again to Edward IV for the term of his life also: since which time they were regularly granted to all his successors, for life, sometimes at the first, sometimes at other subsequent parliaments, till the reign of Charles the [316] First; when, as the noble historian expresses it,<sup>b</sup> his ministers were not sufficiently solicitous for a renewal of this legal grant. And yet they were imprudently and unconstitutionally levied and taken, without consent of parliament, for fifteen years together; which was one of the causes of those unhappy discontents, justifiable at first in too many instances, but which degenerated at last into causeless rebellion and murder. For, as in every other, so in this particular case, the king (previous to the commencement of hostilities) gave the nation ample satisfaction for the errors of his former conduct, by passing an act,<sup>c</sup> whereby he renounced all power in the crown of levying the duty of tonnage and poundage, without the express consent of parliament; and also all power of imposition upon any merchandise whatever. Upon the restoration

<sup>a</sup> Dav. 11, 12.

<sup>b</sup> Hist. Rebell. b. 3.

<sup>c</sup> *Ibid.* 12.

<sup>e</sup> 16 Car. I. c. 8 (Customs, 1640).



this duty was granted to King Charles the Second for life, and so it was to his two immediate successors; but now by three several statutes, 9 Ann., c. 6 (Continuing Certain Duties, 1710), 1 Geo. I, c. 12 (Bank of England, 1714), and 3 Geo. I, c. 7 (National Debt, 1716), it is made perpetual and mortgaged for the debt of the public. The customs thus imposed by parliament are chiefly contained in two books of rates, set forth by parliamentary authority;<sup>a</sup> one signed by Sir Harbottle Grimston, speaker of the house of commons in Charles the Second's time; and the other an additional one signed by Sir Spenser Compton, speaker in the reign of George the First; to which also subsequent additions have been made. Aliens pay a larger proportion than natural subjects, which is what is now generally understood by the aliens' duty; to be exempted from which is one principal cause of the frequent applications to parliament for acts of naturalization.<sup>21</sup>

§ 440. (iii) **Theory and evils of a customs tariff.**—These customs are then, we see, a tax immediately paid by the merchant, although ultimately by the consumer. And yet these are the duties felt least by the people; and, if prudently managed, the people hardly consider that they pay them at all. For the merchant is easy, being sensible he does not pay them for himself; and the consumer, who really <sup>[317]</sup> pays them, confounds them with the price of the commodity: in the same manner as Tacitus observes, that the Emperor Nero gained the reputation of abolishing the tax of the sale of slaves, though he only transferred it from the buyer to the seller, so that it was, as he expresses it, "*remissum magis specie, quam vi: quia, cum venditor pendere juberetur, in partem pretii emptoribus accrescebat* (remitted rather in appearance than reality, for when the seller was ordered to pay it, he enhanced proportionally the price to the buyers)."<sup>e</sup> But this inconvenience attends it on the other hand, that these imposts, if too heavy, are a check and cramp upon trade; and especially when the value of the commodity bears little or no proportion to the quantity of the duty

<sup>a</sup> Stat. 12 Car. II. c. 4 (Tonnage and Poundage, 1660). 11 Geo. I. c. 7 (Customs, 1724).

<sup>e</sup> Hist. l. 13.

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<sup>21</sup> The Customs Tariff Act, 1876, and the Customs Consolidation Act, 1876, are the basis of the present laws governing the customs.

imposed. This in consequence gives rise also to smuggling, which then becomes a very lucrative employment; and its natural and most reasonable punishment, viz., confiscation of the commodity, is in such cases quite ineffectual; the intrinsic value of the goods, which is all that the smuggler has paid, and therefore all that he can lose, being very inconsiderable when compared with his prospect of advantage in evading the duty. Recourse must therefore be had to extraordinary punishments to prevent it; perhaps even to capital ones: which destroys all proportion of punishment,<sup>†</sup> and puts murderers upon an equal footing with such as are really guilty of no natural, but merely a positive, offense.

There is also another ill consequence attending high imposts on merchandise, not frequently considered, but indisputably certain; that the earlier any tax is laid on a commodity, the heavier it falls upon the consumer in the end: for every trader through whose hands it passes must have a profit, not only upon the raw material and his own labor and time in preparing it, but also upon the very tax itself, which he advances to the government; otherwise he loses the use and interest of the money which he so advances. To instance in the article of foreign paper. The merchant pays a duty upon importation, which he does not receive again till he sells the commodity, perhaps at the end of three months. He is therefore equally entitled to a profit upon that duty [318] which he pays at the custom-house, as to a profit upon the original price which he pays to the manufacturer abroad; and considers it accordingly in the price he demands of the stationer. When the stationer sells it again, he requires a profit of the printer or bookseller upon the whole sum advanced by him to the merchant: and the bookseller does not forget to charge the full proportion to the student or ultimate consumer; who therefore does not only pay the original duty, but the profits of these three intermediate traders, who have successively advanced it for him. This might be carried much further in any mechanical, or more complicated, branch of trade.

§ 441. (b) Internal revenue or excise.—Directly opposite in its nature to this is the excise duty; which is an inland imposition, paid sometimes upon the consumption of the commodity, or

<sup>†</sup> Montesq. Sp. L. b. 13. c. 8.

frequently upon the retail sale, which is the last stage before the consumption. This is doubtless, impartially speaking, the most economical way of taxing the subject: the charges of levying, collecting, and managing the excise duties being considerably less in proportion, than in other branches of the revenue. It also renders the commodity cheaper to the consumer than charging it with customs to the same amount would do; for the reason just now given, because generally paid in a much later stage of it. But, at the same time, the rigor and arbitrary proceedings of excise laws seem hardly compatible with the temper of a free nation. For the frauds that might be committed in this branch of the revenue, unless a strict watch is kept, make it necessary, wherever it is established, to give the officers a power of entering and searching the houses of such as deal in excisable commodities, at any hour of the day, and in many cases, of the night likewise. And the proceedings in case of transgressions are so summary and sudden, that a man may be convicted in two days' time in the penalty of many thousand pounds by two commissioners or justices of the peace: to the total exclusion of the trial by jury, and disregard of the common law. For which reason, though Lord [319] Clarendon tells us,<sup>g</sup> that to his knowledge the Earl of Bedford (who was made lord treasurer by King Charles the First, to oblige his parliament) intended to have set up the excise in England, yet it never made a part of that unfortunate prince's revenue; being first introduced, on the model of the Dutch prototype, by the parliament itself after its rupture with the crown. Yet such was the opinion of its general unpopularity, that when in 1642 "aspersions were cast by malignant persons upon the house of commons, that they intended to introduce excises, the house for its vindication therein did declare, that these rumors were false and scandalous; and that their authors should be apprehended and brought to condign punishment."<sup>h</sup> Its original<sup>i</sup> establishment was in 1643, and its progress was gradual; being at first laid upon

<sup>g</sup> Hist. b. 3.

<sup>h</sup> Com. Journ. 8 Oct. 1642.

<sup>i</sup> The translator and continuator of Petavius' chronological history (Lond. 1659, fol.) informs us, that it was first moved for, 28 Mar. 1643, by Mr. Prynne. And it appears from the journals of the commons that on that day the house

those persons and commodities, where it was supposed the hardship would be least perceivable, viz., the makers and venders of beer, ale, cider, and perry,<sup>k</sup> and the royalists at Oxford soon followed the example of their brethren at Westminster by imposing a similar duty; both sides protesting that it should be continued no longer than to the end of the war, and then be utterly abolished.<sup>l</sup> But the parliament at Westminster soon after imposed it on flesh, wine, tobacco, sugar, and such a multitude of other commodities, that it might fairly be denominated general: in pursuance of the plan laid down by Mr. Pymme (who seems to have been the father of the excise) in his letter to Sir John Hotham,<sup>m</sup> signifying, "that they had proceeded in the excise to many particulars, and intended to go on further; but that it [<sup>320</sup>] would be necessary to use the people to it by little and little." And afterwards, when the nation had been accustomed to it for a series of years, the succeeding champions of liberty boldly and openly declared, "the impost of excise to be the most easy and indifferent levy that could be laid upon the people":<sup>n</sup> and accordingly continued it during the whole usurpation. Upon King Charles' return, it having then been long established and its produce well known, some part of it was given to the crown, in 12 Car. II (1660) by way of purchase (as was before observed) for the feudal tenures and other oppressive parts of the hereditary revenue. But, from its first original to the present time, its very name has been odious to the people of England. It has nevertheless been imposed on abundance of other commodities in the reign of King William III, and every succeeding prince, to support the enormous expenses occasioned by our wars on the Continent. Thus brandies and other spirits are now

resolved itself into a committee to consider of raising money, in consequence of which the excise was afterwards voted. But Mr. Prynne was not a member of parliament till 7 Nov. 1648; and published in 1654, "A protestation against the illegal, detestable, and oft-condemned tax and extortion of excise in general." It is probably therefore a mistake of the printer for Mr. Pymme, who was intended for chancellor of the exchequer under the Earl of Bedford. (Lord. Clar. b. 7.)

<sup>k</sup> Com. Journ. 17 May. 1643.

<sup>l</sup> Lord Clar. b. 7.

<sup>m</sup> 30 May 1643. Dugdale of the Troubles, 120.

<sup>n</sup> Ord. 14 Aug. 1649. c. 50. Scobell. 72. Stat. 1656. c. 19. Scobell. 453.

excised at the distillery; printed silks and linens, at the printer's; starch and hair powder at the maker's; gold and silver wire, at the wiredrawer's; plate in the hands of the vender, who pays yearly for a license to sell it; lands and goods sold by auction, for which a pound-rate is payable by the auctioneer, who also is charged with an annual duty for his license; and coaches and other wheel carriages, for which the occupier is excised, though not with the same circumstances of arbitrary strictness, as in most of the other instances. To these we may add coffee and tea, chocolate and cocoa paste, for which the duty is paid by the retailer; all artificial wines, commonly called sweets; paper and pasteboard, first when made, and again if stained or printed; malt as before mentioned; vinegars; and the manufacture of glass; for all which the duty is paid by the manufacturer; hops, for which the person that gathers them is answerable; candles and soap, which are paid for at the maker's; malt liquors brewed for sale, which are excised at the brewery; cider and perry, at the vender's; and leather and skins, at the tanner's. A list, which no friend to his country would wish to see further increased.

§ 442. (c) **Salt tax.**—<sup>[321]</sup> I proceed, therefore, to a third duty, namely, that upon salt; which is another distinct branch of his majesty's extraordinary revenue, and consists in an excise of 3s. 4d. *per* bushel imposed upon all salt, by several statutes of King William and other subsequent reigns. This is not generally called an excise, because under the management of different commissioners: but the commissioners of the salt duties have by statute 1 Ann., c. 21 (1702), the same powers, and must observe the same regulations, as those of other excises. This tax had usually been only temporary; but by statute 26 Geo. II, c. 3 (Salt Duties, 1753), was made perpetual.<sup>22</sup>

§ 443. (d) **The postoffice.**—Another very considerable branch of the revenue is levied with greater cheerfulness, as, instead of

<sup>22</sup> Excises proper are now confined to taxes on beer, spirits, chicory, coffee, glucose, and saccharin. But a considerable number of license fees is classed under this head. Also, duties formerly known as assessed taxes, that is to say, duties assessed upon persons in respect to the houses they inhabit and to certain articles they use, are assigned to this branch of the revenue.



being a burden, it is a manifest advantage to the public. I mean the postoffice, or duty for the carriage of letters. As we have traced the original of the excise to the parliament of 1643, so it is but justice to observe that this useful invention owes its first legislative establishment to the same assembly. It is true there existed postmasters in much earlier times: but I apprehend their business was confined to the furnishing of post-horses to persons who were desirous to travel expeditiously, and to the dispatching of extraordinary packets upon special occasions. King James I originally erected a postoffice under the control of one Matthew de Quester or de l'Equester for the conveyance of letters to and from foreign parts; which office was afterwards claimed by Lord Stanhope,<sup>o</sup> but was confirmed and continued to William Frizell and Thomas Witherings by King Charles I, A. D. 1632, for the better accommodation of the English merchants.<sup>p</sup> In 1635, the same prince erected a letter office for England and Scotland, under the direction of the same Thomas Witherings, and settled certain rates of postage;<sup>q</sup> but this extended only to a few of the principal roads, the times of carriage were uncertain, and the postmasters on each road were required to furnish the mail with horses at the rate of 2½*d.* a mile. Witherings was superseded, for abuses in the execution of [322] both his offices, in 1640; and they were sequestered into the hands of Philip Burlamachy, to be exercised under the care and oversight of the king's principal secretary of state.<sup>r</sup> On the breaking out of the civil war, great confusions and interruptions were necessarily occasioned in the conduct of the letter office. And, about that time, the outline of the present more extended and regular plan seems to have been conceived by Mr. Edmond Prideaux, who was appointed attorney general to the commonwealth after the murder of King Charles. He was chairman of a committee in 1642 for considering what rates should be set upon inland letters;<sup>s</sup> and afterwards appointed postmaster by an ordinance of both the houses,<sup>t</sup> in the execution of which office he first established a *weekly* conveyance of letters into *all* parts of the nation;<sup>u</sup> thereby saving to the public the charge of maintain-

o Latch. Rep. 87.

p 19 Rym. Fœd. 385.

q *Ibid.* 650. 20 Rym. 192.

r 20 Rym. 429.

s Com. Journ. 28 Mar. 1642.

t *Ibid.* 7 Sept. 1644.

u *Ibid.* 21 Mar. 1649.

ing postmasters, to the amount of 7,000*l. per annum*. And, his own emoluments being probably very considerable, the common council of London endeavored to erect another postoffice in opposition to his; till checked by a resolution of the house of commons,<sup>w</sup> declaring, that the office of postmaster is and ought to be in the sole power and disposal of the parliament. This office was afterwards farmed by one Manley in 1654.<sup>x</sup> But, in 1657, a regular postoffice was erected by the authority of the protector and his parliament, upon nearly the same model as has been ever since adopted, with the same rates of postage as were continued till the reign of Queen Anne.<sup>y</sup> After the restoration a similar office, with some improvements, was established by statute 12 Car. II, c. 35 (Establishing a Postoffice, 1660), but the rates of letters were altered, and some further regulations added, by the statutes 9 Ann., c. 10 (1710), 6 Geo. I, c. 21 (Excise, 1719), 26 Geo. II, c. 12 (Customs, 1753), 5 Geo. III, c. 25 (Postage, 1765), and 7 Geo. III, c. 50 (Postoffice, 1766), and penalties were enacted, in order to confine the carriage of letters to the public office only, except in some few cases: a provision, which is absolutely necessary; for nothing but an exclusive right can support an office of this sort: many rival independent offices would only serve to ruin one [323] another. The privilege of letters coming free of postage, to and from members of parliament, was claimed by the house of commons in 1660, when the first legal settlement of the present postoffice was made;<sup>z</sup> but afterwards dropped<sup>a</sup> upon a private assurance from the crown that this privilege should be allowed the members.<sup>b</sup> And accordingly a warrant was constantly issued to the postmaster general,<sup>c</sup> directing the allowance thereof, to the extent of two ounces in weight: till at length it was expressly confirmed by statute 4 Geo. III, c. 24 (Postage, 1763); which adds many new regulations, rendered necessary by the great abuses crept into the practice of franking; whereby the annual amount of franked letters had grad-

<sup>w</sup> *Ibid.* 21 Mar. 1649.

<sup>x</sup> Scobell. 358.

<sup>y</sup> Com. Journ. 9 June 1657. Scobell. 511.

<sup>z</sup> Com. Journ. 17 Dec. 1660.

<sup>a</sup> *Ibid.* 22 Dec. 1660.

<sup>b</sup> *Ibid.* 16 Apr. 1735.

<sup>c</sup> *Ibid.* 26 Feb. 1731.

ually increased, from 23,600*l.* in the year 1715, to 170,700*l.* in the year 1763.<sup>d</sup> There cannot be devised a more eligible method, than this, of raising money upon the subject: for therein both the government and the people find a mutual benefit. The government acquires a large revenue; and the people do their business with greater ease, expedition, and cheapness, than they would be able to do if no such tax (and of course no such office) existed.<sup>23</sup>

§ 444. (e) Stamp duties.—A fifth branch of the perpetual revenue consists in the stamp duties, which are a tax imposed upon all parchment and paper whereon any legal proceedings, or private instruments of almost any nature whatsoever, are written; and also upon licenses for retailing wines, of all denominations: upon all almanacs, newspapers, advertisements, cards, dice, and pamphlets containing less than six sheets of paper. These imposts are very various, according to the nature of the thing stamped, rising gradually from a penny to ten pounds. This is also a tax, which though in some instances it may be heavily felt, by greatly increasing the expense of all mercantile as well as legal proceedings, yet (if moderately imposed) is of service to the public in general, by authenticating instruments, and rendering it much more difficult than formerly to forge deeds of any standing; since, as the officers of this branch of the revenue vary their stamps frequently, [324] by marks perceptible to none but themselves, a man that would forge a deed of King William's time, must know and be able to counterfeit the stamp of that date also. In France and some other countries the duty is laid on the contract itself, not on the instrument in which it is contained; as, with us too (besides the stamps on the indentures), a tax is laid by statute 8 Ann., c. 9

<sup>d</sup> *Ibid.* 28 Mar. 1764.

<sup>23</sup> The privilege of franking, or sending and receiving letters free of duty, formerly exercised by members of parliament, was abolished in 1840. Postage has, likewise, been gradually and steadily reduced. The postoffice provides a class of savings banks, small life insurances and life annuities. The telegraph and telephone systems of Great Britain are under the management of the postoffice. Likewise, duties in connection with the Old Age Pensions Acts of 1908 and 1911 and with the National Insurance Act of 1911 have been placeu upon the postoffice.

(1709), on every apprentice fee; of 6*d.* in the pound, if it be 50*l.* or under, and 1*s.* in the pound, if a greater sum: but this tends to draw the subject into a thousand nice disquisitions and disputes concerning the nature of his contract, and whether taxable or not; in which the farmers of the revenue are sure to have the advantage.\* Our general method answers the purposes of the state as well, and consults the ease of the subject much better. The first institution of the stamp duties was by statute 5 & 6 W. & M., c. 21 (Stamps, 1694), and they have since in many instances been increased to ten times their original amount.

§ 445. (f) **Duty on houses and windows.**—A sixth branch is the duty upon houses and windows. As early as the Conquest mention is made in Domesday Book of *fumage* or *fuage*, vulgarly called *smoke farthings*; which were paid by custom to the king for every chimney in the house. And we read that Edward, the Black Prince (soon after his successes in France), in imitation of the English custom, imposed a tax of a florin upon every hearth in his French dominions.<sup>f</sup> But the first parliamentary establishment of it in England was by statute 13 & 14 Car. II, c. 10 (Taxation, 1662), whereby an hereditary revenue of 2*s.* for every hearth, in all houses paying to church and poor, was granted to the king forever. And, by subsequent statutes, for the more regular assessment of this tax, the constable and two other substantial inhabitants of the parish, to be appointed yearly (or the surveyor, appointed by the crown, together with such constable or other public officer), were, once in every year, empowered to view the inside of every house in the parish. But upon the revolution, by statute 1 W. & M., st. 1, c. 10 (Hearth Money, 1688), hearth money was declared to be “not only a great oppression to the poorer sort, but a badge of slavery upon <sup>[325]</sup> the whole people, exposing every man’s house to be entered into, and searched at pleasure, by persons unknown to him; and therefore, to erect a lasting monument of their majesties’ goodness in every house in the kingdom, the duty of hearth money was taken away and abolished.” This monument of goodness remains among us to

\* Sp. of L. b. xiii. c. 9.

<sup>f</sup> Mod. Un. Hist. xxiii. 463. Spelm. Gloss. tit. *Fuage*.

this day: but the prospect of it was somewhat darkened, when in six years afterwards by statute 7 W. III, c. 18 (Taxation, 1695), a tax was laid upon all houses (except cottages) of 2s. now advanced to 3s. *per* house, and a tax also upon all windows, if they exceeded nine, in such house. Which rates have been from time to time<sup>g</sup> varied, being now extended to all windows exceeding six; and the power is given to surveyors, appointed by the crown, to inspect the outside of houses, and also to pass through any house two days, in the year, into any court or yard to inspect the windows there.

§ 446. (g) **Duty on servants.**—The seventh branch of the extraordinary perpetual revenue is a duty of 21s. *per annum* for every male servant retained or employed in the several capacities specifically mentioned in the act of parliament, and which almost amount to an universality, except such as are employed in husbandry, trade, or manufactures. This was imposed by statute 17 Geo. III, c. 39 (Taxation, 1776),\* and is under the management of the commissioners of the land and window tax.

§ 447. (h) **Licenses to hackney-coaches.**—An eighth branch is the duty arising from licenses to hackney-coaches and chairs in London, and the parts adjacent. In 1654 two hundred hackney-coaches were allowed within London, Westminster, and six miles round, under the direction of the court of aldermen.<sup>h</sup> By statute 13 & 14 Car. II, c. 2 (1662), four hundred were licensed; and the money arising thereby was applied to repairing the streets.<sup>i</sup> This number was increased to seven hundred by statute 5 W. & M., c. 22 (Hackney-coaches, 1694), and the duties vested in the crown: and by the statute 9 Ann., c. 23 (Highways, 1710), and other subse-

\* Ninth edition inserts, "18 Geo. III. c. 26 (House Duty, 1778). 19 Geo. III. c. 59 (Duties on Houses, 1779)"; and adds in a note "Stat. 21 Geo. III. c. 31 (Duties on Servants, 1781)." But all these statutes were repealed by 43 Geo. III. c. 161 (House Tax, 1803), § 84.

<sup>g</sup> Stat. 20 Geo. II. c. 3 (National Debt, 1746). 31 Geo. II. c. 22 (Pension Duties, 1757). 2 Geo. III. c. 8 (Window Duties, 1761). 6 Geo. III. c. 38 (House and Window Duties, 1765).

<sup>h</sup> Scobell. 313.

<sup>i</sup> Com. Journ. 14 Feb. 1661.



quent statutes for their government,<sup>1</sup> there are now a thousand licensed coaches and four hundred chairs. This revenue is governed by commissioners [326] of its own, and is, in truth, a benefit to the subject; as the expense of it is felt by no individual, and its necessary regulations have established a competent jurisdiction, whereby a very refractory race of men may be kept in some tolerable order.

§ 448. (i) **Duty on offices and pensions.**—The ninth and last branch of the king's extraordinary perpetual revenue is the duty upon offices and pensions; consisting in a payment of 1s. in the pound (over and above all other duties<sup>k</sup>) out of all salaries, fees, and perquisites, of offices and pensions payable by the crown. This highly popular taxation was imposed by statute 31 Geo. II, c. 22 (Pension Duties, 1757), and is under the direction of the commissioners of the land tax.<sup>24</sup>

§ 449. 3. **How the revenue is appropriated.**—The clear neat produce of these several branches of the revenue, after all charges of collecting and management paid, amounts at present annually to about seven millions and three-quarters sterling; besides more than two millions and a quarter raised by the land and malt tax. How these immense sums are appropriated, is next to be considered. And this is, first and principally, to the payment of the interest of the national debt.

<sup>1</sup> 10 Ann. c. 19 (Customs and Excise, 1711), § 158. 12 Geo. I. c. 15 (1725). 7 Geo. III. c. 44 (Stamps, 1766). 10 Geo. III. c. 44 (1770). 11 Geo. III. c. 24. 28 (Hackney-coaches and Hackney-coachmen, 1770). 12 Geo. III. c. 49 (Hackney-coaches, 1772).

<sup>k</sup> Previous to this, a deduction of 6*d.* in the pound was charged on all pensions and annuities, and all salaries, fees, and wages of all offices of profit granted by or derived from the crown; in order to pay the interest at the rate of three *per cent.* on one million, which was raised for discharging the debts on the civil list, by statutes 7 Geo. I. st. 1. c. 27 (Pension Duty, 1720), 11 Geo. I. c. 17 (National Debt, 1724) and 12 Geo. I. c. 2 (Pension Duty, 1725). This million, being charged on this particular fund, is not considered as any part of the national debt.

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<sup>24</sup> A duty on profits and pensions payable by the crown, exceeding 100*l.* per annum, was made perpetual in 1836.

§ 450. a. The national debt.—In order to take a clear and comprehensive view of the nature of this national debt, it must first be premised, that after the revolution, when our new connections with Europe introduced a new system of foreign politics, the expenses of the nation, not only in settling the new establishment, but in maintaining long wars, as principals, on the Continent, for the security of the Dutch barrier, reducing the French monarchy, settling the Spanish succession, supporting the house of Austria, maintaining the liberties of the Germanic body, and other purposes, increased to an unusual degree: insomuch that it was not thought advisable to raise all the expenses of any one year by taxes to be levied within that year, lest the unaccustomed weight of them should create murmurs among the people. It was therefore the policy of the times to anticipate the revenues of their posterity, by borrowing immense [327] sums for the current service of the state, and to lay no more taxes upon the subject than would suffice to pay the annual interest of the sums so borrowed: by this means converting the principal debt into a new species of property, transferable from one man to another at any time and in any quantity. A system which seems to have had its original in the state of Florence, A. D. 1344: which government then owed about 60,000*l.* sterling: and, being unable to pay it, formed the principal into an aggregate sum, called metaphorically a *mount* or *bank*, the shares whereof were transferable like our stocks, with interest at 5 per cent, the prices varying according to the exigencies of the state.<sup>1</sup> This laid the foundation of what is called the national debt: for a few long annuities created in the reign of Charles II will hardly deserve that name. And the example then set has been so closely followed during the long wars in the reign of Queen Anne, and since, that the capital of the national debt (funded and unfunded), amounted at the close of the session in June, 1777, to about an hundred and thirty-six millions:<sup>25</sup> to pay the interest of which, together with certain annuities for lives and

<sup>1</sup> *Pro tempore, pro spe, pro commodo, minuitur eorum pretium atque augescit.* (Their price was lessened and increased according to time, expectation, or advantage.) Aretin. See Mod. Un. Hist. xxxvi. 116.

<sup>25</sup> The national debt in 1913 was £593,453,857.

years, and the charges of management, amounting annually to upwards of four millions and three-quarters, the extraordinary revenues just now enumerated (excepting only the land tax and annual malt tax) are in the first place mortgaged, and made perpetual by parliament. Perpetual, I say; but still redeemable by the same authority that imposed them: which, if it at any time can pay off the capital, will abolish those taxes which are raised to discharge the interest.

§ 451. (1) **Relation of national debt and property.**—By this means the quantity of property in the kingdom is greatly increased in idea, compared with former times; yet, if we coolly consider it, not at all increased in reality. We may boast of large fortunes and quantities of money in the funds. But where does this money exist? It exists only in name, in paper, in public faith, in parliamentary security: and that is undoubtedly sufficient for the creditors of the public to rely on. But, then, what is the pledge which the public faith has pawned for the security of these debts? The land, <sup>[328]</sup> the trade, and the personal industry of the subject; from which the money must arise that supplies the several taxes. In these, therefore, and these only, the property of the public creditors does really and intrinsically exist: and of course the land, the trade, and the personal industry of individuals, are diminished in their true value just so much as they are pledged to answer. If A's income amounts to 100*l. per annum*; and he is so far indebted to B, that he pays him 50*l. per annum* for his interest; one-half of the value of A's property is transferred to B the creditor. The creditor's property exists in the demand which he has upon the debtor, and nowhere else; and the debtor is only a trustee to his creditor for one-half of the value of his income. In short, the property of a creditor of the public consists in a certain portion of the national taxes: by how much, therefore, he is the richer, by so much the nation, which pays these taxes, is the poorer.

§ 452. (2) **Relation of national debt and currency.**—The only advantage, that can result to a nation from public debts, is the increase of circulation by multiplying the cash of the kingdom,

and creating a new species of currency, assignable at any time and in any quantity; always, therefore, ready to be employed in any beneficial undertaking, by means of this its transferable quality; and yet producing some profit even when it lies idle and unemployed. A certain proportion of debt seems, therefore, to be highly useful to a trading people; but what that proportion is, it is not for me to determine. Thus much is indisputably certain, that the present magnitude of our national encumbrances very far exceeds all calculations of commercial benefit, and is productive of the greatest inconveniences. For, first, the enormous taxes, that are raised upon the necessities of life for the payment of the interest of this debt, are a hurt both to trade and manufactures, by raising the price as well of the artificer's subsistence, as of the raw material, and of course, in a much greater proportion, the price of the commodity itself. Nay, the very increase of paper circulation itself, when extended beyond what is requisite for commerce or foreign exchange, has a natural tendency to increase the price of provisions as well as of all other merchandise. For, as its effect is to multiply the cash of the kingdom, and this to such an extent [329] that much must remain unemployed, that cash (which is the universal measure of the respective values of all other commodities) must necessarily sink in its own value,<sup>m</sup> and everything grow comparatively dearer. Secondly, if part of this debt be owing to foreigners, either they draw out of the kingdom annually a considerable quantity of specie for the interest; or else it is made an argument to grant them unreasonable privileges, in order to induce them to reside here. Thirdly, if the whole be owing to subjects only, it is then charging the active and industrious subject, who pays his share of the taxes, to maintain the indolent and idle creditor who receives them. Lastly, and principally, it weakens the internal strength of a state, by anticipating those resources which should be reserved to defend it in case of necessity. The interest we now pay for our debts would be nearly sufficient to maintain any war that any national motives could require. And if our ancestors in King William's time had annually paid, so long as their exigencies lasted, even a less sum than we now annually raise upon their accounts, they would in the time

<sup>m</sup> See page 276.

of war have borne no greater burdens than they have bequeathed to and settled upon their posterity in time of peace; and might have been eased the instant the exigence was over.

§ 453. (3) *The principal funds.*—The respective produces of the several taxes before mentioned were originally separate and distinct funds; being securities for the sums advanced on each several tax, and for them only. But at last it became necessary in order to avoid confusion, as they multiplied yearly, to reduce the number of these separate funds, by uniting and blending them together; superadding the faith of parliament for the general security of the whole. So that there are now only three capital funds of any account, the *aggregate* fund, and the *general* fund, so called from such union and addition; and the *South Sea* fund, being the produce of the taxes appropriated to pay the interest of such part of the national debt as was advanced by that company and its annuitants. Whereby the separate funds, which was thus united, are become mutual securities for each other; and the whole produce of them, thus aggregated, <sup>[330]</sup> liable to pay such interest or annuities as were formerly charged upon each distinct fund; the faith of the legislature being moreover engaged to supply any casual deficiencies.<sup>26</sup>

§ 454. (4) *The sinking fund.*—The customs, excises, and other taxes, which are to support these funds, depending on contingencies, upon exports, imports, and consumptions, must necessarily be of a very uncertain amount; but they have always been considerably more than was sufficient to answer the charge upon them. The surpluses, therefore, of the three great national funds, the aggregate, general, and South Sea funds, over and above the interest and annuities charged upon them, are decided by statute 3 Geo. I, c. 7 (National Debt, 1716), to be carried together, and to attend the disposition of parliament; and are usually denominated the *sinking* fund, because originally destined to sink and lower the national debt. To this have been since added many other entire duties, granted in subsequent years; and the annual

<sup>26</sup> By act of 1816 the various funds mentioned were combined into the Consolidated Fund of the United Kingdom.



interest of the sums borrowed on their respective credits is charged on and payable out of the produce of the sinking fund. However, the neat surpluses and savings, after all deductions paid, amount annually to a very considerable sum. For as the interest on the national debt has been at several times reduced (by the consent of the proprietors, who had their option either to lower their interest or be paid their principal), the savings from the appropriated revenues must needs be extremely large. This sinking fund is the last resort of the nation; its only domestic resource, on which must chiefly depend all the hopes we can entertain of ever discharging or moderating our encumbrances. And therefore the prudent and steady application of the large sums now arising from this fund, is a point of the utmost importance, and well worthy the serious attention of parliament; which was thereby enabled, in the year 1765, to reduce above two millions sterling of the public debt; and several additional millions in several succeeding years.

§ 455. (5) **King's household and civil list.**—But, before any part of the aggregate fund (the surpluses whereof are one of the chief ingredients that form the sinking <sup>[331]</sup> fund) can be applied to diminish the principal of the public debt, it stands mortgaged by parliament to raise an annual sum for the maintenance of the king's household and the civil list. For this purpose, in the late reigns, the produce of certain branches of the excise and customs, the postoffice, the duty on wine licenses, the revenues of the remaining crown lands, the profits arising from courts of justice (which articles include all the hereditary revenues of the crown), and also a clear annuity of 120,000*l.* in money, were settled on the king for life, for the support of his majesty's household, and the honor and dignity of the crown. And, as the amount of these several branches was uncertain (though in the last reign they were computed to have sometimes raised almost a million), if they did not arise annually to 800,000*l.* the parliament engaged to make up the deficiency. But his present majesty having, soon after his accession, spontaneously signified his consent, that his own hereditary revenues might be so disposed of as might best conduce to the utility and satisfaction of the public; and having graciously

accepted the limited sum of 800,000*l. per annum* for the support of his civil list; the said hereditary and other revenues were carried into and made a part of the aggregate fund, and the aggregate fund was charged with the payment of the whole annuity to the crown of 800,000*l.*, which, being found insufficient, was increased in 1777 to 900,000*l. per annum.*<sup>a</sup> Hereby the revenues themselves, being put under the same care and management as the other branches of the public patrimony, produce more and are better collected than heretofore; and the public is still a gainer of near 100,000*l. per annum* by this disinterested conduct of his majesty. The civil list, thus liquidated, together with the four millions and three-quarters, interest of the national debt, and more than two millions produced from the sinking fund, make up the seven millions and three-quarters *per annum*, neat money, which were before stated to be the annual produce of our *perpetual* taxes; besides the immense, though uncertain, sums arising from the *annual* taxes on land and malt, but which at an average may be calculated at more than two millions and a quarter; and, [332] added to the preceding sum, make the clear produce of the taxes (exclusive of the charge of collecting) which are raised yearly on the people of this country, amount to about ten millions sterling.

§ 456. (a) **Expenses of the civil list.**—The expenses defrayed by the civil list are those that in any shape relate to civil government; as, the expenses of the household; all salaries to officers of state, to the judges, and every of the king's servants; the appointments to foreign ambassadors; the maintenance of the queen and royal family; the king's private expenses, or privy purse; and other very numerous outgoings, as secret service money, pensions, and other bounties: which sometimes have so far exceeded the revenues appointed for that purpose, that application has been made to parliament to discharge the debts contracted on the civil list; as particularly in 1724, when one million was granted for that purpose by the statute 11 Geo. I, c. 17 (National Debt, 1724), and in 1769 and 1777, when half a million and 600,000*l.* were appropriated to the like uses, by the statutes 9 Geo. III, c. 34 (1768), and 17 Geo. III, c. 47 (Appropriation, 1776).

<sup>a</sup> Stat. 1 Geo. III. c. 1 (Civil List, 1760).

§ 457. (b) *History of the civil list.*—The civil list is indeed properly the whole of the king's revenue in his own distinct capacity; the rest being rather the revenue of the public, or its creditors, though collected and distributed again, in the name and by the officers of the crown: it now standing in the same place, as the hereditary income did formerly; and, as that has gradually diminished, the parliamentary appointments have increased. The whole revenue of Queen Elizabeth did not amount to more than 600,000*l.* a year: ° that of King Charles I was <sup>p</sup> 800,000*l.* and the revenue voted for King Charles II was <sup>q</sup> 1,200,000*l.*, though complaints were made (in the first years at least) that it did not amount to so much.<sup>r</sup> But it must be observed, that under these sums were included all manner of public expenses; among which Lord Clarendon in his speech to the parliament computed, that the charge of the navy and land [333] forces amounted annually to 800,000*l.* which was ten times more than before the former troubles.<sup>s</sup> The same revenue, subject to the same charges, was settled on King James II: <sup>t</sup> but by the increase of trade, and more frugal management, it amounted on an average to a million and half *per annum* (besides other additional customs, granted by parliament,<sup>u</sup> which produced an annual revenue of 400,000*l.*) out of which his fleet and army were maintained at the yearly expense of <sup>w</sup> 1,100,000*l.* After the revolution, when the parliament took into its own hands the annual support of the forces both maritime and military, a civil list revenue was settled on the new king and queen, amounting, with the hereditary duties, to 700,000*l.* *per annum*; <sup>x</sup> and the same was continued to Queen Anne and King George I.<sup>y</sup> That of King George II, we have seen, was nominally augmented to <sup>z</sup> 800,000*l.* and in fact was considerably more: and

° Lord Clar. Continuation. 163.

<sup>p</sup> Com. Journ. 4 Sept. 1660.

<sup>q</sup> *Ibid.*

<sup>r</sup> *Ibid.* 4 Jun. 1663. Lord Clar. *Ibid.*

<sup>s</sup> Lord Clar. 165.

<sup>t</sup> Stat. 1 Jac. II. c. 1 (Revenue, 1685).

<sup>u</sup> *Ibid.* c. 3. & 4.

<sup>w</sup> Com. Journ. 1 Mar. 20 Mar. 1688.

<sup>x</sup> Com. Journ. 14 Mar. 1701.

<sup>y</sup> *Ibid.* 17 Mar. 1701. 11 Aug. 1714.

<sup>z</sup> Stat. 1 Geo. II. c. 1 (Civil List, 1727).

that of his present majesty is avowedly increased to the limited sum of 900,000*l.* And upon the whole it is doubtless much better for the crown, and also for the people, to have the revenue settled upon the modern footing rather than the ancient. For, the crown; because it is more certain, and collected with greater ease: for the people; because they are now delivered from the feudal hardships, and other odious branches of the prerogative. And though complaints have sometimes been made of the increase of the civil list, yet if we consider the sums that have been formerly granted, the limited extent under which it is now established, the revenues and prerogatives given up in lieu of it by the crown, the numerous branches of the present royal family, and (above all) the diminution of the value of money compared with what it was worth in the last century, we must acknowledge these complaints to be void of any rational foundation; and that it is impossible to support that dignity which a king of Great Britain should maintain, with an income in any degree less than what is now established by parliament.<sup>27</sup>

§ 458. Restrictions on the king's prerogative.—[334] This finishes our inquiries into the fiscal prerogatives of the king; or

<sup>27</sup> The modern civil list.—The civil list above mentioned is an annual sum granted by parliament at the commencement of each reign, for the expense of the royal household and establishment, as distinguished from the general exigencies of the state; and is the provision before stated to be made for the crown out of the taxes, in lieu of the crown's proper patrimony, and in consideration of the assignment of that patrimony to the public use. It must be pointed out that, though there has been a civil list so called since the revolution, the king was originally required to provide out of the income so assigned to him practically all the expenses of the civil government; it is only since the reign of William the Fourth that the civil list has been freed from all public charges, and come to mean the income granted for the personal expenses of the monarch. The amount fixed for the civil list has been subject in different reigns to considerable variation. At the commencement of the present reign, a civil list was granted to, and settled on, his majesty (George V), during his reign, and for six months afterwards, to the amount of 470,000*l.* per annum, payable out of the Consolidated Fund, at such times, and in such manner, as the treasury may direct; of which sum, 110,000*l.* is assigned for their majesties' privy purse, and the remainder is applicable chiefly to the salaries and expenses connected with their household, but the "civil list pensions" are no longer chargeable on the civil list. In return for that grant,

his revenue, both ordinary and extraordinary. We have therefore now chalked out all the principal outlines of this vast title of the law, the supreme executive magistrate, or the king's majesty, considered in his several capacities and points of view. But, before we entirely dismiss this subject, it may not be improper to take a short comparative review of the power of the executive magistrate, or prerogative of the crown, as it stood in former days and as it stands at present. And we cannot but observe, that most of the laws for ascertaining, limiting, and restraining this prerogative have been made within the compass of little more than a century past; from the petition of right in 3 Car. I (1627) to the present time. So that the powers of the crown are now to all appearance greatly curtailed and diminished since the reign of King James the First: particularly, by the abolition of the star-chamber and high commission courts in the reign of Charles the First, and by the disclaiming of martial law, and the power of levying taxes on the subject, by the same prince: by the disuse of forest laws for a century past: and by the many excellent provisions enacted under Charles the Second; especially the abolition of military tenures, purveyance, and pre-emption; the *habeas corpus* act; and the act to prevent the discontinuance of parliaments for above three years; and, since the revolution, by the strong and emphatical words in which our liberties are asserted in the Bill of Rights, and Act of Settlement; by the act for triennial, since turned into septennial, elections; by the exclusion of certain officers from the house of commons; by rendering the seats of the judges permanent, and their salaries independent; and by restraining the king's pardon from obstructing parliamentary impeachments. Besides all this, if we consider how the crown is impoverished and stripped of all its ancient revenues, so that it greatly depends on the liberality of parliament for its necessary support and maintenance, we may perhaps be led to think that the balance is inclined pretty strongly to the popular scale, and that the executive magistrate

it was at the same time provided that the hereditary revenues of the crown should, during the present reign, be carried to, and form part of, the Consolidated Fund. The civil list, therefore, now stands in the same place as the hereditary income did formerly; but with this great difference, namely, that it is not chargeable, as the hereditary income was, with the general and public expenses of the government.—STEPHEN, 2 Comm. (16th ed.), 681.



has neither independence nor power enough left to form that check upon the lords and commons which the founders of our constitution intended.

§ 459. **The king's sources of power.**—<sup>[335]</sup> But, on the other hand, it is to be considered that every prince, in the first parliament after his accession, has by long usage a truly royal addition to his hereditary revenue settled upon him for his life; and has never any occasion to apply to parliament for supplies, but upon some public necessity of the whole realm. This restores to him that constitutional independence, which at his first accession seems, it must be owned, to be wanting. And then, with regard to power, we may find, perhaps, that the hands of government are at least sufficiently strengthened; and that an English monarch is now in no danger of being overborne by either the nobility or the people. The instruments of power are not perhaps so open and avowed as they formerly were, and therefore are the less liable to jealous and invidious reflections; but they are not the weaker upon that account. In short, our national debt and taxes (besides the inconveniences before mentioned) have also in their natural consequences thrown such a weight of power into the executive scale of government, as we cannot think was intended by our patriot ancestors; who gloriously struggled for the abolition of the then formidable parts of the prerogative, and by an unaccountable want of foresight established this system in their stead. The entire collection and management of so vast a revenue, being placed in the hands of the crown, have given rise to such a multitude of new officers created by and removable at the royal pleasure, that they have extended the influence of government to every corner of the nation. Witness the commissioners, and the multitude of dependents on the customs, in every port of the kingdom; the commissioners of excise, and their numerous subalterns, in every inland district; the postmasters, and their servants, planted in every town, and upon every public road; the commissioners of the stamps, and their distributors, which are full as scattered and full as numerous; the officers of the salt duty, which though a species of excise and conducted in the same manner, are yet made a distinct corps from the ordinary managers of that revenue; the sur-

veyors of houses and windows; the receivers of the land tax; the managers of lotteries; and the commissioners of hackney-coaches; all which [336] are either mediately or immediately appointed by the crown, and removable at pleasure without any reason assigned: these, it requires but little penetration to see, must give that power, on which they depend for subsistence, an influence most amazingly extensive. To this may be added the frequent opportunities of conferring particular obligations, by preference in loans, subscriptions, tickets, remittances, and other money transactions, which will greatly increase this influence; and that over those persons whose attachment, on account of their wealth, is frequently the most desirable. All this is the natural, though perhaps the unforeseen, consequence of erecting our funds of credit, and to support them establishing our present perpetual taxes: the whole of which is entirely new since the restoration in 1660; and by far the greatest part since the revolution in 1688. And the same may be said with regard to the officers in our numerous army, and the places which the army has created. All which put together give the executive power so persuasive an energy with respect to the persons themselves, and so prevailing an interest with their friends and families, as will amply make amends for the loss of external prerogative.

But, though this profusion of offices should have no effect on individuals, there is still another newly acquired branch of power; and that is, not the influence only, but the force of a disciplined army: paid, indeed, ultimately by the people, but immediately by the crown: raised by the crown, officered by the crown, commanded by the crown. They are kept on foot, it is true, only from year to year, and that by the power of parliament: but during that year they must by the nature of our constitution, if raised at all, be at the absolute disposal of the crown. And there need but few words to demonstrate how great a trust is thereby reposed in the prince by his people. A trust that is more than equivalent to a thousand little troublesome prerogatives.

Add to all this, that, besides the civil list, the immense revenue of almost seven millions sterling, which is annually paid to the creditors of the public, or carried to the sinking [337] fund, is first deposited in the royal exchequer, and thence issued out to

the respective offices of payment. This revenue the people can never refuse to raise, because it is made perpetual by act of parliament: which also, when well considered, will appear to be a trust of great delicacy and high importance.

§ 460. The existing situation as to the king's prerogative.— Upon the whole, therefore, I think it is clear that, whatever may have become of the *nominal*, the real power of the crown has not been too far weakened by any transactions in the last century. Much is indeed given up; but much is also acquired. The stern commands of prerogative have yielded to the milder voice of influence: the slavish and exploded doctrine of nonresistance has given way to a military establishment by law; and to the disuse of parliaments has succeeded a parliamentary trust of an immense perpetual revenue. When, indeed, by the free operation of the sinking fund, our national debts shall be lessened; when the posture of foreign affairs, and the universal introduction of a well planned and national militia, will suffer our formidable army to be thinned and regulated; and when (in consequence of all) our taxes shall be gradually reduced; this adventitious power of the crown will slowly and imperceptibly diminish, as it slowly and imperceptibly rose. But, till that shall happen, it will be our especial duty, as good subjects and good Englishmen, to reverence the crown, and yet guard against corrupt and servile influence from those who are intrusted with its authority; to be loyal, yet free; obedient, and yet independent; and, above everything, to hope that we may long, very long, continue to be governed by a sovereign, who, in all those public acts that have personally proceeded from himself, hath manifested the highest veneration for the free constitution of Britain; hath already in more than one instance remarkably strengthened its outworks; and will therefore never harbor a thought, or adopt a persuasion, in any the remotest degree detrimental to public liberty.

## OF SUBORDINATE MAGISTRATES.

§ 461. **Principal subordinate magistrates.**—In a former chapter of these Commentaries<sup>a</sup> we distinguished magistrates into two kinds: supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only, namely, the supreme legislative power of parliament, and the supreme executive power, which is the king: and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates.

And herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries, or the like: because I do not know that they are in that capacity in any considerable degree the objects of our laws, or have any very important share of magistracy conferred upon them: except that the secretaries of state are allowed the power of commitment, in order to bring offenders to trial.<sup>b 1</sup> Neither shall I here treat of the office and authority of

<sup>a</sup> C. 2, page 146.

<sup>b</sup> 1 Leon. 70. 2 Leon. 175. Comb. 143. 5 Mod. 84. Salk. 347. Carth. 291.

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**1 Relation of king and officers of state.**—How vast a change has taken place since Blackstone's day we may see from a very interesting passage in his book, Book I, chap. ix. He has a chapter on the Subordinate Magistrates. In this he speaks of sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor. He prefaces it with these words: "In a former chapter of these Commentaries we distinguished magistrates into two kinds: supreme, or those in whom the sovereign power of the state resides; and subordinate, or those who act in an inferior secondary sphere. We have hitherto considered the former kind only, namely, the supreme legislative power or parliament, and the supreme executive power, which is in the king; and are now to proceed to inquire into the rights and duties of the principal subordinate magistrates. And herein we are not to investigate the powers and duties of his majesty's great officers of state, the lord treasurer, lord chamberlain, the principal secretaries or the like; because I do not know that they are in that capacity in any considerable degree the objects of our laws or have any very

the lord chancellor, or the other judges of the superior courts of justice; because they will find a more proper place in the third part of these Commentaries. Nor shall I enter into any minute disquisitions, with regard to the rights and dignities of mayors and aldermen, [339] or other magistrates of particular corporations; because these are mere private and strictly municipal rights, depending entirely upon the domestic constitution of their respective franchises. But the magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use and have a jurisdiction and authority dispersedly throughout the kingdom: which are, principally, sheriffs; coroners; justices of the peace; constables; surveyors of highways; and overseers of the poor. In treating of all which I shall inquire into, first, their antiquity and original; next, the manner in which they are appointed and may be removed; and lastly, their rights and duties. And first of sheriffs.

§ 462. 1. **The sheriff.**—The sheriff is an officer of very great antiquity in this kingdom, his name being derived from two Saxon

important share of magistracy conferred upon them: except that the secretaries of state are allowed the power of commitment in order to bring offenders to trial." Now that is a very memorable sentence, and on the whole (though perhaps it is a little exaggerated) I think that it was true in Blackstone's day. The lord treasurer, the secretaries of state, were of course very important persons—perhaps quite as important then as now—but the law knew them not, or merely knew them as persons who advised the king in the use of his prerogatives. The law gave powers to sheriffs and coroners, to surveyors of highways and overseers of the poor; it gave few powers to the high officers of state, to the men who for good and evil had really the destinies of England in their hands: the powers that they in fact exercised were in law the king's powers. But I know no proof of the power of Blackstone's genius so striking as the fact that the sentence that I have just quoted should be repeated nowadays in books which profess to set forth the modern law of England. Does not our law know these high officers of state? Open the statute book, on almost every page of it you will find, "it shall be lawful for the treasury to do this," "it shall be lawful for one of the secretaries of state to do that."

This is the result of a modern movement, a movement which began, we may say, about the time of the Reform Bill of 1832. The new wants of a new age have been met in a new manner—by giving statutory powers of all kinds, sometimes to the queen in council, sometimes to the treasury, sometimes to a secretary of state, sometimes to this board, sometimes to the other. But of this



words, *scire gerefa*, the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*; to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden:<sup>c</sup> reserving to themselves the honor, but the labor was laid on the sheriff. So that now the sheriff does all the king's business in the county; and though he be still called *vice-comes*, yet he is entirely independent of, and not subject to the earl; the king by his letters patent committing *custodiam comitatus* (the custody of the county) to the sheriff, and him alone.

§ 463. a. Election of sheriff.—Sheriffs were formerly chosen by the inhabitants of the several counties. In confirmation of which it was ordained by statute 28 Edw. I, c. 8 (Election of Sheriffs, 1300), that the people should have election of sheriffs in every shire, where the shrievalty is not of inheritance. For anciently in some counties the sheriffs were hereditary; as I apprehend they were in Scotland till the statute 20 Geo. II, c. 43

<sup>c</sup> Dalton of Sheriffs, c. 1.

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vast change our institutional writers have hardly yet taken any account. They go on writing as though England were governed by the royal prerogatives, as if ministers had nothing else to do than to advise the king as to how his prerogatives should be exercised.

In my view, which I put forward with some diffidence and with a full warning that it is not orthodox, we can no longer say that the executive power is vested in the king: the king has powers, this minister has powers, and that minister has powers. The requisite harmony is secured by the extra-legal organization of cabinet and ministry. The powers legally given to the king are certainly the most important, but I cannot consent to call them supreme. To be able to declare war and peace is certainly an important power, perhaps the most important power that the law can give, and this belongs to the king. But the power to make rules for the government of the police force is also an important power, and this our law gives to a secretary of state. The one power may be vastly more important than the other, but it is in no sense supreme over the other. The supremacy of the king's powers, if it is to be found anywhere, must be found in the fact that the ministers legally hold their offices during his good pleasure.—MAITLAND, Const. Hist. of England, 416.

(Heritable Jurisdictions, 1746); and still continue in the county of [340] Westmoreland to this day; the city of London having also the inheritance of the shrievalty of Middlesex vested in their body by charter.<sup>d 2</sup> The reason of these popular elections is assigned in the same statute, c. 13, "that the commons might choose such as would not be a burden to them." And herein appears plainly a strong trace of the democratic part of our constitution; in which form of government it is an indispensable requisite, that the people should choose their own magistrates.<sup>e</sup> This election was in all probability not absolutely vested in the commons, but required the royal approbation. For in the Gothic constitution, the judges of their county courts (which office is executed by our sheriff) were elected by the people, but confirmed by the king: and the form of their election was thus managed; the people, or *incolæ territorii* (the inhabitants of the territory), chose *twelve* electors, and they nominated *three* persons, *ex quibus rex unum confirmabat* (of whom the king confirmed one.)<sup>f</sup> But, with us in England, these popular elections, growing tumultuous, were put an end to by the statute 9 Edw. II, st. 2 (Sheriffs, 1315), which enacted that the sheriffs should from thenceforth be assigned by the chancellor, treasurer, and the judges; as being persons in whom the same trust might with confidence be reposed. By statutes 14 Edw. III, c. 7 (Sheriffs, 1340), 23 Hen. VI, c. 8 (Commissioners of Sewers, 1444), and 21 Hen. VIII, c. 20 (President of the Council, 1529), the chancellor, treasurer, president of the king's council, *chief* justices, and *chief* baron, are to make this election; and that on the morrow of All Souls in the exchequer. And the king's letters patent, appointing the new sheriffs, used commonly to bear date the sixth day of November.<sup>g</sup> The statute of Cambridge, 12 Rich. II, c. 2 (Corrupt Appointments to Offices, 1388), ordains, that the

<sup>d</sup> 3 Rep. 72.

<sup>f</sup> Stiernh. De Jure Goth. l. 1. c. 3.

<sup>e</sup> Montesq. Sp. L. b. 2. c. 2.

<sup>g</sup> Stat. 12 Edw. IV. c. 1 (Sheriff, 1472).

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<sup>2</sup> Upon the death of the hereditary holder, Earl of Thanet, without issue, all hereditary claims and title to the office of sheriff of Westmoreland were abolished in 1850. By the Local Government Act, 1888, it was provided that the crown should appoint the sheriff of Middlesex, and of the county of London, then newly created, and that with the consent of the city, the sheriff of the county of London might exercise jurisdiction in the city also.

chancellor, treasurer, keeper of the privy seal, steward of the king's house, the king's chamberlain, clerk of the rolls, the justices of the one bench and the other, barons of the exchequer, and all other that shall be called to ordain, name, or make justices of the peace, *sheriffs*, and other officers of the king, shall be sworn to act indifferently, and to name no man that sueth to be put in office, but such only as they shall judge to be the best and most sufficient. And the custom now is (and has been at least [341] ever since the time of Fortescue,<sup>a</sup> who was chief justice and chancellor to Henry the Sixth) that all the judges, together with the other great officers, meet in the exchequer chamber on the morrow of All Souls yearly (which day is now altered to the morrow of St. Martin by the last act for abbreviating Michaelmas term) and then and there propose three persons to the king, who afterwards appoints one of them to be sheriff. This custom, of the *twelve* judges proposing *three* persons, seems borrowed from the Gothic constitution before mentioned: with this difference, that among the Goths the twelve nominors were first elected by the people themselves. And this usage of ours at its first introduction, I am apt to believe, was founded upon some statute, though not now to be found among our printed laws: first, because it is materially different from the direction of all the statutes before mentioned; which it is hard to conceive that the judges would have countenanced by their concurrence, or that Fortescue would have inserted in his book, unless by the authority of some statute: and also, because a statute is expressly referred to in the record, which Sir Edward Coke tells us<sup>1</sup> he transcribed from the council book of 3 March, 34 Hen. VI (1455), and which is in substance as follows. The king had of his own authority appointed a man sheriff of Lincolnshire, which office he refused to take upon him: whereupon the opinions of the judges were taken, what should be done in this behalf. And the two chief justices, Sir John Fortescue and Sir John Prisot, delivered the unanimous opinion of them all: "that the king did an error when he made a person sheriff, that was not chosen and presented to him according to the *statute*; that the person refusing was liable to no fine for disobedience, as if he had been one of the *three* persons chosen according to the tenor

<sup>a</sup> De L. L. c. 24.<sup>1</sup> 2 Inst. 559.

of the *statute*; that they would advise the king to have recourse to the *three* persons that were chosen according to the *statute*, or that some other thrifty man be entreated to occupy the office for this year; and that, the next year, to eschew such inconveniences, the order of the *statute* in this behalf made be observed." But notwithstanding this unanimous resolution of [342] all the judges of England, thus entered in the council book, and the statute 34 & 35 Hen. VIII, c. 26, sec. 61 (1543), which expressly recognizes this to be the law of the land, some of our writers<sup>1</sup> have affirmed, that the king, by his prerogative, may name whom he pleases to be sheriff, whether chosen by the judges or no. This is grounded on a very particular case in the fifth year of Queen Elizabeth (1562), when, by reason of the plague, there was no Michaelmas term kept at Westminster; so that the judges could not meet there *in crastino animarum* (on the morrow of All Souls) to nominate the sheriffs: whereupon the queen named them herself, without such previous assembly, appointing for the most part one of two remaining in the last year's list.<sup>k</sup> And this case, thus circumstanced, is the only authority in our books for the making these extraordinary sheriffs. It is true, the reporter adds, that it was held that the queen by her prerogative might make a sheriff without the election of the judges, *non obstante aliquo statuto in contrarium* (notwithstanding any statute to the contrary): but the doctrine of *non obstante's* which sets the prerogative above the laws, was effectually demolished by the Bill of Rights at the revolution, and abdicated Westminster Hall when King James abdicated the kingdom. However, it must be acknowledged, that the practice of occasionally naming what are called pocket-sheriffs, by the sole authority of the crown, hath uniformly continued to the reign of his present majesty; in which, I believe, few (if any) instances have occurred.<sup>3</sup>

<sup>1</sup> Jenkins. 229.

<sup>k</sup> Dyer. 225.

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<sup>3</sup> Under the Sheriffs Act, 1887, the annual appointment of sheriffs is made at the Royal Courts of Justice on the 12th day of November in every year, in the manner heretofore in use, and by the same high officers, or two of them, together with the judges, or two of them. And by the same act, in continuance of a similar provision in the Fines Act, 1833, whenever any person is duly pricked or appointed to be sheriff of any county, a warrant is to be made out

§ 464. **b. Sheriff's term of office.**—Sheriffs, by virtue of several old statutes, are to continue in their office no longer than one year; and yet it hath been said<sup>1</sup> that a sheriff may be appointed *durante bene placito* or during the king's pleasure; and so is the form of the royal writ.<sup>m</sup> Therefore, till a new sheriff be named, his office cannot be determined, unless by his own death or the demise of the king;<sup>4</sup> in which last case it was usual for the successor to send a new writ to the old sheriff:<sup>n</sup> but now by statute 1 Ann., st. 1, c. 8 (1702), all officers appointed by the [343] preceding king may hold their offices, for six months after the king's demise, unless sooner displaced by the successor. We may further observe, that by statute 1 Rich. II, c. 11 (Sheriffs, 1377), no man that has served the office of sheriff for one year can be compelled to serve the same again within three years after.

§ 465. **c. Powers and duties of the sheriff.**—We shall find it is of the utmost importance to have the sheriff appointed according to law, when we consider his power and duty. These are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

§ 466. **(1) Judicial capacity of the sheriff.**—In his judicial capacity he is to hear and determine all causes of forty shillings value and under, in his county court, of which more in its proper place; and he has also a judicial power in divers other civil cases.<sup>o</sup> He is likewise to decide the elections of knights of the shire (subject to the control of the house of commons), of coroners, and of

<sup>1</sup> 4 Rep. 32.

<sup>n</sup> *Ibid.* 7.

<sup>m</sup> Dalt. of Sheriffs. 8.

<sup>o</sup> Dalt. c. 4.

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and signed by the clerk to the privy council, and transmitted by him to the person so appointed; and this appointment so made is of the same effect as if by patent under the great seal. A duplicate of the warrant is within ten days from the date thereof to be transmitted by the clerk of the privy council to the clerk of the peace for the county; and the sheriff so appointed continues in office until his successor is duly and fully appointed. In the event of his dying within the term of his office, the under-sheriff takes his place, and acts as *occasional* sheriff.—STEPHEN, 2 Comm. (16th ed.), 718.

<sup>4</sup> The office of sheriff no longer determines on the demise of the crown.



verderers; to judge of the qualification of voters, and to return such as he shall determine to be duly elected.

§ 467. (2) **Sheriff as keeper of the king's peace.**—As the keeper of the king's peace, both by common law and special commission, he is the first man in the county,<sup>5</sup> and superior in rank to any nobleman therein, during his office.<sup>p</sup> He may apprehend, and commit to prison, all persons who break the peace, or attempt to break it: and may bind anyone in a recognizance to keep the king's peace. He may, and is bound *ex officio* to pursue, and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. He is also to defend his county against any of the king's enemies when they come into the land: and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him; which is called the *posse comitatus*, or power of the county:<sup>q</sup> which summons, every person above fifteen years old, and under the degree of a peer, is bound to attend upon warning,<sup>r</sup> [344] under pain of fine and imprisonment.<sup>s</sup> But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the great charter,<sup>t</sup> he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offense. For it would be highly unbecoming, that the executioners of justice should be also the judges; should impose, as well as levy, fines and amercements; should one day condemn a man to death, and personally execute him the next. Neither may he act as an ordinary justice of the peace during the time of his office:<sup>u</sup> for this would be equally inconsistent; he being in many respects the servant of the justices.

<sup>p</sup> 1 Roll. Rep. 237.

<sup>q</sup> Dalt. c. 95.

<sup>r</sup> Lamb. Eiren. 315.

<sup>s</sup> Stat. 2 Hen. V. c. 8 (Riots and Unlawful Assemblies, 1414).

<sup>t</sup> Cap. 17.

<sup>u</sup> Stat. 1 Mar. st. 2. c. 8 (Sheriffs, 1553).

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<sup>5</sup> He is now the second man in the county.

§ 468. (3) **Sheriff executes judicial process.**—In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes, he is to serve the writ, to arrest, and to take bail; when the cause comes to trial, he must summon and return the jury; when it is determined, he must see the judgment of the court carried into execution. In criminal matters, he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extends to death itself.

§ 469. (4) **Sheriff as the king's bailiff.**—As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick; for so his county is frequently called in the writs: a word introduced by the princes of the Norman line; in imitation of the French, whose territory is divided into bailiwicks, as that of England into counties.<sup>w</sup> He must seize to the king's use all lands devolved to the crown by attainder or escheat; must levy all fines and forfeitures, must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject; and must also collect the king's rents within his bailiwick, if commanded by process from the exchequer.<sup>x</sup>

§ 470. (5) **Officers subordinate to the sheriff.**—[345] To execute these various offices, the sheriff has under him many inferior officers; an under-sheriff, bailiffs, and jailers; who must neither buy, sell, nor farm their offices, on forfeiture of 500*l*.<sup>y</sup>

§ 471. (a) **Deputy sheriffs.**—The under-sheriff usually performs all the duties of the office; a very few only excepted, where the personal presence of the high-sheriff is necessary. But no under-sheriff shall abide in his office above one year;<sup>z</sup> and if he does, by statute 23 Hen. VI, c. 8 (1444), he forfeits 200*l*., a very large penalty in those early days. And no under-sheriff or

<sup>w</sup> Fortesc. de L. L. c. 24.

<sup>x</sup> Dalt. c. 9.

<sup>y</sup> Stat. 3 Geo. I. c. 15 (Estreats, 1717).

<sup>z</sup> Stat. 42 Edw. III. c. 9 (Crown Debts, 1368).

sheriff's officer shall practice as an attorney, during the time he continues in such office:<sup>a</sup> for this would be a great inlet to partiality and oppression. But these salutary regulations are shamefully evaded, by practicing in the names of other attorneys, and putting in sham deputies by way of nominal under-sheriffs: by reason of which, says Dalton,<sup>b</sup> the under-sheriffs and bailiffs do grow so cunning in their several places, that they are able to deceive, and it may well be feared that many of them do deceive, both the king, the high-sheriff, and the county.

§ 472. (b) **Bailiffs.**—Bailiffs, or sheriff's officers, are either bailiffs of hundreds, or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs, to collect fines therein; to summon juries; to attend the judges and justices at the assizes, and quarter sessions; and also to execute writs and process in the several hundreds. But, as these are generally plain men, and not thoroughly skillful in this latter part of their office, that of serving writs, and making arrests and executions, it is now usual to join special bailiffs with them; who are generally mean persons employed by the sheriffs on account only of their adroitness and dexterity in hunting and seizing their prey.<sup>6</sup> The sheriff being answerable for the misdemeanors of these bailiffs, they are therefore usually bound in an obligation for the due execution [346] of their office, and thence are called bound bailiffs; which the common people have corrupted into a much more homely appellation.

§ 473. (c) **Jailers.**—Jailers are also the servants of the sheriff, and he must be responsible for their conduct. Their business is to keep safely all such persons as are committed to them by lawful warrant: and, if they suffer any such to escape, the sheriff shall answer it to the king, if it be a criminal matter; or,

<sup>a</sup> Stat. 1 Hen. V. c. 4 (Bailiffs of Sheriffs, 1413).

<sup>b</sup> Of Sheriffs, c. 115.

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<sup>6</sup> Cited 2 N. H. 519. The power of the sheriff to make deputies for the execution or on mean process is incident to his office at common law, and cannot be restrained unless by positive statute. (4 Bacon's Abr., tit. Sheriff; Clark v. Bray, Kirby, 240; Dungan v. Hall, 64 Ill. 255.)—HAMMOND.

in a civil case, to the party injured.<sup>c</sup> And to this end the sheriff must<sup>d</sup> have lands sufficient within the county to answer the king and his people. The abuses of jailers and sheriff's officers toward the unfortunate persons in their custody are well restrained and guarded against by statute 32 Geo. II, c. 28 (Debtor's Imprisonment, 1758), and by statute 14 Geo. III, c. 59 (Health of Prisoners, 1774), provisions are made for better preserving the health of prisoners and preventing the jail distemper.

§ 474. (6) Sheriff's personal expenses.—The vast expense, which custom had introduced in serving the office of high-sheriff, was grown such a burden to the subject, that it was enacted, by statute 13 & 14 Car. II, c. 21 (Expenses of Sheriffs, 1662), that no sheriff (except of London, Westmoreland, and towns which are counties of themselves) should keep any table at the assizes, except for his own family, or give any presents to the judges or their servants, or have more than forty men in livery: yet, for the sake of safety and decency, he may not have less than twenty men in England and twelve in Wales: upon forfeiture, in any of these cases, of 200*l*.<sup>7</sup>

§ 475. 2. The coroner.—The coroner's is also a very ancient office at the common law.<sup>8</sup> He is called coroner, *coronator*, because he hath principally to do with pleas of the crown, or such

<sup>c</sup> Dalt. c. 118. 4 Rep. 34.

<sup>d</sup> Stat. 9 Edw. II. st. 2 (Sheriffs, 1315). 2 Edw. III. c. 4 (Sheriffs, 1328). 4 Edw. III. c. 9 (Civil Procedure, 1330). 5 Edw. III. c. 4 (Sheriff's Qualification, 1331). 13 & 14 Car. II. c. 21. § 7 (Sheriffs, 1662).

<sup>7</sup> The office of sheriff is now regulated by the Sheriff's Act, 1887, the substance of which may be found in 2 Stephen's Comm. (16th ed.), 719 ff.

<sup>8</sup> Below [the sheriff] in rank and of more recent origin stand the coroners, or, to give them their full title, the keepers of the pleas of the crown (*custodes placitorum coronæ*). Normally the county has four coroners who are elected by the county in the county court. Their origin is traced to an ordinance of 1194. The function implied by their title is that of keeping (*custodire*) as distinguished from that of holding (*tenere*) the pleas of the crown; they are not to hear and determine causes, but are to keep record of all that goes on in the county and concerns the administration of criminal justice, and more particularly must they guard the revenues which will come to the king if such justice be duly done.—POLLOCK & MAITLAND, 1 Hist. Eng. Law (2d ed.), 534.

wherein the king is more immediately concerned.<sup>e</sup> And in this light the lord chief justice of the king's bench is the principal coroner in the kingdom, and may (if he pleases) exercise the jurisdiction of a coroner in any part of the realm.<sup>f</sup> But [347] there are also particular coroners for every county of England; usually four, but sometimes six, and sometimes fewer.<sup>g</sup> This officer<sup>h</sup> is of equal antiquity with the sheriff; and was ordained together with him to keep the peace, when the earls gave up the wardship of the county.

§ 476. a. Election of coroner.—He is still chosen by all the freeholders in the county court as by the policy of our ancient laws the sheriffs, and conservators of the peace, and all other officers were, who were concerned in matters that affected the liberty of the people;<sup>1</sup> and as verderers of the forest still are, whose business it is to stand between the prerogative and the subject in the execution of the forest laws. For this purpose there is a writ at common law *de coronatore eligendo* (of choosing a coroner):<sup>k</sup> in which it is expressly commanded the sheriff, “*quod talem eligi faciat, qui melius et sciat, et velit, et possit, officio illi intendere* (that he cause such one to be chosen as is the best informed, and most willing and able to hold that office).”<sup>l</sup> And, in order to effect this the more surely, it was enacted by the statute<sup>1</sup> of Westm. 1 that none but lawful and discreet knights should be chosen; and there was an instance in the 5 Edw. III (1331), of a man being removed from this office, because he was only a merchant.<sup>m</sup> But it seems it is now sufficient if a man hath lands enough to be made a knight, whether he be really knighted or not:<sup>n</sup> for the coroner ought to have an estate sufficient to maintain the dignity of his office, and answer any fines that may be set upon him for his mis-

<sup>e</sup> 2 Inst. 31. 4 Inst. 271.

<sup>f</sup> 4 Rep. 57.

<sup>g</sup> F. N. B. 163.

<sup>h</sup> Mirror. c. 1. § 3.

<sup>1</sup> 2 Inst. 558.

<sup>k</sup> F. N. B. 163.

<sup>l</sup> 3 Edw. I. c. 10 (Coroners, 1275).

<sup>m</sup> 2 Inst. 32.

<sup>n</sup> F. N. B. 163, 164.

<sup>9</sup> The writ *de coronatore eligendo* is now, by the Local Government Act, 1888, directed to the county council, who are also made the electors of the sheriff.



behavior;<sup>o</sup> and if he hath not enough to answer, his fine shall be levied on the county, as a punishment for electing an insufficient officer.<sup>p</sup> Now, indeed, through the culpable neglect of gentlemen of property, this office has been suffered to fall into disrepute, and get into low and indigent hands: so that, although formerly no coroners would condescend to be paid for serving their country, and they were by the aforesaid statute of Westm. 1 expressly forbidden to take a [348] reward, under pain of great forfeiture to the king; yet for many years past they have only desired to be chosen for the sake of their perquisites: being allowed fees for their attendance by the statute 3 Hen. VII, c. 1 (Star-Chamber, 1487), which Sir Edward Coke complains of heavily;<sup>q</sup> though since his time those fees have been much enlarged.<sup>r</sup> <sup>10</sup>

§ 477. **b. Coroner's term of office.**—The coroner is chosen for life: but may be removed, either by being made sheriff, or chosen verderer, which are offices incompatible with the other; or by the king's writ *de coronatore exonerando* (of discharging the coroner), for a cause to be therein assigned, as that he is engaged in other business, is incapacitated by years of sickness, hath not a sufficient estate in the county, or lives in an inconvenient part of it.<sup>s</sup> And by the statute 25 Geo. II, c. 29 (Coroners, 1751), extortion, neglect, or misbehavior are also made causes of removal.

§ 478. **c. Powers and duties of the coroner—(1) Coroner's judicial functions.**—The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial; but principally judicial. This is in great measure ascertained by statute 4 Edw. I (1276), *de officio coronatoris* (of the office of coroner); and consists, first, in inquiring, when any person is slain, or dies

<sup>o</sup> *Ibid.*

<sup>p</sup> *Mirr. c. 1. § 3.* 2 *Inst.* 175.

<sup>q</sup> 2 *Inst.* 210.

<sup>r</sup> Stat. 25 Geo. II. c. 29 (1751).

<sup>s</sup> *F. N. B.* 163, 164.

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<sup>10</sup> Coroners are now said to be in general persons of high respectability. By the Coroners Act, 1887, they are required to possess land in fee in the county. They are paid by salary, and no longer by fees.

suddenly, or in prison, concerning the manner of his death. And this must be "*super visum corporis* (on the view of the body)";<sup>i</sup> for, if the body be not found, the coroner could not sit.<sup>u</sup> He must also sit at the very place where the death happened; and his inquiry is made by a jury from four, five, or six of the neighboring towns, over whom he is to preside. If any be found guilty by this inquest of murder, he is to commit to prison for further trial, and is also to inquire concerning their lands, goods and chattels, which are forfeited thereby: but, whether it be murder or not, he must inquire whether any deodand has accrued to the king, or the [349] lord of the franchise, by this death: and must certify the whole of this inquisition\* to the court of king's bench, or the next assizes. Another branch of his office is to inquire concerning shipwrecks; and certify whether wreck or not, and who is in possession of the goods. Concerning treasure-trove, he is also to inquire who were the finders, and where it is, and whether anyone be suspected of having found and concealed a treasure; "and that may be well perceived (saith the old statute of Edw. I) where one liveth riotously, hunting taverns, and hath done so of long time": whereupon he might be attached, and held to bail, upon this suspicion only.

§ 479. (2) **Coroner's municipal functions.**—The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff, for suspicion of partiality (as that he is interested in the suit, or of kindred to either plain-

\* Ninth edition inserts here, "under his own seal and the seals of the jurors [Stat. 33 Hen. VIII. c. 12 (Murder, 1541). 1 & 2 P. & M. c. 13 (1554). 2 West Symbol. § 310. Crompt. 264. Tremain. P. C. 621.] together with the evidence thereon."

<sup>t</sup> 4 Inst. 271.

<sup>u</sup> Thus, in the Gothic constitution, before any fine was payable by the neighborhood, for the slaughter of a man therein, "*de corpore delicti constare oportebat; i. e. non tam fuisse aliquem in territorio isto mortuum inventum, quam vulncratum et cæsum. Potest enim homo etiam ex alia causa subito mori.*" (It was necessary that the crime should be evident; that is, not merely that a person was found dead in that district, but that he was wounded and slain. For a man may die suddenly from other causes.)" Stiernhook, De Jure Gothor. l. 3. c. 4.

tiff or defendant), the process must then be awarded to the coroner, instead of the sheriff, for execution of the king's writs.<sup>v 11</sup>

§ 480. 3. Justices of the peace.—The next species of subordinate magistrates, whom I am to consider, are justices of the peace; the principal of whom is the *custos rotulorum*, or keeper of the records of the county. The common law hath ever had a special care and regard for the conservation of the peace; for peace is the very end and foundation of civil society. And therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these some had, and still have, this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes* or *conservatores pacis* (keepers of the peace). Those that were so *virtute officii* (by virtue of their office) still continue: but the latter sort are superseded by the modern justices.

§ 481. a. Conservators of the peace.—The king's majesty<sup>w</sup> is, by his office and dignity royal, the principal conservator of the peace within all his dominions; [350] and may give authority to any other to see the peace kept, and to punish such as break it: hence it is usually called the king's peace.<sup>12</sup> The lord chancellor

v 4 Inst. 271.

w Lambard. Eirenarch. 12.

11 The office of coroner is now governed by the Coroners Acts of 1844, 1887, and 1892, the substance of which is given in 2 Stephen's Comm. (16th ed.), 730 ff.

12 We said that the king's peace and protection had become the established right of every peaceable subject. Nevertheless a trace of the archaic ideas persisted as long as the art of common law pleading itself. The right was to be enjoyed only on condition of being formally demanded. In order to give the king's courts jurisdiction of a plea of trespass it was needful to insert in the writ the words *vi et armis*, which imported a breach of the peace; and it was usual, if not necessary, also to add expressly the words *contra pacem nostram*. Without the allegation of force and arms the writ was merely "vicountiel," that is, the sheriff did not return it to the superior court but had to determine the matter in the county court. By so many steps and transformations did it become possible for Lambarde, and Blackstone after him, to say, with unconscious inversion of the historical order of development, and as if the matter were in itself too obvious to need explanation: "The king's majesty

or keeper, the lord treasurer, the lord high steward of England, the lord marshal, the lord high constable of England (when any such officers are in being) and all the justices of the court of king's bench (by virtue of their offices) and the master of the rolls (by prescription) are general conservators of the peace throughout the whole kingdom, and may commit all breakers of it, or bind them in recognizances to keep it:<sup>x</sup> the other judges are only so in their own courts. The coroner is also a conservator of the peace within his own county;<sup>y</sup> as is also the sheriff;<sup>z</sup> and both of them may take a recognizance or security for the peace. Constables, tithing-men, and the like, are also conservators of the peace within their own jurisdictions; and may apprehend all breakers of the peace, and commit them, till they find sureties for their keeping it.<sup>a</sup>

Those that were, without any office, simply and merely conservators of the peace, either claimed that power by prescription;<sup>b</sup> or were bound to exercise it by the tenure of their lands;<sup>c</sup> or, lastly, were chosen by the freeholders in full county court before the sheriff; the writ for their election directing them to be chosen "*de probioribus et potentioribus comitatus sui in custodes pacis* (from the most upright and powerful of their county as keepers of the peace)."<sup>d</sup> But when Queen Isabel, the wife of Edward II, had contrived to depose her husband by a forced resignation of the crown, and had set up his son Edward III in his place; this, being a thing then without example in England, it was feared would much alarm the people: especially as the old king was living, though hurried about from castle to castle: till at last he met with an untimely death. To prevent, therefore, any risings, or other disturbance of the peace, the new king sent writs to all the sheriffs in England, the form of which is preserved by [351] Thomas Walsingham,<sup>e</sup> giving a plausible account of the manner of his ob-

<sup>x</sup> Lamb. 12.

<sup>y</sup> Britton. 3.

<sup>z</sup> F. N. B. 81.

<sup>a</sup> Lamb. 14.

<sup>b</sup> *Ibid.* 15.

<sup>c</sup> *Ibid.* 17.

<sup>d</sup> *Ibid.* 16.

<sup>e</sup> Hist. A. D. 1327.

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is, by his office and dignity royal, the principal conservator of the peace within all his dominions; and may give authority to any other to see the peace kept, and to punish such as break it; hence it is usually called the King's Peace."—POLLOCK, *The King's Peace*, in *Oxford Lectures*, 90.

taining the crown; to wit, that it was done *ipsius patris beneplacito* (by the good pleasure of his father): and withal commanding each sheriff that the peace be kept throughout his bailiwick, on pain and peril of disinheritaunce and loss of life and limb. And in a few weeks after the date of these writs, it was ordained in parliament,<sup>f</sup> that, for the better maintaining and keeping of the peace in every county, good men and lawful, which were no maintainers of evil, or barretors in the country, should be *assigned* to keep the peace. And in this manner, and upon this occasion, was the election of the conservators of the peace taken from the people, and given to the king;<sup>g</sup> this assignment being construed to be by the king's commission.<sup>h</sup> But still they were only called conservators, wardens, or keepers of the peace, till the statute 34 Edw. III, c. 1 (1360), gave them the power of trying felonies; and then they acquired the more honorable appellation of justices.<sup>i</sup>

§ 482. **b. Appointment of justices.**—These justices are appointed by the king's special commission under the great seal, the form of which was settled by all the judges, A. D. 1590.<sup>j</sup> This appoints them all,<sup>k</sup> jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors: in which number some particular justices, or one of them, are directed to be always included, and no business to be done without their presence: the words of the commission running thus, "*Quorum aliquem vestrum, A. B. C. D. etc. unum esse volumus* (Of whom we will that some one of you, A, B, C, D, etc., be one)"; whence the persons so named are usually called justices of the *quorum*. And formerly it was customary to appoint only a select number of justices, eminent for their skill and discretion, to be of the *quorum*; but now the practice is to advance almost all of them to that dignity, naming them all over again in the *quorum* clause, except perhaps only some one inconsiderable

<sup>f</sup> Stat. 1 Edw. III. c. 16 (Justices of the Peace, 1327).

<sup>g</sup> Lamb. 20.

<sup>h</sup> Stat. 4 Edw. III. c. 2 (Justices of Assize, 1330). 18 Edw. III. st. 2. c. 2 (Justices of the Peace, 1344).

<sup>i</sup> Lamb. 23.

<sup>j</sup> *Ibid.* 43.

<sup>k</sup> See the form itself, Lamb. 35. Burn. tit. Justices, § 1.



person for the sake of propriety: and no exception is now allowable, [352] for not expressing in the form of warrants, etc., that the justice who issued them is of the *quorum*.<sup>13</sup> When any justice intends to act under this commission, he sues out a writ of *dedimus potestatem* (we have empowered) from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him; which done, he is at liberty to act.<sup>14</sup>

§ 483. c. Number and qualifications of justices.—Touching the number and qualifications of these justices; it was ordained by statute 18 Edw. III, c. 2 (Justices of the Peace, 1344), that *two or three*, of the best reputation in each county shall be assigned to be keepers of the peace. But these being found rather too few for that purpose, it was provided by statute 34 Edw. III, c. 1 (1360), that one lord, and three, or four, of the most worthy men in the county, with some learned in the law, shall be made justices in every county. But afterwards the number of justices, through the ambition of private persons, became so large, that it was thought necessary by statute, 12 Rich. II, c. 10 (Justice of the Peace, 1388), and 14 Rich. II, c. 11 (Justice of the Peace, 1390), to restrain them at first to six, and afterwards to eight only. But this rule is now disregarded, and the cause seems to be (as Lambard observed long ago<sup>m</sup>) that the growing number of statute laws, committed from time to time to the charge of justices of the peace, have occasioned also (and very reasonably) their increase to a larger number. And, as to their qualifications, the statutes just cited direct them to be of the best reputation and most worthy men in the county: and the statute 13 Rich. II, c. 7 (1389), orders them to be of the most sufficient knights, esquires, and gentlemen of the law. Also by statute 2 Hen. V, st. 1, c. 4, and st. 2, c. 1

<sup>1</sup> Stat. 26 Geo. II. c. 27 (Justices, 1752). See also Stat. 7 Geo. III. c. 21 (Justices' Quorum, 1767).

<sup>m</sup> Lamb. 34.

<sup>13</sup> The keeping of the proper record of all justices of the peace is now regulated by the Crown Office Act, 1877.

<sup>14</sup> Cited 4 Me. 418, as to quorum; 25 N. H. 491; 58 N. Y. 530, as to jurisdiction generally.—HAMMOND.

(Justice of the Peace, 1414), they must be resident in their several counties. And because, contrary to these statutes, men of small substance had crept into the commission, whose poverty made them both covetous and contemptible, it was enacted by statute 18 Hen. VI, c. 11 (Justices of the Peace, 1439), that no justice should be put in commission if he had not lands to the value of 20*l. per annum*. And, the rate of money being greatly altered since that time, it is now enacted by statute 5 Geo. II, c. 11 (1731), that every justice, except <sup>[353]</sup> as is therein excepted, shall have 100*l. per annum* clear of all deductions; and, if he acts without such qualification, he shall forfeit 100*l.* This qualification<sup>n</sup> is almost an equivalent to the 20*l. per annum* required in Henry the Sixth's time: and of this<sup>o</sup> the justice must now make oath. Also it is provided by the act 5 Geo. II, that no practicing attorney, solicitor, or proctor shall be capable of acting as a justice of the peace.

§ 484. d. Term of office of justices.—As the office of these justices is conferred by the king, so it subsists only during his pleasure; and is determinable, 1. By the demise of the crown; that is, in six months after.<sup>p</sup> But if the same justice is put in commission by the successor, he shall not be obliged to sue out a new *dedimus* (i. e., the writ of *dedimus potestatem*—we have empowered), or to swear to his qualification afresh:<sup>q</sup> nor, by reason of any new commission, to take the oaths more than once in the same reign.<sup>r</sup> 2. By express writ under the great seal,<sup>s</sup> discharging any particular person from being any longer justice. 3. By superseding the commission by writ of *supersedeas*, which suspends the power of all the justices, but does not totally destroy it; seeing it may be revived again by another writ, called a *procedendo* (proceeding). 4. By a new commission, which virtually, though silently, discharges all the former justices that are not included therein; for two commissions cannot subsist at once. 5. By acces-

<sup>n</sup> See Bishop Fleetwood's calculations in his *Chronicon Pretiosum*.

<sup>o</sup> Stat. 18 Geo. II. c. 20 (Justices' Qualification, 1744).

<sup>p</sup> Stat. 1 Ann. c. 8 (1702).

<sup>q</sup> Stat. 1 Geo. III. c. 13 (Justice of the Peace, 1760).

<sup>r</sup> Stat. 7 Geo. III. c. 9 (Justice of the Peace, 1766).

<sup>s</sup> Lamb. 67.

sion of the office of sheriff or coroner.<sup>t</sup> Formerly it was thought, that if a man was named in any commission of the peace, and had afterwards a new dignity conferred upon him, that this determined his office; he no longer answering the description of the commission: but now<sup>u</sup> it is provided, that, notwithstanding a new title of dignity, the justice on whom it is conferred shall still continue a justice.

§ 485. **e. Jurisdiction of justices.**—The power, office, and duty of a justice of the peace depend on his commission, and on the several statutes which [354] have created objects of his jurisdiction. His commission, first, empowers him singly to conserve the peace; and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offenses; which is the ground of their jurisdiction at sessions, of which more will be said in its proper place. And as to the powers given to one, two, or more justices by the several statutes, which from time to time have heaped upon them such an infinite variety of business, that few care to undertake, and fewer understand, the office; they are such and of so great importance to the public, that the country is greatly obliged to any worthy magistrate, that without sinister views of his own will engage in this troublesome service. And therefore, if a well-meaning justice makes any undesigned slip in his practice, great lenity and indulgence are shown to him in the courts of law; and there are many statutes made to protect him in the upright discharge of his office;<sup>w</sup> which, among other privileges, prohibit such justices from being sued for any oversights without notice beforehand; and stop all suits begun, on tender made of sufficient amends. But, on the other hand, any malicious or tyrannical abuse of their office is usually severely

<sup>t</sup> Stat. 1 Mar. st. 1. c. 8 (1553).

<sup>u</sup> Stat. 1 Edw. VI. c. 7 (Demise of the Crown, 1547).

<sup>w</sup> Stat. 7 Jac. I. c. 5 (Public Officers: Protection, 1609). 21 Jac. I. c. 12 (Public Officers: Protection, 1623). 24 Geo. II. c. 44 (Constables: Protection, 1750).

punished; and all persons who recover a verdict against a justice, for any willful or malicious injury, are entitled to double costs.

It is impossible upon our present plan to enter minutely into the particulars of the accumulated authority, thus committed to the charge of these magistrates. I must therefore refer myself at present to such subsequent part of these Commentaries as will in their turns comprise almost every object of the justices' jurisdiction: and in the meantime recommend to the student the perusal of Mr. Lambard's *Eirenarcha*, and Dr. Burn's *Justice of the Peace*; wherein he will find everything relative to this subject, both in ancient and modern practice, collected with great care and accuracy, and disposed in a most clear and judicious method.<sup>15</sup>

[355] I shall next consider some officers of lower rank than those which have gone before, and of more confined jurisdiction; but still such as are universally in use through every part of the kingdom.

§ 486. 4. The constable.—Fourthly, then, of the constable. The word *constable* is frequently said to be derived from the Saxon, *koning-stapel*, and to signify the support of the king. But, as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language wherein it is plainly derived from the Latin *comes stabuli* (count of the stable), an officer well known in the empire; so called because, like the great constable of France, as well as the lord high constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms, which were performed on horseback. This great office of lord high constable hath been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford, Duke of Buckingham, under King Henry VIII; as in France it was suppressed about a century after by an edict of Louis XIII:<sup>x</sup> but from his office, says Lambard,<sup>y</sup> this lower constablenesship was at first drawn and fetched, and is as it were a very finger of that hand. For

<sup>x</sup> Phillips' *Life of Pole*. ii. 111.

<sup>y</sup> *Of Constables*. 5.

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<sup>15</sup> The office of justice of the peace is now regulated by various statutes, such as the Justices Qualifications Act, 1875, and the Justices of the Peace Act, 1906.

the statute of Winchester,<sup>z</sup> which first appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armor*.<sup>16</sup>

§ 487. **a. Kinds of constables:** (1) **High constables;** (2) **Petty constables.**—Constables are of two sorts, high constables, and petty constables. The former were first ordained by the statute of Winchester, as before mentioned: and are appointed at the court leets of the franchise or hundred over which they preside, or in default of that, by the justices at their quarter sessions; and are removable by the same authority that [356] appoints them.<sup>a</sup> <sup>17</sup> The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, first instituted about the reign of Edw. III.<sup>b</sup> (1326–1377). These petty constables have two offices united in them; the one ancient, the other modern. Their ancient office is that of headborough, tithing-man, or borsholder; of whom we formerly spoke,<sup>c</sup> and who are as ancient as the time of King Alfred: their more modern office is that of constable merely; which was appointed (as was observed) so lately as the reign of Edward III, in order to assist the high constable.<sup>d</sup> And in general the ancient headboroughs, tithing-men, and borsholders, were made use of to serve as petty constables; though not so generally, but that in many places they still continue distinct officers from the constable. They are all chosen by the jury at the court-leet; or, if no court-leet be held, are appointed by two justices of the peace.<sup>e</sup>

§ 488. **b. Duties of constables.**—The general duty of all constables, both high and petty, as well as of the other officers, is to keep the king's peace in their several districts; and to that pur-

<sup>z</sup> 13 Edw. I. c. 6 (1285).

<sup>a</sup> Salk. 150.

<sup>b</sup> Spelm. Gloss. 148.

<sup>c</sup> Page. 114.

<sup>d</sup> Lamb. 9.

<sup>e</sup> Stat. 14 & 15 Car. II. c. 12 (1663).

<sup>16</sup> An historical sketch of the office of constable, both in England and the United States, may be found in the case of *Allor v. Wayne County Auditors*, 43 Mich. 76, 4 N. W. 492.

<sup>17</sup> High constables have now almost disappeared.



pose they are armed with very large powers, of arresting, and imprisoning, of breaking open houses, and the like: of the extent of which powers, considering what manner of men are for the most part put into these offices, it is perhaps very well that they are generally kept in ignorance. One of their principal duties, arising from the statute of Winchester, which appoints them, is to keep watch and ward in their respective jurisdictions. Ward, guard, or *custodia*, is chiefly applied to the daytime, in order to apprehend rioters, and robbers on the highways; the manner of doing which is left to the discretion of the justices of the peace and the constable:<sup>f</sup> the hundred being, however, answerable for all robberies committed therein, by daylight, for having kept negligent guard. Watch is properly applicable to the night only (being called among our Teutonic ancestors *wacht* or *wacta*<sup>g</sup>), and it [357] begins at the time when ward ends, and ends when that begins: for, by the statute of Winchester, in walled towns the gates shall be closed from sunsetting to sunrising, and watch shall be kept in every borough and town, especially in the summer season, to apprehend all rogues, vagabonds, and night-walkers, and make them give an account of themselves. The constable may appoint watchmen, at his discretion, regulated by the custom of the place; and these, being his deputies, have for the time being the authority of their principal. But, with regard to the infinite number of other minute duties, that are laid upon constables by a diversity of statutes, I must again refer to Mr. Lambard and Dr. Burn; in whose compilations may be also seen, what powers and duties belong to the constable or tithing-man indifferently, and what to the constable only: for the constable may do whatever the tithing-man may; but it does not hold *e converso* (conversely), the tithing-man not having an equal power with the constable.<sup>18</sup>

§ 489. 5. Surveyors of highways.—We are next to consider the surveyors of the highways. Every parish is bound of common

<sup>f</sup> Dalt. Just. c. 104.

<sup>g</sup> *Excubias et explorationes quas wactas vocant.* (Watches and searches which they call *wactas*). Capitular. Hludov. Pii. cap. 1. A. D. 815.

<sup>18</sup> For a brief account of the modern parochial and borough police and the county constabulary, see 2 Stephen's Comm. (16th ed.), 744 ff.

right to keep the high roads, that go through it, in good and sufficient repair; unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burden no man was exempt by our ancient laws, whatever other immunities he might enjoy: this being part of the *trinoda necessitas* (the threefold obligation), to which every man's estate was subject; viz., *expeditio contra hostem*, *arcium constructio*, *et pontium reparatio* (expedition against the enemy, the construction of arsenals, and the repair of bridges). For, though the reparation of bridges only is expressed, yet that of roads also must be understood; as in the Roman law, *ad instructiones reparationesque itinerum et pontium, nullum genus hominum, nulliusque dignitatis ac venerationis meritis, cessare oportet* (with respect to the construction and repairing of ways and bridges, no class of men of whatever rank or dignity should be exempted).<sup>b</sup> And indeed now, for the most part, the care of the roads only seems to be left to parishes; that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. VIII, c. 5 (Bridges, 1530). If the parish neglected these repairs, they might formerly, as they may still, be indicted for such their neglect: but it was not then incumbent on any particular officer to call the parish together, and [358] set them upon this work; for which reason by the statute 2 & 3 Ph. & M., c. 8 (Highways, 1555), surveyors of the highways were ordered to be chosen in every parish.<sup>1</sup>

§ 490. a. Appointment of highway surveyors.—These surveyors were originally, according to the statute of Philip and Mary, to be appointed by the constable and churchwardens of the parish; but now<sup>k</sup> they are constituted by two neighboring justices, out of such substantial inhabitants or others, as are specially de-

<sup>b</sup> C. 11. 74. 4.

<sup>1</sup> This office, Mr. Dalton (Just. cap. 50.) says exactly answers that of the *curatores viarum* (keepers of the ways) of the Romans: but I should guess that theirs was an office of rather more dignity and authority than ours, not only from comparing the method of making and mending the Roman ways with those of our country parishes: but also because one Thermus, who was the curator of the Flaminian way, was candidate for the consulship with Julius Cæsar. (Cic. ad Attic. l. 1. ep. 1.)

<sup>k</sup> Stat. 13 Geo. III. c. 78 (Highways, 1772).

scribed in a subsequent statute, and may have salaries allotted them for their trouble.

§ 491. **b. Powers and duties of highway surveyors.**—Their office and duty consists in putting in execution a variety of ancient statutes for the repairs of the public highways; that is, of ways leading from one town to another: all which are now reduced into one act by statute 13 Geo. III, c. 78 (Highways, 1773), amended by 14 Geo. III, c. 14 (Turnpike Roads, 1774). By these it is enacted, 1. That they may remove all annoyances in the highways, or give notice to the owner to remove them; who is liable to penalties on noncompliance. 2. They are to call together all the inhabitants and occupiers of lands, tenements, and hereditaments within the parish, six days in every year, to labor in fetching materials or repairing the highways: all persons keeping drafts (of three horses, etc.) or occupying lands, being obliged to send a team for every draft, and for every 50*l.* a year, which they keep or occupy; persons keeping less than a draft, or occupying less than 50*l.* a year, to contribute in a less proportion; and all other persons chargeable, between the ages of eighteen and sixty-five, to work or find a laborer. But they may compound with the surveyors, at certain easy rates established by the act. And every cartway leading to any market-town must be made twenty feet wide at the least, if the fences will permit; and may be increased by two justices, at the expense of the <sup>[359]</sup> parish, to the breadth of thirty feet. 3. The surveyors may lay out their own money in purchasing materials for repairs, in erecting guide-posts, and making drains, and shall be reimbursed by a rate, to be allowed at a special sessions. 4. In case the personal labor of the parish be not sufficient, the surveyors, with the consent of the quarter sessions, may levy a rate on the parish, in aid of the personal duty, not exceeding, in any one year, together with the other highway rates, the sum of 9*d.* in the pound; for the due application of which they are to account upon oath. As for turnpikes, which are now universally introduced in aid of such rates, and the law relating to them, these depend principally on the particular powers granted in the several road acts, and upon some general provisions which are extended to all turnpike roads in the kingdom, by statute

13 Geo. III, c. 84 (1773), amended by 14 Geo. III, c. 57 and 82 (1774).<sup>19</sup>

§ 492. 6. **Overseers of the poor.**—I proceed, therefore, lastly, to consider the overseers of the poor; their original, appointment, and duty.

The poor of England, till the time of Henry VIII, subsisted entirely upon private benevolence, and the charity of well-disposed Christians. For, though it appears by the Mirror,<sup>1</sup> that by the common law the poor were to be “sustained by parsons, rectors of the church, and the parishioners; so that none of them die for default of sustenance”; and though by the statutes 12 Rich. II, c. 7 (1388), and 19 Hen. VII, c. 12 (Vagrancy, 1503), the poor are directed to abide in the cities or towns wherein they were born, or such wherein they had dwelt for three years (which seem to be the first rudiments of parish settlements), yet till the statute 27 Hen. VIII, c. 25 (Vagabonds, 1535), I find no compulsory method chalked out for this purpose: but the poor seem to have been left to such relief as the humanity of their neighbors would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the least (though frequently esteemed quite otherwise) that they supported and [360] fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But, upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reign of King Henry the Eighth and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years *greatly* increased. These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy, and therefore able, but not willing, to exercise any honest employment. To pro-

<sup>1</sup> C. 1. § 3.

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<sup>19</sup> Highways and highway authorities are now governed by modern statutes. The subject is treated in 3 Stephen's Comm. (16th ed.), 83-98.

vide in some measure for both of these, in and about the metropolis, Edward the Sixth founded three royal hospitals; Christ's and St. Thomas' for the relief of the impotent through infancy or sickness; and Bridewell for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large; and therefore, after many other fruitless experiments, by statute 43 Eliz., c. 2 (Poor Relief, 1601), overseers of the poor were appointed in every parish.

§ 493. a. **Appointment of overseers of the poor.**—By virtue of the statute last mentioned, these overseers are to be nominated yearly in Easter-week, or within one month after (though a subsequent nomination will be valid<sup>m</sup>), by two justices dwelling near the parish. They must be substantial householders, and so expressed to be in the appointment of the justices.<sup>n</sup>

§ 494. b. **Powers and duties of overseers of the poor.**—Their office and duty, according to the same statute, are principally these: first, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work: and secondly, to provide work for such as are able, and cannot otherwise get employment: but this latter part of their duty, which, according to the wise regulations of that salutary statute, should go hand in hand with the other, is now most shamefully neglected. [361] However, for these joint purposes, they are empowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which has been further explained and enforced by several subsequent statutes.

§ 495. (1) **Poor Relief Act, 1601.**—The two great objects of this statute seem to have been, 1. To relieve the impotent poor, and them only. 2. To find employment for such as are able to work: and this principally by providing stocks of raw materials to be worked up at home, which perhaps might be more beneficial than accumulating all the poor in one common workhouse; a practice which tends to destroy all domestic connections (the only

<sup>m</sup> Stra. 1123.

<sup>n</sup> 2 Lord Raym. 1394.



felicity of the honest and industrious laborer), and to put the sober and diligent upon a level, in point of their earnings, with those who are dissolute and idle. Whereas, if none were to be relieved but those who are incapable to get their livings and that in proportion to their incapacity; if no children were to be removed from their parents, but such as are brought up in rags and idleness; and if every poor man and his family were employed whenever they requested it, and were allowed the whole profits of their labor;—a spirit of cheerful industry would soon diffuse itself through every cottage; work would become easy and habitual, when absolutely necessary to their daily subsistence; and the most indigent peasant would go through his task without a murmur, if assured that he and his children (when incapable of work through infancy, age, or infirmity) would then, and then only, be entitled to support from his opulent neighbors.

This appears to have been the plan of the statute of Queen Elizabeth; in which the only defect was confining the management of the poor to small, parochial districts; which are frequently incapable of furnishing proper work, or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had: none being obliged to reside in the places of their settlement, but such as were unable or unwilling to work; and those places of settlement being only such where they [362] were *born*, or had made their *abode*, originally for three years,<sup>o</sup> and afterwards (in the case of vagabonds) for one year only.<sup>p</sup>

§ 496. (2) **Poor Relief Act, 1662.**—After the restoration a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivisions of parishes; has greatly increased their number, by confining them all to their respective districts; has given birth to the intricacy of our poor laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, has created an infinity of expensive lawsuits between contending neighbor-

<sup>o</sup> Stat. 19 Hen. VII. c. 12 (Vagrancy, 1503). 1 Edw. VI. c. 3 (Poor Relief, 1547). 3 Edw. VI. c. 16 (Vagrancy, 1550). 14 Eliz. c. 5 (Poor Relief, 1572).

<sup>p</sup> Stat. 39 Eliz. c. 4 (Vagrancy, 1597).

hoods, concerning those settlements and removals. By the statute 13 & 14 Car. II, c. 12 (Poor Relief, 1662), a legal settlement was declared to be gained by *birth*; or by *inhabitation*, *apprenticeship*, or *service*, for forty days: within which period all intruders were made removable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l*. The frauds, naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II, c. 17 (1685), which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniences, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases; which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had.

§ 497. (3) The law of settlements.—The law of settlements may be therefore now reduced to the following general heads; or, a settlement in a parish may be acquired, 1. By *birth*; for, wherever a child is first known <sup>[363]</sup> to be, that is always *prima facie* the place of settlement, until some other can be shown.<sup>q</sup> This is also generally the place of settlement of a bastard child; for a bastard having in the eye of the law no father, cannot be referred to *his* settlement, as other children may.<sup>r</sup> But in legitimate children, though the place of birth be *prima facie* the settlement, yet it is not conclusively so; for there are, 2. Settlements by *parentage*, being the settlement of one's father or mother: all legitimate children being really settled in the parish where their parents are settled, until they get a new settlement for themselves.<sup>ss</sup> A new

<sup>q</sup> Carth. 433. Comb. 364. Salk. 485. 1 Lord Raym. 567.

<sup>r</sup> See p. 459.

<sup>s</sup> Salk. 427.

<sup>ss</sup> Salk. 528. 2 Lord Raym. 1473.

settlement may be acquired several ways; as, 3. By *marriage*. For a woman, marrying a man that is settled in another parish, changes her own settlement: the law not permitting the separation of husband and wife.<sup>t</sup> But if the man has no settlement, hers is suspended during his life, if he remains in England and is able to maintain her; but in his absence, or after his death, or during (perhaps) his inability, she may be removed to her old settlement.<sup>u</sup> The other methods of acquiring settlements in any parish are all reducible to this one, of *forty days' residence* therein: but this forty days' residence (which is construed to be lodging or lying there) must not be by fraud, or stealth, or in any clandestine manner; but accompanied with one or other of the following concomitant circumstances. The next method, therefore, of gaining a settlement, is, 4. By forty days' residence, and *notice*. For if a stranger comes into a parish, and delivers notice in writing of his place of abode, and number of his family, to one of the overseers (which must be read in the church and registered) and resides there unmolested for forty days after such notice, he is legally settled thereby.<sup>w</sup> For the law presumes that such a one at the time of notice is not likely to become chargeable, else he would not venture to give it; or that, in such case, the parish would take care to remove him. But there are also other circumstances equivalent to such notice: therefore, 5. *Renting* for a year a <sup>[364]</sup> tenement of the yearly value of ten pounds, and residing forty days in the parish, gains a settlement without notice;<sup>x</sup> upon the principle of having substance enough to gain credit for such a house. 6. Being charged to and paying the public *taxes* and levies of the parish (excepting those for scavengers, highways,<sup>y</sup> and windows<sup>z</sup>); and, 7. Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as churchwarden, etc., are both of them equivalent to notice, and gain a settlement,<sup>a</sup> if coupled with

<sup>t</sup> Stra. 544.

<sup>u</sup> Foley. 249. 251, 252. Bur. Sett. C. 370.

<sup>w</sup> Stat. 13 & 14 Car. II. c. 12 (Poor Relief, 1662). 1 Jac. II. c. 17 (1685). 3 & 4 W. & M. c. 11 (Poor Relief, 1691).

<sup>x</sup> Stat. 13 & 14 Car. II. c. 12.

<sup>y</sup> Stat. 9 Geo. I. c. 7. § 6 (Poor Relief, 1722).

<sup>z</sup> Stat. 21 Geo. II. c. 10. § 13 (Window Duties, 1747).

<sup>a</sup> Stat. 3 & 4 W. & M. c. 11.

a residence of forty days. 8. Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service; and 9. Being bound an *apprentice*, give the servant and apprentice a settlement, without notice,<sup>b</sup> in that place wherein they serve the last forty days. This is meant to encourage application to trades, and going out to reputable services. 10. Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law or of a third person, as by descent, gift, devise, etc., is a sufficient settlement:<sup>c</sup> but if a man acquire it by his own act, as by purchase (in its popular sense, in consideration of money paid), then unless the consideration advanced, *bona fide*, be 30*l.* it is no settlement for any longer time than the person shall inhabit thereon.<sup>d</sup> He is in no case removable from his own property; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

All persons, not so settled, may be removed to their own parishes, on complaint of the overseers, by two justices of the peace, if they shall adjudge them likely to become chargeable to the parish, into which they have intruded: unless they are in a way of getting a legal settlement, as by having hired a house of 10*l.*, *per annum*, or living in an [365] annual service; for then they are not removable.<sup>e</sup> And in all other cases, if the parish to which they belong, will grant them a certificate, acknowledging them to be *their* parishioners, they cannot be removed merely because *likely* to become chargeable, but only when they become *actually* chargeable.<sup>f</sup> But such certificated person can gain no settlement by any of the means above mentioned; unless by renting a tenement of 10*l.* *per annum*, or by serving an annual office in the parish, being legally placed therein: neither can an apprentice or servant to such certificated person gain a settlement by such their service.<sup>g</sup>

<sup>b</sup> Stat. 3 & 4 W. & M. c. 11 (1692). 8 & 9 W. III. c. 10 (Juries, 1696).  
31 Geo. II. c. 11 (Poor, 1757).

<sup>c</sup> Salk. 524.

<sup>d</sup> Stat. 9 Geo. I. c. 7 (Poor Relief, 1722).

<sup>e</sup> Salk. 472.

<sup>f</sup> Stat. 8 & 9 W. III. c. 30 (Poor Relief, 1697).

<sup>g</sup> Stat. 12 Ann. c. 18 (Poor, 1712).

These are the general heads of the laws relating to the poor, which, by the resolutions of the courts of justice thereon within a century past, are branched into a great variety. And yet, notwithstanding the pains that have been taken about them, they still remain very imperfect, and inadequate to the purposes they are designed for: a fate that has generally attended most of our statute laws, where they have not the foundation of the common law to build on. When the shires, the hundreds, and the tithings were kept in the same admirable order that they were disposed in by the great Alfred, there were no persons idle, consequently none but the impotent that needed relief: and the statute of 43 Eliz. (Poor Relief, 1601) seems entirely founded on the same principle. But when this excellent scheme was neglected and departed from, we cannot but observe with concern what miserable shifts and lame expedients have from time to time been adopted, in order to patch up the flaws occasioned by this neglect. There is not a more necessary or more certain maxim in the frame and constitution of society than that every individual must contribute his share, in order to the well-being of the community: and surely they must be very deficient in sound policy, who suffer one-half of a parish to continue idle, dissolute, and unemployed, and at length are amazed to find that the industry of the other half is not able to maintain the whole.<sup>20</sup>

<sup>20</sup> The relief of the poor is provided for by modern statutes, which are discussed in 3 Stephen's Comm. (16th ed.), 116 ff.



## OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

§ 498. **The people.**—Having, in the eight preceding chapters treated of persons as they stand in the public relations of *magistrates*, I now proceed to consider such persons as fall under the denomination of the *people*. And herein all the inferior and subordinate magistrates, treated of in the last chapter, are included.

§ 499. **Division of the people**—1. **Natural-born subjects.** 2. **Aliens.**—The first and most obvious division of the people is into aliens and natural-born subjects.<sup>1</sup> Natural-born subjects are such

1 **Citizens.**—"It is interesting to notice that these words, 'citizen' and 'citizenship,' which we use so freely and familiarly to-day as indicating membership of a self-governing state, did not have that meaning in English speech until a little more than a hundred years ago; and it is we, on this side of the water, who have given them this sense, as it is we who have given prominence to the thing for which these words now stand. The words, indeed, are very old in English usage, as one may see by his Blackstone; but they imported merely membership of a burgh or local municipal corporation. [See 5 Seld. Soc. Pub. xxxvii, lxxxv-lxxxvii, 40, 43, 55, for *conciuis* in 13th and 14th centuries.] The word 'subject' was the English representative of our present term 'citizen.' Our sense of it seems to have been a Gallicism; in French use (*teste* Rousseau) it was common enough to speak of one's countrymen as *citoyens* and *conciitoyens*. In the Declaration of Independence we read it once: 'He has constrained our fellow-citizens,' etc.; and once in 1781, in the Articles of Confederation. In the treaty with France of 1778, the usual phrase is 'subjects,' 'people,' or 'inhabitants,' but 'citizens' does occur as applicable to the United States. In the treaty with Great Britain of 1782, it is used in a marked way: 'There shall be a . . . peace between his British majesty and the said states, and between the subjects of the one and the citizens of the other.' There was evidently felt to be an awkwardness in calling these newly emancipated republican 'sovereigns' of America by the old phrase of 'subjects.' Of course, as all know, the word was freely used in the national Constitution in 1789; and so, but less freely, in the Massachusetts Constitution of 1780; but it does not occur in the rejected constitution of 1778. I believe that it is not to be found in any of the ten state constitutions that were adopted before that of Massachusetts. In the ninth decade it seems to have become a familiar phrase. There are, however, interesting little signs, in the correspondence of the period, of a certain perplexity that was felt by foreigners at our use of the word. See, for

as are born within the dominions of the crown of England: that is, within the ligeance, or as it is generally called, the allegiance of the king: and aliens, such as are born out of it.

§ 500. 3. *Allegiance and fealty.*—Allegiance is the tie, or *ligamen*, which binds the subject to the king, in return for that protection which the king affords the subject. The thing itself, or substantial part of it, is founded in reason and the nature of government; the name and the form are derived to us from our Gothic ancestors. Under the feudal system, every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them; and there was a mutual trust or confidence subsisting between the lord and vassal, that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord and defend him against all his

example, in 1784, John Adams' Works, viii, 213."—The Dawes Bill and the Indians, J. B. Thayer, 61 Atlantic Monthly, 318, n.

"In the usage of English-speaking people, the word 'citizen,' in the sense of membership of the state, is quite modern. 'The term "citizen,"' said Mr. Justice Daniel, in a dissenting opinion in *Rundle v. Delaware etc. Canal Co.*, 14 Howard (1852), 80, 97, 14 L. Ed. 335, 342, 'will be found rarely occurring in the writers of English law.' The word is, indeed, familiar enough in our older reports, law books, and general literature as designating the member of a borough. For instance, in *R. v. Hanger* (1614–15), 1 Rolle, 138, the rights of '*un citizen de London*,' are elaborately considered by Coke, C. J., with many references to the Year-Books. '*Sont 5 sorts de Citizens*,' he says, etc. So Blackstone (1 Comm. 174): 'As for the (parliamentary) electors of citizens and burgesses, these are supposed to be the mercantile part or trading interest of the kingdom.' And in Shakespeare (*As You Like It*, Act II, sc. 1), when the banished duke, having proposed to 'go and kill us venison,' adds,—

'And yet it irks me the poor dappled fools,  
Being native burghers in this desert city,  
Should in their own confines,' etc.,—

we hear just afterwards of Jaques moralizing in the forest over a wounded deer, 'left and abandoned of his velvet friends':—

'Ay, quoth Jaques,  
Sweep on, you fat and greasy citizens.'

"The proper English meaning of the term 'citizen' imported membership of a borough or local municipal corporation. The usual word for a man's political relation to the monarch or the state was 'subject.' In France, the correspond-

enemies. This obligation on the part of the vassal was called his *fidelitas* or fealty; and an oath of fealty was required, by the feudal law, to be taken by all tenants to their landlord, which is couched in almost [367] the same terms as our ancient oath of allegiance:<sup>a</sup> except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the oath of allegiance; and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines fidelitatem fecit.*"<sup>b</sup> Land held by this exalted species of fealty was called *feudum ligium*, a liege fee; the vassals *homines ligii*, or liege men; and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other, for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure;<sup>c</sup> and *liege* homage, which included the fealty before mentioned, and the services consequent upon it. Thus when our Edward III in 1329, did homage to Philip VI of France, for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage.<sup>d</sup> But with us in England, it becoming a settled principle of tenure, that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be

<sup>a</sup> 2 Feud. 5, 6, 7.

<sup>c</sup> 7 Rep. Calvin's Case. 7.

<sup>b</sup> 2 Feud. 99.

<sup>d</sup> 2 Carte 401. Mod. Un. Hist. xxiii, 420.

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ing phrase *citoyen*, *concitoyen*, seems to have long been familiar, in the modern sense of the word 'citizen.'

"In the Massachusetts Constitution (1780), the word occurs, but more sparingly than would be expected in a similar document now. In the Federal Constitution, prepared in 1787, it is freely used.

"It seems, then, to have been the events which happened in this country in the eighth and ninth decades of the last century which first brought the word 'citizen,' in our modern sense of it, into familiar English speech. See Minor v. Happersett, 21 Wall. 162, 166, 22 L. Ed. 627, 628.

"Compare 1 Blackstone's Comm. 366." 1 Thayer's Const. Cas. 459, n.—Legal Essays by JAMES BRADLEY THAYER, note 3, p. 122.

taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy the term of allegiance was soon brought to signify all other engagements, which are due from subjects to their prince, as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years,<sup>e</sup> contained a promise “to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honor, and not to know or hear of any ill or damage intended him, [368] “without defending him therefrom.” Upon which Sir Matthew Hale<sup>f</sup> makes this remark; that it was short and plain, not entangled with long or intricate clauses or declarations, and yet is comprehensive of the whole duty from the subject to his sovereign. But, at the revolution, the terms of this oath being thought perhaps to favor too much the notion of nonresistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former; the subject only promising “that he will be faithful and bear *true* allegiance to the king,” without mentioning “his heirs,” or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope’s pretended authority: and the oath of abjuration, introduced in the reign of King William,<sup>g</sup> very amply supplies the loose and general texture of the oath of allegiance; it recognizing the right of his majesty, derived under the act of settlement; engaging to support him to the utmost of the juror’s power; promising to disclose all traitorous conspiracies against him: and expressly renouncing any claim of the descendants of the late pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment; and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection.<sup>h</sup> And the oath of allegiance may be tendered<sup>i</sup> to all persons above the age of twelve years, whether natives,

<sup>e</sup> Mirror. c. 3. § 35. Fleta. 3. 16. Britton. c. 29. 7 Rep. Calvin’s Case. 6.

<sup>f</sup> 1 Hale P. C. 63.

<sup>g</sup> Stat. 13 W. III. c. 6 (Succession to the Crown, 1701).

<sup>h</sup> Stat. 1 Geo. I. c. 13 (Succession to the Crown, 1714). 6 Geo. III. 53 (Treason, 1766).

<sup>i</sup> 2 Inst. 121. 1 Hal. P. C. 64.

denizens, or aliens, either in the court-leet of the manor, or in the sheriff's tourn, which is the court-leet of the county.<sup>2</sup>

But, besides these express engagements, the law also holds that there is an implied, original, and virtual allegiance, owing from every subject to his sovereign, antecedently to any express promise: and although the subject never swore any faith or allegiance in form. For as the king, by the very descent of the crown, is fully invested with all the rights and bound to all the duties of sovereignty, before his coronation: [369] so the subject is bound to his prince by an intrinsic allegiance, before the superinduction of those outward bonds of oath, homage and fealty; which were only instituted to remind the subject of this his previous duty, and for the better securing its performance.<sup>k</sup> The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law. Which occasions Sir Edward Coke very justly to observe,<sup>l</sup> that "all subjects are equally bounden to their allegiance, as if they had taken the oath; because it is written by the finger of the law in their hearts, and the taking of the corporal oath is but an outward declaration of the same." The sanction of an oath, it is true, in case of violation of duty, makes the guilt still more accumulated, by superadding perjury to treason: but it does not increase the civil obligation to loyalty; it only strengthens the *social* tie by uniting it with that of *religion*.

§ 501. a. **Natural, or perpetual allegiance.**—Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the king's dominions immedi-

<sup>k</sup> 1 Hal. P. C. 61.

<sup>l</sup> 2 Inst. 121.

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<sup>2</sup> In 1868, by the Promissory Oaths Act, the former oaths of allegiance and supremacy were abolished, and a simple and comprehensive oath of allegiance was substituted. Furthermore, this oath is only exacted of aliens upon naturalization, of members of parliament, persons on acceptance of certain offices, and a few others. And an affirmation is allowed in place of an oath, and the kissing of the Book is no longer required.



ately upon their birth.<sup>m</sup> For, immediately upon their birth, they are under the king's protection; at a time too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude; which cannot be forfeited, canceled, or altered, by any change of time, place or circumstance, nor by anything but the united concurrence of the legislature.<sup>n</sup> An Englishman who removes to France, or to China, owes the same allegiance to the king of England there as at home, and twenty years hence as well as now. For it is a principle of universal law,<sup>o</sup> that the natural-born subject of one prince cannot by any act of his own—no, not by swearing allegiance to another—put off or discharge his natural allegiance to the former: for this natural allegiance was intrinsic, and primitive, [370] and antecedent to the other; and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed, the natural-born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another: but it is his own act that brings him into these straits and difficulties, of owing service to two masters; and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands, by which he is connected to his natural prince.

§ 502. **b. Local, or temporary, allegiance.**—Local allegiance is such as is due from an alien,<sup>3</sup> or stranger born, for so long time as he continues within the king's dominion and protection:<sup>p</sup>

<sup>m</sup> 7 Rep. 7.

• 1 Hal. P. C. 68.

<sup>n</sup> 2 P. Wms.

<sup>p</sup> 7 Rep. 6.

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<sup>3</sup> **Local allegiance.**—Aliens resident in this country are subject to its laws, written or unwritten, whenever applicable to them. This is a consequence of the territorial applicability of all law, which has been for at least a thousand years the *jus gentium* of civilized states, though they have never conceded it to barbarous nations. It is expressly enacted also by a statute of 1540, 32 Hen. VIII, c. 16, 9, which may be considered common law with us. It is true of all laws imposing duty, but may be limited in the case of rights. (Kelyng, 38; Andree v. Fletcher, 2 Term Rep. 135.) It is said in a recent case that such an alien may even be guilty of treason or misprision of treason. (Carlisle v. United States, 16 Wall. 147, 21 L. Ed. 426.) A resident alien is bound by the state insolvent laws. (Von Glahn v. Varrenne, 1 Dill. 515, Fed. Cas. No. 16,994.)—HAMMOND.

and it ceases the instant such stranger transfers himself from this kingdom to another.\* Natural allegiance is therefore perpetual, and local temporary only: and that for this reason, evidently founded upon the nature of government; that allegiance is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. As, therefore, the prince is always under a constant tie to protect his natural-born subjects, at all times and in all countries. for this reason their allegiance due to him is equally universal and permanent. But, on the other hand, as the prince affords his protection to an alien, only during his residence in this realm, the allegiance of an alien is confined (in point of time) to the duration of such his residence, and (in point of locality) to the dominions of the British empire. From which considerations Sir Matthew Hale<sup>a</sup> deduces this consequence, that, though there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practice anything against his crown and dignity: wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defense or aid of the rightful king) have been afterwards punished with death; because of the breach of that temporary allegiance, which was due to him as king *de*

<sup>a</sup> 1 Hal. P. C. 60.

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4 Change of domicile.—To constitute a *domicile*, two things must concur: First, residence; second, the intention to remain there. (Mitchell v. United States, 21 Wall. 350, 22 L. Ed. 534.) Domicile, therefore, means more than residence. A man may be a resident of a particular locality without having his domicile there. He can have but one domicile at one and the same time, at least for the same purpose, although he may have several residences. (Per Staples, J., in Long v. Ryan, 30 Gratt. (Va.) 718.)

Two things must concur to effectuate a *change of domicile*: First, an actual change or removal of residence; second, an intention to make such change or removal permanent. If both of these requisites concur on point of time, the place to which removal is made becomes instantly the place of domicile, notwithstanding the party may entertain a floating intention to return at some future period. (Story on Conflict of Laws, § 46.) The leading English case is *Summerville v. Summerville*, 5 Ves. 760, so often reaffirmed as to be the unquestioned law. (Per Brown, J., in *Doyle v. Clark*, 1 Flip. 536, Fed. Cas. No. 4053, 8 Rep. 163.)—HAMMOND.

*facto*. And upon this footing, after Edward IV recovered the crown, which had been long [371] detained from his house by the line of Lancaster, treasons committed against Henry VI were capitally punished, though Henry had been declared an usurper by parliament.

§ 503. **c. Allegiance is personal.**—This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the king, or regal office, but to his natural person, and blood royal: and for the misapplication of their allegiance, viz., to the regal capacity or crown, exclusive of the person of the king, were the Spencers banished in the reign of Edward II (1307–1327).<sup>r</sup> And from hence arose that principle of personal attachment, and affectionate loyalty which induced our forefathers (and, if occasion required, would doubtless induce their sons) to hazard all that was dear to them, life, fortune, and family, in defense and support of their liege lord and sovereign.

This allegiance, then, both express and implied, is the duty of all the king's subjects, under the distinctions here laid down, of local and temporary, or universal and perpetual. Their rights are also distinguishable by the same criterions of time and locality; natural-born subjects having a great variety of rights, which they acquire by being born within the king's ligeance, and can never forfeit by any distance of place or time, but only by their own misbehavior: the explanation of which rights is the principal subject of the two first books of these Commentaries. The same is also in some degree the case of aliens; though their rights are much more circumscribed, being acquired only by residence here, and lost whenever they remove. I shall, however, here endeavor to chalk out some of the principal lines, whereby they are distinguished from natives, descending to further particulars when they come in course.

§ 504. **4. Rights of aliens.**—An alien born may purchase lands, or other estates, but not for his own use; for the king is thereupon entitled to them.<sup>s</sup> If an alien could acquire a per-

<sup>r</sup> 1 Hal. P. C. 67.

<sup>s</sup> Co. Litt. 2.

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<sup>5</sup> Property rights of aliens in the United States.—The common law, unmodified by statute or treaty, excludes aliens from inheriting lands in the

manent property in lands, he must owe an allegiance, equally permanent with that property, to the king of England; which would probably be inconsistent with that, which he owes to his own [372] natural liege lord: besides that thereby the nation might in time be subject to foreign influence, and feel many other inconveniences. Wherefore by the civil law such contracts were also made void:<sup>†</sup> but the prince had no such advantage of forfeiture thereby, as with us in England. Among other reasons, which might be given for our constitution, it seems to be intended by way of punishment for the alien's presumption, in attempting to acquire any landed property:<sup>‡</sup> for the vendor is not affected by it, he having

† Cod. l. 11. tit. 55.

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United States from a citizen thereof. The disabilities of aliens in respect to holding lands are removed in many of the states. In respect to some nations, treaties have given the subjects of such nations, although alien residents, the right to hold land in the United States. It is held by the supreme court of the United States that the treaty power extends to all proper subjects of negotiation between our government and the governments of other nations; and that the manner in which property may be transferred, devised, or inherited is a fitting subject for such negotiation and regulation by mutual stipulations between the two countries. *De Geofroy v. Riggs*, 133 U. S. 258, 33 L. Ed. 642, 10 Sup. Ct. Rep. 295; *Wunderle v. Wunderle*, 144 Ill. 40, 19 L. R. A. 84, 33 N. E. 195. The California Act of 1913 provides that aliens not eligible to citizenship may hold lands to the extent provided by any existing treaty between the United States and such aliens' nation, and may hold land for agricultural purposes for a term not exceeding three years.

Aliens have a right to acquire personal estate and make and enforce contracts in relation to the same. *Airhart v. Massieu*, 98 U. S. 491, 25 L. Ed. 213; *McNair v. Toler*, 21 Minn. 175; *Crashley v. Press Pub. Co.*, 179 N. Y. 27, 1 Ann. Cas. 196, 71 N. E. 258.

‡ An alien's inability to hold land.—Blackstone is at no loss for reasons why an alien should not hold land in England, but when he has to explain why the king should seize the land which aliens acquire, we feel that he is in difficulties. He suggests that this forfeiture "is intended by way of punishment for the alien's presumption in attempting to acquire any landed property." The truth seems to be that in the course of the thirteenth century our kings acquired a habit of seizing the lands of Normans and other Frenchmen. The Normans are traitors; the Frenchmen are enemies. All this will be otherwise if a permanent peace is ever established. But that permanent peace never comes, and it is always difficult to obtain a restoration of lands which the king has seized. France is the one foreign country that has to be considered in this context; Germans and Italians come here as merchants, but they have no ancestral claims

resigned his right, and received an equivalent in exchange. Yet an alien may acquire a property in goods, money, and other personal estate, or may hire a house for his habitation: "for personal estate is of a transitory and movable nature; and, besides, this indulgence to strangers is necessary for the advancement of trade."<sup>7</sup> Aliens also may trade as freely as other people; only they are subject to certain higher duties at the custom-house: and there are also some obsolete statutes of Henry VIII, prohibiting alien artificers to work for themselves in this kingdom; but it is generally held that they were virtually repealed by statute 5 Eliz., c. 7 (Importation, 1562). Also an alien may bring an action concerning personal property, and may make a will, and dispose of his personal estate: "not as it is in France, where the king at the death of an alien is entitled to all he is worth, by the *droit d'aubaine* or *jus albinatus*, (the right of inheriting the estate of a deceased alien),"<sup>8</sup> unless he has a peculiar exemption. When I mention

<sup>u</sup> 7 Rep. 17.

<sup>x</sup> A word derived from *alibi notas*. Spelm. Gl. 24.

<sup>w</sup> Lutw. 34.

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to urge and do not want English lands, while as to Scotland, owing to the English king's claim to an overlordship or to some other reason, Balliols and Bruces hold land on both sides of the border until a long war breaks out between the two countries. To us it seems that the king's claim to seize the lands of aliens is an exaggerated generalization of his claim to seize the lands of his French enemies. Such an exaggerated generalization of a royal right will not seem strange to those who have studied the growth of the king's prerogatives. (See the apocryphal statute, *Prærogativa Regis*, c. 14—Statutes, i. p. 226.) Here we seem to see the king's claim growing. First we have an assertion of his right to the lands of the Normans, then we are told that this extends also to lands of certain persons born beyond the sea, and we have various readings of the clause which defines this class of persons. One version says, "those whose ancestors were in the faith of the king of France in the reign of King John." Another, "those who were not in the king's faith." In this context "foreigner" and "subject of the king of France" are for practical purposes synonymous terms. In France also the *droit d'aubaine* but slowly attains its full stature. (Viollet, *Histoire du Droit Civil*, p. 365.)—POLL. & MAIT., 1 Hist. Eng. Law (2d ed.), 462.

<sup>7</sup> Now, under the Naturalization Act, 1870, real and personal property of every description may be acquired and disposed of by an alien; and a title to such property may be derived through, from, or in succession to an alien, in all respects as though he were a natural-born British subject.

<sup>8</sup> *Droit d'aubaine*.—The municipal laws of all European countries formerly prohibited aliens from holding real property within the territory of the



these rights of an alien, I must be understood of alien friends only, or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the king's special favor, during the time of war.<sup>9</sup>

§ 505. 5. **British subjects born abroad.**—When I say that an alien is one who is born out of the king's dominions, or allegiance, this also must be understood with some restrictions. The common law, indeed, stood absolutely so; with only a very few exceptions; so that a particular act of parliament became necessary after the restoration,<sup>7</sup> “for the naturalization of children of his majesty's English subjects, born in foreign countries during the late [373] troubles.” And this maxim of the law proceeded upon a general principle, that every man owes natural allegiance where he is born, and cannot owe two such allegiances, or serve two masters, at once.

<sup>7</sup> Stat. 29 Car. II. c. 6 (1677).

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state. During the prevalence of the feudal system, the acquisition of property in land involved the notion of allegiance to the prince within whose dominions it lay, which might be inconsistent with that which the proprietor owed to his native sovereign. It was also during the same rude ages that the *jus albinagii* or *droit d'aubaine* was established; by which all the property of a deceased foreigner (movable or immovable) was confiscated to the use of the state, to the exclusion of his heirs, whether claiming *ab intestato*, or under a will of the decedent. In the progress of civilization, this barbarous and inhospitable usage has been, by degrees, almost entirely abolished. This improvement has been accomplished either by municipal regulations, or by international compacts founded upon the basis of reciprocity. Previous to the French revolution of 1789, the *droit d'aubaine* had been either abolished or modified by treaties between France and other states; and it was entirely abrogated by a decree of the Constituent Assembly in 1791, with respect to all nations, without exception and without regard to reciprocity. This gratuitous concession was retracted, and the subject placed on its original footing of reciprocity by the Code Napoleon, in 1803; but this part of the Civil Code was again repealed, by the Ordinance of the 14th July, 1819, admitting foreigners to the right of possessing both real and personal property in France, and of taking by succession *ab intestato*, or by will, in the same manner with native subjects.—WHEATON, Int. Law (4th Eng. ed.), 134.

<sup>9</sup> **Right to exclude aliens.**—It seems that the crown of England enjoyed at common law the right of excluding or expelling from the country any alien. Contrarily, it has been held, that an alien has not any right, enforceable by action, to enter British territory. *Musgrove v. Chun Teeong Toy*, [1891] App. Cas. 272. And the Aliens Act, 1905, provides for the exclusion in certain

Yet the children of the king's ambassadors born abroad were always held to be natural subjects:<sup>z</sup> for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent; so, with regard to the son also, he was held (by a kind of *postliminium*)<sup>10</sup> to be born under the king of England's allegiance, represented by his father, the ambassador. To encourage, also, foreign commerce, it was enacted by statute 25 Edw. III, st. 2 (British Subject, 1350), that all children, born abroad, provided *both* their parents were at the time of the birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England: and accordingly it hath been so adjudged in behalf of merchants.<sup>a</sup> But by several more modern statutes<sup>b</sup> these restrictions are still further taken off: so that all children born out of the king's ligeance, whose *fathers* (or grandfathers by the father's side) were natural-born subjects, are now deemed to be natural-born subjects themselves, to all intents and purposes; unless their said ancestors were attainted, or banished beyond sea, for high treason; or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet so as that the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be Protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.

<sup>z</sup> 7 Rep. 18.

<sup>a</sup> Cro. Car. 601. Mar. 91. Jenk. Cent. 3.

<sup>b</sup> 7 Ann. c. 5 (Foreign Protestants' Naturalization, 1708). 4 Geo. II. c. 21 (British Nationality, 1730), and 13 Geo. III. c. 21 (British Nationality, 1772).

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cases from the United Kingdom of aliens who are criminals or in destitute circumstances.

In the United States it has been held that the right to exclude or expel aliens, absolutely or upon condition, being an inherent and inalienable right of a sovereign and independent nation, Congress has the power to expel as well as to exclude undesirable immigrants. *Fong Yue Ting v. United States*, 149 U. S. 698, 37 L. Ed. 905, 13 Sup. Ct. Rep. 1016; *Lem Moon Sing v. United States*, 158 U. S. 538, 39 L. Ed. 1082, 15 Sup. Ct. Rep. 967.

<sup>10</sup> *Postliminium*: the return or restoration of a person to a former estate or right.

§ 506. 6. Children of aliens.—The children of aliens, born here in England, are, generally speaking, natural-born subjects, and entitled to all the privileges of such.<sup>11</sup> In which the constitution of France differs from ours; for there, by their *jus albinatus*, if a child be born of foreign parents, it is an alien.<sup>c</sup>

<sup>c</sup> Jenk. Cent. 3. cites *treasure francois*. 312.

<sup>11</sup> Citizens born abroad.—With the exception of those born of alien enemies who happen to hold a part of the country as enemies, it is the allegiance, not the soil, that determines. (7 Coke Rep. 18 a.) Whether a child born in the house of a foreign ambassador would be an alien or citizen seems doubtful.

The *dictum* of the commentator as to French law is no longer true. A child born in France of foreign parents may claim French citizenship under certain conditions. (Code Nap. I, 1, 9.) In both countries the citizenship derived by actual birth is probably now held to be conclusive if properly claimed. (See Wooddesson, Lect. 1, 231.)

Two distinct and sometimes contradictory principles lie at the foundation of the law of allegiance: (1) That children follow the parents' condition. (2) That allegiance depends on place of birth. The former is termed by Westlake (Private International Law, § 7) the Roman principle; but it seems rather to be that of the doctrine of personal law, common among all early European peoples, perhaps among the Romans in an early stage of their development as well as the rest. The latter is no doubt feudal in its origin, and dates from the time when territorial law had become the accepted rule. Westlake states (§ 16) the present English rule thus: "Legitimate children, wherever born, are regularly members of that state of which their fathers are members at the time of their birth, but may choose, if they prefer it, the nationality of their place of birth."

Vattel, sections 213, 215, also makes the father's condition the natural one of the child, though he recognizes the power of positive laws to change the rule. But the English common-law rule seems to have reversed this order, and to have made the place of birth the controlling consideration—to be overruled only by positive statutes, such as that of 25 Edw. III, st. 2, and those following, which gave citizenship to the children of English fathers born abroad. "To this day, not only are all persons born within the United Kingdom *ipso facto* entitled to all the civil privileges conferred by the British character, but our law holds that they cannot divest themselves of that character by any act of theirs." (Westlake, § 12; Macdonald's Case, 18 State Trials, 857; Udny v. Udny, 1 H. L. Cas. 441.) And this was the doctrine of the American courts down to a very recent period. They held to indefeasible allegiance, even while the legislature provided, and the courts themselves administered oaths of naturalization. (2 Kent, 42, 49; Wharton's Am. State Trials, 655. See Holmes' note to 2 Kent, 49.) By the common law, allegiance is not a matter of individual choice. It attaches at the time, and on account of birth, and under

§ 507. 7. **Denizens.**—A denizen is an alien born, but who has obtained *ex donatione regis* (by gift of the king) letters patent to make him an English subject: <sup>[374]</sup> a high and incommunicable branch of the royal prerogative.<sup>d</sup> A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not; but cannot take by inheritance:<sup>e</sup> for his parent, through whom he must claim, being an alien, had no inheritable blood; and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him; but his issue born *after* may.<sup>f</sup> A denizen is not excused<sup>g</sup> from paying the alien's duty and some

<sup>d</sup> 7 Rep. Calvin's Case. 25.

<sup>e</sup> 11 Rep. 67.

<sup>f</sup> Co. Litt. 8. Vaugh. 285.

<sup>g</sup> Stat. 22 Hen. VIII. c. 8 (Customs, 1530).

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circumstances in which the family owe allegiance, and is entitled to protection. A person may be domiciled in one place or country, and owe allegiance to and be a citizen of another. "The fact that plaintiff's grandfather made his permanent domicile in Canada does not of itself prove him to be an alien. Even if he was regarded as a British subject, this would not necessarily make him an alien. The laws of the United States determine what persons shall be regarded as citizens, *irrespective of such persons' pleasure or the laws or pleasure of any other government.*" (Seevers, J., in *State v. Adams*, 45 Iowa, 99, 101, 24 Am. Dec. 760.) A. removed to Canada in 1790. His son was born there in 1795; his grandson in 1834. The two latter came to Iowa that year, and have resided there ever since. *Held*, that the grandson was a citizen by virtue of the Act of 1802. (U. S. Rev. Stats. § 2172.) "Children of persons who now are, or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." Seevers, J., cites also as authorities, *Calais v. Marshfield*, 30 Me. 511; *Peck v. Young*, 26 Wend. (N. Y.) 613; *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99, 7 L. Ed. 617. But this would not apply to a colored man, born of slaves who emigrated to Canada. (*People v. Board of Registration of Detroit*, 26 Mich. 51, 12 Am. Rep. 297.) By the common law, a child born within the allegiance of the United States is born a subject thereof, without reference to the political status or condition of its parents. (*McKay v. Campbell* (1871), Fed. Cas. No. 8840, 2 Saw. 118; *Lynch v. Clarke*, 1 Sand. Ch. (N. Y.) 583.) *Aliter* as to an Indian child. (*Lynch v. Clarke*, 1 Sand. Ch. (N. Y.) 583.) In *Lynch v. Clarke*, the point decided was that Julia Lynch, born in New York in 1819, of alien parents temporarily there, who returned to Ireland when she

other mercantile burdens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, etc., from the crown.<sup>a</sup>

§ 508. 8. Naturalization.—Naturalization cannot be performed but by act of parliament: for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, etc.<sup>1</sup> No bill for naturalization can be received in either house of

<sup>a</sup> Stat. 12 W. III. c. 2 (Act of Settlement, 1700).

<sup>1</sup> *Ibid.*

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was a few months old, was a citizen of the United States. This question is very fully argued on pages 588–637. The abandonment of the doctrine of indefeasible allegiance by England and the United States destroys the force of this reasoning, and seems to leave no presumption in favor of either the citizenship by birthplace, or that by inheritance. The American-born child of an English native subject domiciled in America is a subject of both countries. (Cranworth, L. C., in *Dawson v. Jay*, 3 De Gex, M. & G. 764, 772, 1853.) A man may at the same time enjoy the rights of citizenship under two governments. (Rutledge, C. J., in *Talbot v. Janson*, 3 Dall. 138, 169, 1 L. Ed. 543, 556.)—HAMMOND.

**Elective citizenship.**—A question of difficulty upon which there is now very little authority is that of the effect of choice in cases of elective citizenship. In a variety of forms, most civilized nations recognize the citizenship of all children actually born upon their soil, except those of alien enemies, without reference to the nationality of their parents. Most of them also recognize as native citizens the children of their own citizens, though born in a foreign country. This is a common-law doctrine with us, and perhaps in England, also, though the first clear recognition of it there was by the statute 25 Edw. III, c. 2, and 33 Hen. VIII, c. 25. Such children have the option of claiming either the country of their actual birth, or that of their parents as their native land. And while it is understood that this option once deliberately exercised cannot be revoked, it is far from settled what acts shall constitute such a choice of citizenship, or when it ceases to be revocable. Instances have been known of repeated changes in the citizenship claimed by a single individual, as in the command, indifferently, of English and American merchant vessels. The following cases throw some light upon it, while far from yielding a settled doctrine:

A native citizen of England, who had become a citizen of the United States, was held entitled in the latter character to trade with the East Indies, although



parliament, without such disabling clause in it:<sup>j</sup> nor without a clause disabling the person from obtaining any immunity in trade thereby, in any foreign country; unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized.<sup>k</sup> Neither can any person be naturalized or restored in blood unless he hath received the sacrament of the Lord's Supper within one month before the bringing in of the bill; and unless he also takes the oaths of allegiance and supremacy in the presence of the parliament.<sup>l</sup> But these provisions have been usually dispensed with by special acts of par-

<sup>j</sup> Stat. 1 Geo. I. c. 4 (Naturalization, 1714).

<sup>k</sup> Stat. 14 Geo. III. c. 84 (Naturalization, 1774).

<sup>l</sup> Stat. 7 Jac. I. c. 2 (Naturalization and Restoration of Blood, 1609).

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the charter of the East India company excluded him as an Englishman. The English court decided that his being a natural-born subject of England did not exclude him from the advantages by treaty as a citizen of the United States. (*Wilson v. Marryat*, 8 Term Rep. 31; *Marryat v. Wilson* [in Error], 1 Bos. & P. 430.)

A native of France, grandson of a native Englishman, and therefore entitled to English citizenship by stat. 3 Geo. III, c. 26, claimed as an Englishman, damages for confiscation of his property in France; but the judicial committee of the privy council held that he and his father had sufficiently indicated by their conduct that they elected to be citizens of France, in spite of the opinions of six eminent French lawyers to the contrary. (*Drummond's Case*, 2 Knapp, 295.) The English courts have also held that naturalization abroad, with abjuration of British allegiance, did not divest one of the character of British subject, and therefore did not disqualify his (foreign-born) son or grandson from inheriting as such. (*Fitch v. Weber*, 6 Hare, 51.)

Although it is more than a century since the separation of the United States from England, questions are still arising as to rights to lands, honors, etc., accruing by descent, and dependent on the citizenship of parties at and after the time of separation. Rights existing before the separation were not affected by it unless actually confiscated then. By the treaty of 1794, article 9, it was stipulated that subjects of either state and their heirs should not be treated as aliens, except with reference to rights purchased after the separation. But there is an important difference in the two countries as to the date of separation. The Americans consider July 4, 1776, the English, September 3, 1783, as that date. (2 Kent, 59, and cases cited; *Dawson's Lessee v. Godfrey*, 4 Cranch, 321, 2 L. Ed. 634; *Harden v. Fisher*, 1 Wheat. 300, 4 L. Ed. 96; *Orr v. Hodgson*, 4 Wheat. 453, 4 L. Ed. 613; *Blight's Lessee v. Rochester*, 7 Wheat. 535, 5 L. Ed. 516; *Hughes v. Edwards*, 9 Wheat. 489, 6 L. Ed. 142; *Read v. Read*,

liament, previous to bills of naturalization of any foreign princes or princesses.<sup>m 12</sup>

These are the principal distinctions between aliens, denizens, and natives: distinctions, which endeavors have been [375] frequently used since the commencement of this century to lay almost totally aside, by one general naturalization act for all foreign Protestants.

<sup>m</sup> Stat. 4 Ann. c. 1 (Land Tax, 1705). 7 Geo. II. c. 3 (Prince of Orange, 1733). 9 Geo. II. c. 24 (Princess of Wales, 1735). 4 Geo. III. c. 4 (Naturalization, 1763).

5 Call (Va.), 189, *Hunter v. Fairfax's Devises*, 1 Munf. (Va.) 218; *Doe v. Mulcoster*, 5 Barn. & C. 771.)

Of course the same question may arise as to the duties of such an individual to one state or the other, especially in cases of war between them. The only precedents upon this point were made under the old doctrine of indefeasible allegiance, such as the case of Aeneas Macdonald, who was tried and convicted as a traitor for assisting the Pretender in the rebellion of 1745 (18 St. Tr. 857), though carried to France in his infancy and living there all his life. Such cases can hardly be said to help us at all in settling the present doctrine, unless it be as showing the hardships to be avoided. (See, also, *Dr. Storey's Case*, 1 St. Tr. 1087; *Dyer*, 298, 300; 1 Hale P. C. 68, 96; *Woolsey's International Law*, § 66.)

Entirely different is the question of the divided allegiance of American citizens between the state and the Union. "Every citizen of the United States is also a citizen of a state or territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be a transgression of the laws of both. That either or both (if they see fit) may punish such an offender, cannot be doubted; yet it cannot be truly averred that the offender has been twice punished for the same offense; but that only by one act he has committed two offenses, for each of which he is justly punishable. He could not plead the punishment by one in bar to a conviction by the other." (*Moore v. People*, 14 How. 13, 14 L. Ed. 306, citing as a proof that passing false coin may be an offense against both the state and the Union, *Fox v. Ohio*, 5 How. 432, 12 L. Ed. 223, and *United States v. Marigold*, 9 How. 560, 13 L. Ed. 257. See, also, *People v. Kelly*, 38 Cal. 145, 99 Am. Dec. 360; *State v. Tuller*, 34 Conn. 280; *State v. Zulich*, 29 N. J. L. 409.) It is not correct to say that there is concurrent jurisdiction in such a case, as said in 1 *Bishop on Criminal Law* (6th ed.), § 178; *United States v. Doss*, 11 Am. Law Reg., N. S., 320, Fed. Cas. No. 14,985. — HAMMOND.

12 **Alienage and naturalization.**—The present division in this country may be stated as that of aliens and citizens, whether natural born or naturalized, since the latter have all the rights of native citizens and all their political

An attempt which was once carried into execution by the statute 7 Ann., c. 5 (Foreign Protestants' Naturalization, 1708), but this, after three years' experience of it, was repealed by the statute 10 Ann., c. 5 (1711), except one clause, which was just now mentioned, for naturalizing the children of English parents born abroad. However, every foreign seaman, who in time of war serves two years on board an English ship by virtue of the king's proclamation, is *ipso facto* naturalized under the like restrictions as in statute 12 W. III, c. 2 (1700);<sup>a</sup> and all foreign Protestants, and Jews, upon their residing seven years in any of the American colonies, without being absent above two months at a time, and all

<sup>a</sup> Stat. 13 Geo. II. 3 (Supply of Seamen, 1739).

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rights, with a few exceptions, imposed by positive law. (Opinions of the Attorneys-General, art. ix, p. 360, by Black, A. G.) A native citizen only is eligible to the presidency and vice-presidency, and in a few states to the governorship, and by the navigation laws to the command of an American ship, and as to all property rights there is no distinction. Naturalization is granted under the authority of the federal government, and is recognized by all the states alike, but it may be obtained in any court of record having common-law jurisdiction, whether state or federal.

No such intermediate class as *denizens* is recognized by our law, but a distinction is made in some cases by legislation between resident and nonresident aliens. The laws of some states allow the former to hold, purchase, or inherit land and enjoy other rights of citizenship while still excluding nonresident aliens. For these distinctions reference must be made to the statutes of each state. In a few cases also resident aliens who have declared their intention of becoming citizens are allowed to vote before naturalization; but this does not make them citizens even of the particular state. It is now agreed that the power to establish a uniform rule of naturalization, given to Congress by United States Constitution, article i, section 8, is exclusive (1 Kent, 390), though some early decisions held the contrary. The alien wishing to be naturalized must have declared his intention in some court of record at least two years beforehand, and prove this by certified copy of the record, commonly called the preliminary papers. He must also prove by witnesses that he has resided within the United States five years, at least, and within the state (or territory) where the court sits, one year, and that during that time he has conducted himself as a man of good moral character, attached to the principles of the United States Constitution, and well disposed to the good order and happiness of the same. He must also take an oath that he will support the United States Constitution, and renounce all allegiance and fidelity to every foreign prince or state, and particularly to the prince, potentate or state of

foreign Protestants serving two years in a military capacity there, or being three years employed in the whale fishery, without afterwards absenting themselves from the king's dominions for more than one year, and none of them falling within the incapacities declared by statute 4 Geo. II, c. 21 (British Nationality, 1730), shall be (upon taking the oaths of allegiance and abjuration, or in some cases, an affirmation to the same effect) naturalized to all intents and purposes, as if they had been born in this kingdom; except as to sitting in parliament or in the privy council, and holding offices or grants of lands, etc., from the crown within the kingdoms of Great Britain or Ireland.<sup>o</sup> They therefore are admissible

<sup>o</sup> Stat. 13 Geo. II. c. 7 (Naturalization, 1739). 20 Geo. II. c. 44 (Aliens, 1746). 22 Geo. II. c. 45 (1748). 2 Geo. III. c. 25 (Naturalization, 1761). 13 Geo. III. c. 25 (Naturalization, 1772).

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which he has been a subject (naming him or it), and renounce his title of nobility, if any. (U. S. Rev. Stats., §§ 2165, 2170, 2174.)

The wife and minor children of a naturalized citizen residing in this country become citizens by the act of court admitting the husband and father. (U. S. Rev. Stats., § 2172, Act of 10 Feb., 1855; *Campbell v. Gordon*, 6 Cranch, 177, 3 L. Ed. 191; *State v. Penney*, 10 Ark. 621.) So as to the wife in England. (Stat. 7 & 8 Vict., c. 60.) If he has made the preliminary declaration but dies before admission, they are citizens. (U. S. Rev. Stats., § 2168.) But a wife may be naturalized without her husband's concurrence. (*Shanks v. Dupont*, 3 Pet. 248, 7 L. Ed. 669.) The preliminary declaration may be dispensed with in the case of an alien who has resided in the United States at least three years before majority (U. S. Rev. Stats., § 2167); or of one who has been in the military service of the United States and honorably discharged upon proof of one year's residence and good character. (U. S. Rev. Stats., § 2166.) This is on the same principle with an English statute of 13 Geo. II, c. 3. (See 1 Comm. 375, note *n*.) The admission is conclusive as a record of the facts recited, and they cannot be afterwards inquired into. (*Campbell v. Gordon*, 6 Cranch, 182, 3 L. Ed. 192; *Stark v. Chesapeake Ins. Co.*, 7 Cranch, 420, 3 L. Ed. 391.)

Although the United States assumed the right to naturalize foreigners from the beginning of its existence as a nation, and required of them as a condition the renunciation of all allegiance to the state or monarch of their nativity, yet for more than half a century its courts and legal writers adhered to the doctrine of indefeasible allegiance of the common law. During this time the singular spectacle was presented of a court gravely administering to a new citizen an oath to disown all allegiance to foreign powers, and especially by name to the king of Great Britain or of France, etc., as the case might be,

to all other privileges, which Protestants or Jews born in this kingdom are entitled to. What those privileges are, with respect to Jews<sup>p</sup> in particular, was the subject of very high debates about the time of the famous Jew bill,<sup>q</sup> which enabled all Jews to prefer bills of naturalization in parliament, without receiving the sacra-

<sup>p</sup> A pretty accurate account of the Jews till their banishment in 8 Edw. I. may be found in Molloy *De Jure Maritimo*, b. 3. c. 6.

<sup>q</sup> Stat. 26 Geo. II. c. 26 (Naturalization of Jews, 1753).

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and certifying that he had thus become a citizen of the United States, and no longer one of his native kingdom, and at the same session, perhaps, deciding in a litigated case that such oaths were invalid, and that no man could cast off his natural allegiance. This inconsistency, however, has now been cured by the adoption of a more liberal doctrine.

England also has finally abandoned the older doctrine and recognized the right of expatriation. Neither country, probably, would hold the right to be an absolute one, exercisable at the pleasure of the individual in the midst of a foreign war, or while in a position of trust and responsibility. But the extent of such exceptions is yet to be determined by actual decisions. The speculations upon this subject of writers upon public law give some hint of what the decisions may be, but are not authoritative.

On this much discussed and unsettled subject, see Sharswood's and Cooley's notes to this passage in their editions; 1 Kent. Comm. Lect. 4; 2 Kent. Comm. Lect. 25; Bowyer on Public Law, p. 152; Vattel, lib. 1. c. 19, §§ 220-228 (a very full discussion of the question on principle, maintaining the existence of the right wherever a good reason exists, but not absolutely); Woolsey's International Law, § 66; Wheaton's International Law, Dana's note, 49; Phillimore's International Law, vol. 1, 350-354; New Am. Cyclopedia, art. "Naturalization"; Marcy to Sartiges, Senate Ex. Doc. No. 9, Feb. 26, 1857; Marcy to Hulsemann, Senate Ex. Doc. Nos. 1 and 41 (33d Cong.), Sept., 1853; Story on Constitution, note to § 1104; Rawle on Constitution, c. 9, pp. 85-101; Sergeant's Const. Law, c. 30, pp. 318-322; note to Williams' Case, Wharton's Am. State Trials, 655. (The note to this contains the fullest collection of references to decisions bearing on the question, pp. 654-658.) The earlier doctrine of indefeasible allegiance is supported in Foster Cr. Law, 184; 1 Kent, 42; Doe v. Acklon, 2 Barn. & C. 779; Williams' Case, Wharton Am. St. Tr. 652; Inglis v. Sailors' Snug Harbor, 3 Pet. 99, 7 L. Ed. 617; Shanks v. Dupont, 3 Pet. 242, 7 L. Ed. 666. The better doctrine was sustained by foreign jurists much earlier. (Puffendorf, lib. 8, 2, § 11, etc.; Grotius *De Jure B. et P.*, lib. 2, 5, 24; Burlamaqui, vol. 2, 5, 13; Vattel, lib. 1, § 223, etc.) It was early advocated in America. (Tucker's Blackstone, vol. 2, App. 90; Talbot v. Janson, 3 Dall. 152, 1 L. Ed. 549; Murray v. The Charming Betsy, 2 Cranch, 64, 2 L. Ed. 208; The Santissima Trinidad, 7 Wheat. 347, 5 L. Ed. 470; Murray v. McCarty, 2 Munf. (Va.)



ment, as ordained by statute 7 Jac. I (1609). It is not my intention to revive this controversy again; for the act lived only a few months, and was then repealed:<sup>r</sup> therefore peace be now to its *manes*.

<sup>r</sup> Stat. 27 Geo. II. c. 1 (Naturalization of Jews, 1754).

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396; *Branch v. Bowman*, 2 Leigh (Va.), 170; *Stoughton v. Taylor*, 2 Paine, 652, Fed. Cas. No. 7558.)

As the law stood before 1870, every person born within the British dominions, though he should be removed in infancy to another country where his family resides, owes an allegiance to the British crown which he could never resign or lose except by act of parliament, or by the recognition of the independence, or the cession of the portion of British territory in which he resided. By the Naturalization Act, 1870, 33 & 34 Vict., c. 14, it was made possible for British subjects to renounce their nationality and allegiance, and the ways in which that nationality is lost are defined. So British subjects voluntarily naturalized in a foreign state are deemed aliens from the time of such naturalization, unless, in the case of persons naturalized before the passing of the act, they have declared their desire to remain British subjects, within two years from the passing of the act. Persons who from having been born within British territory are British subjects, but who at birth became under the law of any foreign state subjects of such state, and also persons who, though born abroad, are British subjects by reason of parentage, may by declarations of alienage get rid of British nationality. (Ency. Britannica, art. "Allegiance," vol. 1, p. 589.)—HAMMOND.

## OF THE CLERGY.

§ 509. **The clergy.**—The people, whether aliens, denizens, or natural-born subjects, are divisible into two kinds; the clergy and laity: the clergy, comprehending all persons in holy orders, and in ecclesiastical offices, will be the subject of the following chapter.

§ 510. **Privileges and disabilities of the clergy.**—This venerable body of men, being separate and set apart from the rest of the people, in order to attend the more closely to the service of Almighty God, have thereupon large privileges allowed them by our municipal laws: and had formerly much greater, which were abridged at the time of the Reformation on account of the ill use which the popish clergy had endeavored to make of them. For, the laws having exempted them from almost every personal duty, they attempted a total exemption from every secular tie. But it is observed by Sir Edward Coke,<sup>a</sup> that, as the overflowing of waters doth many times make the river to lose its proper channel, so in times past ecclesiastical persons, seeking to extend their liberties beyond their true bounds, either lost or enjoyed not those which of right belonged to them. The personal exemptions do indeed for the most part continue. A clergyman cannot be compelled to serve on a jury, nor to appear at a court-leet or view of frankpledge; which almost every other person is obliged to do;<sup>b</sup> but if a layman is summoned on a jury, and before the trial takes orders, he shall notwithstanding appear and be sworn.<sup>c</sup> Neither can he be [377] chosen to any temporal office; as bailiff, reeve, constable, or the like: in regard of his own continual attendance on the sacred function.<sup>d</sup> During his attendance on divine service he is privileged from arrests in civil suits.<sup>e</sup> In cases also of felony, a clerk in orders shall have the benefit of his clergy, without being branded

<sup>a</sup> 2 Inst. 4.

<sup>b</sup> F. N. B. 160. 2 Inst. 4.

<sup>c</sup> 4 Leon. 190.

<sup>d</sup> Finch. L. 88.

<sup>e</sup> Stat. 50 Edw. III. c. 5 (1376). 1 Rich. II. c. 16 (1377).

in the hand; and may likewise have it more than once; in both which particulars he is distinguished from a layman.<sup>f</sup> But as they have their privileges, so also they have their disabilities, on account of their spiritual avocations. Clergymen, we have seen,<sup>g</sup> are incapable of sitting in the house of commons; and by statute 21 Hen. VIII, c. 13 (Clergy, 1529), are not (in general) allowed to take any lands or tenements to farm, upon pain of 10*l.* *per* month, and total avoidance of the lease; nor upon like pain to keep any tan-house or brew-house; nor shall engage in any manner of trade, nor sell any merchandise, under forfeiture of the treble value. Which prohibition is consonant to the canon law.

§ 511. **Ecclesiastical orders.**—In the frame and constitution of ecclesiastical polity there are divers ranks and degrees: which I shall consider in their respective order, merely as they are taken notice of by the secular laws of England; without intermeddling with the canons and constitutions, by which the clergy have bound themselves. And under each division I shall consider, 1. The method of their appointment; 2. Their rights and duties; and 3. The manner wherein their character or office may cease.

§ 512. 1. **Archbishops and bishops: appointment.**—An archbishop or bishop is elected by the chapter of his cathedral church, by virtue of a license from the crown. Election was, in very early times, the usual mode of elevation to the episcopal chair throughout all Christendom; and this was promiscuously performed by the laity as well as the clergy;<sup>h</sup> till at length it becoming tumultuous, the [378] emperors and other sovereigns of the respective kingdoms of Europe took the appointment in some degree into their own hands; by reserving to themselves the right of confirming these elections, and of granting investiture of the temporalties, which now began almost universally to be annexed to this spiritual dignity; without which confirmation and investiture the elected

<sup>f</sup> 2 Inst. 637. Stat. 4 Hen. VII. c. 13 (Benefit of Clergy, 1488), and 1 Edw. VI. c. 12 (Criminal Law, 1547).

<sup>g</sup> Page 175.

<sup>h</sup> *Per clerum et populum.* (By the clergy and people.) Palm. 25. 2 Roll. Rep. 102. M. Paris. A. D. 1095.

bishop could neither be consecrated nor receive any secular profits. This right was acknowledged in the Emperor Charlemagne, A. D. 773, by Pope Hadrian I, and the Council of Lateran,<sup>1</sup> and universally exercised by other Christian princes: but the policy of the court of Rome at the same time began by degrees to exclude the laity from any share in these elections, and to confine them wholly to the clergy, which at length was completely effected; the mere form of election appearing to the people to be a thing of little consequence, while the crown was in possession of an absolute negative, which was almost equivalent to a direct right of nomination. Hence the right of appointing to bishoprics is said to have been in the crown of England<sup>k</sup> (as well as other kingdoms in Europe) even in the Saxon times; because the rights of confirmation and investiture were in effect (though not in form) a right of complete donation.<sup>1</sup> But when, by length of time, the custom of making elections by the clergy only was fully established, the popes began to except to the usual method of granting these investitures, which was *per annulum et baculum* (by the ring and staff), by the prince's delivering to the prelate a ring, and pastoral staff or crosier; pretending, that this was an encroachment on the church's authority, and an attempt by these symbols to confer a spiritual jurisdiction: and Pope Gregory VII, towards the close of the eleventh century, published a bull of excommunication against all princes who should dare to confer investitures, and all prelates who should venture to receive them.<sup>m</sup> This was a bold step towards effecting the plan then adopted [379] by the Roman see, of rendering the clergy entirely independent of the civil authority: and long and eager were the contests occasioned by this papal

<sup>1</sup> Decret. 1. dist. 63. c. 22.

<sup>k</sup> Palm. 28.

<sup>1</sup> "*Nulla electio praelatorum (sunt verba Ingulphi) erat mere libera et canonica; sed omnes dignitates tam episcoporum, quam abbatum, per annulum et baculum regis curia pro sua complacentia conferebat.*" *Penes clericos et monachos fuit electio, sed electum a rege postulabant.* ("There was no election of prelates [says Ingulphus] purely free and canonical; but the king's court granted all dignities at its pleasure, as well of bishops as abbots, by the ring and the staff." The election was in the power of the clergy and monks, but they requested election by the king.) Selden, Jan. Angl. 1. 1. § 39.

<sup>m</sup> Decret. 2. caus. 16. qu. 7. c. 12 & 13.

claim. But at length, when the Emperor Henry V agreed to remove all suspicion of encroachment on the spiritual character, by conferring investitures for the future *per sceptrum* (by the scepter) and not *per annulum et baculum* (by the ring and staff); and when the kings of England and France consented also to alter the form in their kingdoms, and receive only homage from the bishops for their temporalities, instead of investing them by the ring and crosier; the court of Rome found it prudent to suspend for awhile its other pretensions.<sup>n</sup>

This concession was obtained from King Henry the First in England, by means of that obstinate and arrogant prelate, Archbishop Anselm:<sup>o</sup> but King John (about a century afterwards) in order to obtain the protection of the pope against his discontented barons, was also prevailed upon to give up by a charter, to all the monasteries and cathedrals in the kingdom, the free right of electing their prelates, whether abbots or bishops: reserving only to the crown the custody of the temporalities during the vacancy; the form of granting a license to elect (which is the original of our *conge d' eslire*—permission to elect), on refusal whereof the electors might proceed without it; and the right of approbation afterwards, which was not to be denied without a reasonable and lawful cause.<sup>p</sup> This grant was expressly recognized and confirmed in King John's *magna carta*,<sup>q</sup> and was again established by statute 25 Edw. III, st. 6, sec. 3 (Benefices, 1352).

But by statute 25 Hen. VIII, c. 20 (Annates, 1534), the ancient right of nomination was, in effect, restored to the crown: it being enacted that, at every future avoidance of a bishopric, the king may send the dean and chapter his usual license to proceed to election; which is always to be accompanied with a letter missive from the king, containing the name of the person whom he would have them elect: and, if the dean and chapter delay their election above twelve days, the [380] nomination shall devolve to the king, who may by letters patent appoint such person as he pleases. This election or nomination, if it be of a bishop, must be signified by the

<sup>n</sup> Mod. Un. Hist. xxv. 363. xxix. 115.

<sup>o</sup> M. Paris. A. D. 1107.

<sup>p</sup> M. Paris. A. D. 1214. 1 Rym. Fœd. 193.

<sup>q</sup> Cap. 1. edit. Oxon. 1759.



king's letters patent to the archbishop of the province; if it be of an archbishop, to the other archbishop and two bishops, or to four bishops; requiring them to confirm, invest, and consecrate the person so elected: which they are bound to perform immediately, without any application to the See of Rome. After which the bishop-elect shall sue to the king for his temporalities, shall make oath to the king and none other, and shall take restitution of his secular possessions out of the king's hands only. And if such dean and chapter do not elect in the manner by this act appointed, or if such archbishop or bishop do refuse to confirm, invest, and consecrate such bishop-elect, they shall incur all the penalties of a *præmunire*.<sup>1</sup>

§ 513. a. Rights and duties of archbishops.—An archbishop is the chief of the clergy in a whole province;<sup>2</sup> and has the inspection of the bishops of that province, as well as of the inferior clergy, and may deprive them on notorious cause.<sup>r</sup> The archbishop has also his own diocese, wherein he exercises episcopal jurisdiction; as in his province he exercises archiepiscopal. As archbishop, he, upon receipt of the king's writ, calls the bishops and clergy of his province to meet in convocation: but without the king's writ he cannot assemble them.<sup>s</sup> To him all appeals are made from inferior jurisdictions within his province; and, as an appeal lies from the bishop in person to him in person, so it also lies from the consistory courts of each diocese to his archiepiscopal court. During the vacancy of any see in his province, he is guardian of the spiritualities thereof, as the king is of the temporalities; and he executes all ecclesiastical jurisdiction therein. If an archiepiscopal see be vacant, the dean and chapter are the spiritual guardians, ever since the office of prior of Canterbury was abolished at the Reformation.<sup>t</sup> The archbishop is entitled to present by

<sup>r</sup> Lord. Raym. 541.

<sup>t</sup> 2 Roll. Abr. 22.

<sup>s</sup> 4 Inst. 322, 323.

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<sup>1</sup> The penalties of a *præmunire* involves the loss of all civil rights, with forfeiture of lands, goods, and chattels, and imprisonment during the royal pleasure.

<sup>2</sup> There are two archbishops for England and Wales, namely, the Archbishop of Canterbury and the Archbishop of York.

lapse to all the ecclesiastical livings in the disposal of his [381] diocesan bishops, if not filled within six months. And the archbishop has a customary prerogative, when a bishop is consecrated by him, to name a clerk or chaplain of his own to be provided for by such suffragan bishop; in lieu of which it is now usual for the bishop to make over by deed to the archbishop, his executors and assigns, the next presentation of such dignity or benefice in the bishop's disposal within that see, as the archbishop himself shall choose; which is therefore called his *option*:<sup>u</sup> which options are only binding on the bishop himself who grants them, and not on his successors. The prerogative itself seems to be derived from the legatine power formerly annexed by the popes to the metropolitan of Canterbury.<sup>w</sup> And we may add, that the papal claim itself (like most others of that encroaching see) was probably set up in imitation of the imperial prerogative called *primæ* or *primariæ preces* (first prayers, or suits); whereby the emperor exercises, and hath immemorially exercised,<sup>x</sup> a right of naming to the first prebend that becomes vacant after his accession in every church of the empire.<sup>y</sup> A right that was also exercised by the crown of England in the reign of Edward I;<sup>z</sup> and which probably gave rise to the royal corodies, which were mentioned in a former chapter.<sup>a</sup> It is likewise the privilege, by custom, of the archbishop of Canterbury, to crown the kings and queens of this kingdom. And he hath also by the statute 25 Hen. VIII, c. 21 (Peter-pence, 1534), the power of granting dispensations in any case, not contrary to the holy scriptures and the law of God, where the pope used formerly to grant them: which is the foundation of his grant-

<sup>u</sup> Cowell's Interp. tit. Option.

<sup>w</sup> Sherlock of Options. 1.

<sup>x</sup> Goldast. Constit. Imper. tom. 3. pag. 406.

<sup>y</sup> Dufresne. V. 806. Mod. Univ. Hist. xxix. 5.

<sup>z</sup> *Rex, etc., salutem. Scribatis episcopo Karl. quod—Roberto de Icard pensionem suam, quam ad preces regis prædicto Roberto concessit, de cætero solvat; et de proxima ecclesia vacatura de collatione prædicti episcopi, quam ipse Robertus acceptaverit, respiciat.* (The king, etc., sends greeting. That you write to the Bishop of Carlisle, that he henceforth pay to Robert de Icard the pension which he granted to the said Robert at the desire of the king: and that the aforesaid bishop see that the said Robert be appointed to the next church vacancy in his collation.) Brev. 11 Edw. I (1283), 3 Fryn. 1264.

<sup>a</sup> C. 8, page 283.

ing special licenses, to marry at any place or time, to hold two livings, and the like: and on this also is founded the right he exercises of conferring degrees, in prejudice of the two universities.<sup>b</sup>

§ 514. **b. Rights and duties of bishops.**—<sup>[382]</sup> The power and authority of a bishop, besides the administration of certain holy ordinances peculiar to that sacred order, consist principally in inspecting the manners of the people and clergy, and punishing them in order to reformation, by ecclesiastical censures. To this purpose he has several courts under him, and may visit at pleasure every part of his diocese. His chancellor is appointed to hold his courts for him, and to assist him in matters of ecclesiastical law; who, as well as all other ecclesiastical officers, if lay or married, must be a doctor of the civil law, so created in some university.<sup>c</sup> It is also the business of a bishop to institute, and to direct induction, to all ecclesiastical livings in his diocese.

§ 515. **c. Expiration of office of archbishops and bishops.**—Archbishoprics and bishoprics may become void by death, deprivation for any very gross and notorious crime, and also by resignation. All resignations must be made to some superior.<sup>d</sup> Therefore, a bishop must resign to his metropolitan; but the archbishop can resign to none but the king himself.

§ 516. **Dean and chapter.**—A dean and chapter are the council of the bishop, to assist him with their advice in affairs of religion, and also in the temporal concerns of his see.<sup>e</sup> When the rest of the clergy were settled in the several parishes of each diocese (as hath formerly<sup>f</sup> been mentioned) these were reserved for the celebration of divine service in the bishop's own cathedral; and the chief of them, who presided over the rest, obtained the name of *decanus* or dean, being probably at first appointed to superintend *ten* canons or prebendaries.

All ancient deans are elected by the chapter, by *conge d' eslire* (permission to elect) from the king, the letters missive of recom-

<sup>b</sup> See the Bishop of Chester's Case, Oxon. 1721.

<sup>c</sup> Stat. 37 Hen. VIII. c. 17 (Ecclesiastical Jurisdiction, 1545).

<sup>d</sup> Gibs. Cod. 822.

<sup>e</sup> 3 Rep. 75. Co. Litt. 103, 300.

<sup>f</sup> Pages 112, 113.

mentation, in the same manner as bishops: but in those chapters, that were founded by Henry VIII out of the spoils of the dissolved monasteries, the deanery is donative, and the installation [383] merely by the king's letters patent.<sup>g</sup> The chapter, consisting of canons or prebendaries, are sometimes appointed by the king, sometimes by the bishop, and sometimes elected by each other.

The dean and chapter are, as was before observed, the nominal electors of a bishop. The bishop is their ordinary and immediate superior; and has, generally speaking, the power of visiting them, and correcting their excesses and enormities. They had also a check on the bishop at common law: for till the statute 32 Hen. VIII, c. 28 (Leaseholds, 1540), his grant or lease would not have bound his successors, unless confirmed by the dean and chapter.<sup>h</sup>

Deaneries and prebends may become void, like a bishopric, by death, by deprivation, or by resignation to either the king or the bishop.<sup>i</sup> Also I may here mention, once for all, that if a dean, prebendary, or other spiritual person be made a bishop, all the preferments of which he was before possessed are void; and the king may present to them in right of his prerogative royal. But they are not void by the election, but only by the consecration.<sup>j</sup>

§ 517. 3. Archdeacons.—An archdeacon hath an ecclesiastical jurisdiction, immediately subordinate to the bishop, throughout the whole of his diocese, or in some particular part of it. He is usually appointed by the bishop himself; and hath a kind of episcopal authority, originally derived from the bishop, but now independent and distinct from his.<sup>k</sup> He therefore visits the clergy; and has his separate court for punishment of offenders by spiritual censures, and for hearing all other causes of ecclesiastical cognizance.

§ 518. 4. Rural deans.—The rural deans are very ancient officers of the church,<sup>l</sup> but almost grown out of use; though their

<sup>g</sup> Gibs. Cod. 173.

<sup>h</sup> Co. Litt. 103.

<sup>i</sup> Plowd. 498.

<sup>j</sup> Bro. Abr. t. Presentation. 3. 61. Cro. Eliz. 542. 790. 2 Roll. Abr. 352. 4 Mod. 200. Salk. 137.

<sup>k</sup> 1 Burn. Eccl. Law. 68, 69.

<sup>l</sup> Kennet, Par. Antiq. 633.

deaneries still subsist as an ecclesiastical division of the diocese, or archdeaconry. They seem to have been deputies of the [384] bishop, planted all round his diocese, the better to inspect the conduct of the parochial clergy, to inquire into and report dilapidations, and to examine the candidates for confirmation; and armed, in minuter matters, with an inferior degree of judicial and coercive authority.<sup>m</sup>

§ 519. 5. **Parsons and vicars.**—The next, and indeed the most numerous, order of men in the system of ecclesiastical polity, are the parsons<sup>3</sup> and vicars of churches: in treating of whom I shall first mark out the distinction between them; shall next observe the method by which one may become a parson or vicar; shall then briefly touch upon their rights and duties; and shall, lastly, show how one may cease to be either.

A parson, *persona ecclesiæ*, is one that hath full possession of all the rights of a parochial church. He is called parson, *persona*, because by his person the church, which is an invisible body, is represented; and he is in himself a body corporate, in order to protect and defend the rights of the church (which he personates) by a perpetual succession.<sup>n</sup> He is sometimes called the rector, or governor, of the church: but the appellation of *parson* (however it may be depreciated by familiar, clownish, and indiscriminate use), is the most legal, most beneficial, and most honorable title that a parish priest can enjoy; because such a one (Sir Edward Coke observes), and he only, is said *vicem seu personam ecclesiæ gerere* (to represent the church). A parson has, during his life, the freehold in himself of the parsonage house, the glebe, the tithes, and other dues. But these are sometimes *appropriated*; that is to say, the benefice is perpetually annexed to some spiritual corporation, either sole or aggregate, being the patron of the living; whom the law esteems equally capable of providing for the service of the church, as any single private clergyman. This contrivance seems to have sprung from the policy of the monastic orders, who have never been deficient in subtle inventions for the increase of their

<sup>m</sup> Gibs. Cod. 972. 1550.

<sup>n</sup> Co. Litt. 300.

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<sup>3</sup> Parsons are now regularly called "rectors."



own power and emoluments. At the first establishment of parochial clergy, the tithes of the parish were distributed in a fourfold division; one for the use of the bishop, another for maintaining [385] the fabric of the church, a third for the poor, and the fourth to provide for the incumbent. When the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their usual share of these tithes, and the division was into three parts only. And hence it was inferred by the monasteries that a small part was sufficient for the officiating priest; and that the remainder might well be applied to the use of their own fraternities (the endowment of which was construed to be a work of the most exalted piety), subject to the burden of repairing the church and providing for its constant supply. And therefore they begged and bought, for masses and obits, and sometimes even for money, all the advowsons within their reach, and then appropriated the benefices to the use of their own corporation. But, in order to complete such appropriation effectually, the king's license, and consent of the bishop, must first be obtained: because both the king and the bishop may sometime or other have an interest, by lapse, in the presentation to the benefice; which can never happen if it be appropriated to the use of a corporation, which never dies: and also because the law reposes a confidence in them, that they will not consent to anything that shall be to the prejudice of the church. The consent of the patron also is necessarily implied, because (as was before observed) the appropriation can be originally made to none, but to such spiritual corporation, as is also the patron of the church; the whole being indeed nothing else but an allowance for the patrons to retain the tithes and glebe in their own hands, without presenting any clerk, they themselves undertaking to provide for the service of the church.<sup>o</sup> When the appropriation is thus made, the appropriators and their successors are perpetual parsons of the church; and must sue and be sued, in all matters concerning the rights of the church, by the name of parsons.<sup>p</sup>

This appropriation may be severed, and the church become disappropriate, two ways: as, first, if the patron or appropriator presents a clerk, who is instituted and inducted to the parsonage: for

<sup>o</sup> Plowd. 496-500.

<sup>p</sup> Hob. 307.

the incumbent so instituted and inducted is to all intents and purposes complete parson; and the appropriation, [386] being once severed, can never be reunited again, unless by a repetition of the same solemnities.<sup>a</sup> And, when the clerk so presented is distinct from the vicar, the rectory thus vested in him becomes what is called a *sinecure*; because he hath no cure of souls, having a vicar under him to whom that cure is committed.<sup>f</sup> Also, if the corporation which has the appropriation is dissolved, the parsonage becomes disappropriate at common law; because the perpetuity of person is gone, which is necessary to support the appropriation.

In this manner, and subject to these conditions, may appropriations be made at this day: and thus were most, if not all, of the appropriations at present existing originally made; being annexed to bishoprics, prebends, religious houses, nay, even to nunneries, and certain military orders, all of which were spiritual corporations. At the dissolution of monasteries by statutes 27 Hen. VIII, c. 28 (Religious Houses, 1536), and 31 Hen. VIII, c. 13 (Religious Houses, 1539), the appropriations of the several parsonages, which belonged to those respective religious houses (amounting to more than one-third of all the parishes in England<sup>g</sup>) would have been by the rules of the common law disappropriated, had not a clause in those statutes intervened, to give them to the king in as ample a manner as the abbots, etc., formerly held the same, at the time of their dissolution. This, though perhaps scarcely defensible, was not without example; for the same was done in former reigns, when the alien priories (that is, such as were filled by foreigners only) were dissolved and given to the crown.<sup>h</sup> And from these two roots have sprung all the lay appropriations or secular parsonages, which we now see in the kingdom; they having been afterwards granted out from time to time by the crown.<sup>i</sup>

These appropriating corporations, or religious houses, were wont to depute one of their own body to perform divine service, and

<sup>a</sup> Co. Litt. 46.

<sup>f</sup> Sinecures might also be created by other means. 2 Burn. Eccl. Law. 347.

<sup>g</sup> Seld. Review of Tith. c. 9. Spelm. Apology. 35.

<sup>h</sup> 2 Inst. 584.

<sup>i</sup> Sir H. Spelman (of Tithes, c. 29) says these are now called impropriations as being *improperly* in the hands of laymen.

administer the sacraments, in those parishes of which the society was thus the parson. This officiating <sup>[387]</sup> minister was in reality no more than a curate, deputy, or vicegerent of the appropriator, and therefore called *vicarius* or *vicar*. His stipend was at the discretion of the appropriator, who was, however, bound of common right to find somebody, *qui illi de temporalibus, episcopo de spiritualibus, debeat respondere* (who should answer to him concerning temporal, to the bishop concerning spiritual, affairs).<sup>w</sup> But this was done in so scandalous a manner, and the parishes suffered so much by the neglect of the appropriators, that the legislature was forced to interpose: and accordingly it is enacted by statute 15 Rich. II, c. 6 (Benefices, 1391), that in all appropriations of churches, the diocesan bishop shall ordain (in proportion to the value of the church) a competent sum to be distributed among the poor parishioners annually; and that the vicarage shall be *sufficiently* endowed. It seems the parish were frequently sufferers, not only by the want of divine service, but also by withholding those alms, for which, among other purposes, the payment of tithes was originally imposed: and therefore in this act a pension is directed to be distributed among the poor parochians, as well as a sufficient stipend to the vicar. But he, being liable to be removed at the pleasure of the appropriator, was not likely to insist too rigidly on the legal sufficiency of the stipend: and therefore by statute 4 Hen. IV, c. 12 (Benefices, 1402), it is ordained, that the vicar shall be a secular person, not a member of any religious house; that he shall be vicar perpetual, not removable at the caprice of the monastery; and that he shall be canonically instituted and inducted, and be sufficiently endowed, at the discretion of the ordinary, for these three express purposes, to do divine service, to inform the people, and to keep hospitality. The endowments in consequence of these statutes have usually been by a portion of the glebe, or land, belonging to the parsonage, and a particular share of the tithes, which the appropriators found it most troublesome to collect, and which are therefore generally called *privy* or *small tithes*; the greater, or *predial*, tithes being still reserved to their own use. But one and the same rule was not observed in the endowment of all vicarages. Hence some are more liberally,

<sup>w</sup> Seld. Tith. c. 11. 1.

and some more scantily, endowed: and hence the tithes of many things, as wood in particular, are in some parishes rectorial, and in some vicarial tithes.

[388] The distinction, therefore, of a parson and vicar is this: the parson has for the most part the whole right to all the ecclesiastical dues in his parish; but a vicar has generally an appropriator over him, entitled to the best part of the profits, to whom he is in effect perpetual curate, with a standing salary. Though in some places the vicarage has been considerably augmented by a large share of the great tithes; which augmentations were greatly assisted by the statute 29 Car. II, c. 8 (Benefices, 1677), enacted in favor of poor vicars and curates, which rendered such temporary augmentations (when made by the appropriators) perpetual.

§ 520. a. **Holy orders.**—The method of becoming a parson or vicar is much the same. To both there are four requisites necessary: holy orders; presentation; institution; and induction. The method of conferring the holy orders of deacon and priest, according to the liturgy and canons,<sup>x</sup> is foreign to the purpose of these Commentaries; any further than as they are necessary requisites to make a complete parson or vicar. By common law a deacon, of any age, might be instituted and inducted to a parsonage or vicarage: but it was ordained by statute 13 Eliz., c. 12 (Church Discipline, 1571), that no person under twenty-three years of age, and in deacon's orders, should be presented to any benefice with cure; and if he were not ordained priest within one year after his induction, he should be *ipso facto* deprived: and now, by statute 13 & 14 Car. II, c. 4 (Act of Uniformity, 1662), no person is capable to be admitted to any benefice, unless he hath been first ordained a priest; and then he is, in the language of the law, a clerk in orders. But if he obtains orders, or a license to preach, by money or corrupt practices (which seems to be the true, though not the common, notion of simony), the person giving such orders forfeits<sup>y</sup> 40*l.* and the person receiving 10*l.*, and is incapable of any ecclesiastical preferment for seven years afterwards.

<sup>x</sup> See 2 Burn, Eccl. Law. 103.

<sup>y</sup> Stat. 31 Eliz. c. 6 (Benefices, 1588).

§ 521. **b. Presentation.**—Any clerk may be presented<sup>a</sup> to a parsonage or vicarage; that is, the patron, to whom the advowson of the church [389] belongs, may offer his clerk to the bishop of the diocese to be instituted. Of advowsons, or the right of presentation, being a species of private property, we shall find a more convenient place to treat in the second part of these Commentaries. But when a clerk is presented, the bishop may refuse him upon many accounts. As, 1. If the patron is excommunicated, and remains in contempt forty days.<sup>a</sup> Or, 2. If the clerk be unfit:<sup>b</sup> which unfitness is of several kinds. First, with regard to his person; as if he be a bastard, an outlaw, an excommunicate, an alien, under age, or the like.<sup>c</sup> Next, with regard to his faith or morals; as for any particular heresy, or vice that is *malum in se* (offense in itself): but if the bishop alleges only in generals, as that he is *schismaticus inveteratus* (an inveterate schismatic), or objects a fault that is *malum prohibitum* (offense because prohibited) merely, as haunting taverns, playing at unlawful games, or the like; it is not good cause of refusal.<sup>d</sup> Or, lastly, the clerk may be unfit to discharge the pastoral office for want of learning. In any of which cases the bishop may refuse the clerk. In case the refusal is for heresy, schism, inability of learning, or other matter of ecclesiastical cognizance, there the bishop must give notice to the patron of such his cause of refusal, who, being usually a layman, is not supposed to have knowledge of it; else he cannot present by lapse: but, if the cause be temporal, there he is not bound to give notice.<sup>e</sup>

If an action at law be brought by the patron against the bishop for refusing his clerk, the bishop must assign the cause. If the cause be of a temporal nature and the fact admitted (as, for instance, outlawry), the judges of the king's courts must determine its validity, or, whether it be sufficient cause of refusal: but if the

<sup>z</sup> A layman may also be presented; but he must take priest's orders before his admission. 1 Burn. 103.

<sup>a</sup> 2 Roll. Abr. 355.

<sup>b</sup> Glanv. l. 13. c. 20.

<sup>c</sup> 2 Roll. Abr. 356. 2 Inst. 632. Stat. 3 Rich. II. c. 3 (Benefice, 1379). 7 Rich. II. c. 12 (Benefice, 1383).

<sup>d</sup> 5 Rep. 58.

<sup>e</sup> 2 Inst. 632.



fact be denied, it must be determined by a jury. If the cause be of a spiritual nature (as, heresy, particularly alleged), the fact if denied shall also be determined by a jury; and if the fact be admitted or found, the court upon consultation and advice of learned divines shall decide its sufficiency.<sup>f</sup> If the cause be want of learning, the bishop need not specify in what points the clerk is deficient, [390] but only allege that he is deficient:<sup>g</sup> for the statute 9 Edw. II, st. 1, c. 13 (Benefice, 1315), is express, that the examination of the fitness of a person presented to a benefice belongs to the ecclesiastical judge. But because it would be nugatory in this case to demand the reason of refusal from the ordinary, if the patron were bound to abide by his determination, who has already pronounced his clerk unfit; therefore, if the bishop returns the clerk to be *minus sufficiens in literatura* (deficient in learning), the court shall write to the metropolitan, to re-examine him, and certify his qualifications; which certificate of the archbishop is final.<sup>h</sup>

§ 522. c. Institution.—If the bishop hath no objections, but admits the patron's presentation, the clerk so admitted is next to be instituted by him; which is a kind of investiture of the spiritual part of the benefice: for by institution the care of the souls of the parish is committed to the charge of the clerk. When a vicar is instituted, he (besides the usual forms) takes, if required by the bishop, an oath of perpetual residence; for the maxim of law is, that *vicarius non habet vicarium* (a vicar has no deputy): and, as the nonresidence of the appropriators was the cause of the perpetual establishment of vicarages, the law judges it very improper for them to defeat the end of their constitution, and by absence to create the very mischief which they were appointed to remedy: especially as, if any profits are to arise from putting in a curate and living at a distance from the parish, the appropriator, who is the real parson, has undoubtedly the elder title to them. When the ordinary is also the patron, and *confers* the living, the presentation and institution are one and the same act, and are called a collation to a benefice. By institution or collation the church is full, so that there can be no fresh presentation till another vacancy,

<sup>f</sup> 2 Inst. 632.

<sup>h</sup> 2 Inst. 632.

<sup>g</sup> 5 Rep. 58. 3 Lev. 313.

at least in the case of a common patron; but the church is not full against the king, till induction: nay, even if a clerk is instituted upon the king's presentation, the crown may revoke it before induction, and present another clerk.<sup>1</sup> Upon institution also the clerk may enter on the parsonage house and glebe, and take the tithes; but he cannot grant or let them, or bring an action for them, till induction.

§ 523. d. Induction.—<sup>[391]</sup> Induction is performed by a mandate from the bishop to the archdeacon, who usually issues out a precept to other clergymen to perform it for him. It is done by giving the clerk corporal possession of the church, as by holding the ring of the door, tolling a bell, or the like; and is a form required by law, with intent to give all the parishioners due notice, and sufficient certainty of their new minister, to whom their tithes are to be paid. This, therefore, is the investiture of the temporal part of the benefice, as institution is of the spiritual. And when a clerk is thus presented, instituted, and inducted into a rectory, he is then, and not before, in full and complete possession, and is called in law *persona impersonata*, or parson imparsonee.<sup>k</sup>

§ 524. e. Rights of parsons and vicars.—The rights of a parson or vicar, in his tithes and ecclesiastical dues, fall more properly under the second book of these Commentaries: and as to his duties, they are principally of ecclesiastical cognizance; those only excepted which are laid upon him by statute. And those are indeed so numerous, that it is impracticable to recite them here with any tolerable conciseness or accuracy. Some of them we may remark, as they arise in the progress of our inquiries, but for the rest I must refer myself to such authors as have compiled treatises expressly upon this subject.<sup>1</sup> I shall only just mention the article of residence, upon the supposition of which the law doth style every parochial minister an incumbent. By statute 21 Hen. VIII, c. 13 (Clergy, 1529), persons willfully absenting themselves from

<sup>1</sup> Co. Litt. 344.

<sup>k</sup> Co. Litt. 300.

<sup>1</sup> These are very numerous: but there are few which can be relied on with certainty. Among these are Bishop Gibson's Codex, Dr. Burn's Ecclesiastical Law, and the earlier editions of the Clergyman's Law, published under the name of Dr. Watson, but compiled by Mr. Place, a barrister.

their benefices, for one month together, or two months in the year, incur a penalty of 5*l.* to the king, and 5*l.* to any person that will sue for the same: except chaplains to the king, or others therein mentioned,<sup>m</sup> during their attendance in the household of such as retain them: and also except<sup>n</sup> all heads of houses, magistrates, and professors in the universities, and all students under forty years of age residing there, *bona fide*, [392] for study. Legal residence is not only in the parish, but also in the parsonage house, if there be one: for it hath been resolved,<sup>o</sup> that the statute intended residence, not only for serving the cure, and for hospitality; but likewise for maintaining the house, that the successor also may keep hospitality there, and, if there be no parsonage house, it hath been holden that the incumbent is bound to hire one, in the same or some neighboring parish, to answer the purposes of residence. For the more effectual promotion of which important duty among the parochial clergy, a provision is made by the statute 17 Geo. III, c. 53 (Clergy Residences Repair, 1776), for raising money upon ecclesiastical benefices, to be paid off by annually decreasing installments, and to be expended in rebuilding or repairing the houses belonging to such benefices.

§ 525. *f. Expiration of office.*—We have seen that there is but one way whereby one may become a parson or vicar: there are many ways by which one may cease to be so. 1. By death. 2. By cession, in taking another benefice. For by statute 21 Hen. VIII, c. 13 (Clergy, 1529), if anyone having a benefice of 8*l.* *per annum*, or upwards (according to the present valuation in the king's books<sup>p</sup>), accepts any other, the first shall be adjudged void, unless he obtains a dispensation; which no one is entitled to have, but the chaplains of the king and others therein mentioned; the brethren and sons of lords and knights, and doctors and bachelors of divinity and law, *admitted by the universities* of this realm. And a vacancy thus made, for want of a dispensation, is called

<sup>m</sup> Stat. 25 Hen. VIII. c. 16 (Clergy, 1533). 33 Hen. VIII. c. 28 (Clergy, 1541).

<sup>n</sup> Stat. 28 Hen. VIII. c. 13 (Clergy, 1536).

<sup>o</sup> 6 Rep. 21.

<sup>p</sup> Cro. Car. 456.

cession. 3. By consecration; for, as was mentioned before,<sup>a</sup> when a clerk is promoted to a bishopric, all his other preferments are void the instant that he is consecrated. But there is a method, by the favor of the crown, of holding such livings *in commendam* (in trust). *Commenda*, or *ecclesia commendata* (a living in trust), is a living commended by the crown to the care of a clerk, to hold till a proper pastor is provided for it. This may be temporary for one, two, or three years; or perpetual: being a kind of dispensation to avoid the vacancy of the living, and is called a *commenda retinere* (to retain a trust living). There is also a *commenda recipere* (to receive a trust living), which is to take a benefice *de novo*, in the bishop's [<sup>393</sup>] own gift, or the gift of some other patron consenting to the same; and this is the same to him as institution and induction are to another clerk.<sup>q</sup> 4. By resignation. But this is of no avail, till accepted by the ordinary; into whose hands the resignation must be made.<sup>r</sup> 5. By deprivation; either, first, by sentence declaratory in the ecclesiastical courts, for fit and sufficient causes allowed by the common law; such as attainder of treason or felony,<sup>s</sup> or conviction of other infamous crime in the king's courts; for heresy, infidelity,<sup>ss</sup> gross immorality, and the like: or, secondly, in pursuance of divers penal statutes, which declare the benefice void, for some nonfeasance or neglect, or else some malfeasance or crime. As, for simony;<sup>t</sup> for maintaining any doctrine in derogation of the king's supremacy, or of the thirty-nine articles, or of the book of common-prayer;<sup>u</sup> for neglecting after institution to read the liturgy and articles in the church, or make the declarations against popery, or take the abjuration oath;<sup>v</sup> for using any other form of prayer than the liturgy of the church of England;<sup>w</sup> or for absenting himself sixty

<sup>a</sup> Page 383.

<sup>q</sup> Hob. 144.

<sup>r</sup> Cro. Jac. 198.

<sup>s</sup> Dyer. 108. Jenk. 210.

<sup>ss</sup> Fitzh. Abr. t. Trial. 54.

<sup>t</sup> Stat. 31 Eliz. c. 6 (Benefices, 1588). 12 Ann. c. 12 (1713).

<sup>u</sup> Stat. 1 Eliz. c. 1 & 2 (Act of Supremacy, 1558; Act of Uniformity, 1558). 13 Eliz. c. 12 (Church Discipline, 1571).

<sup>v</sup> Stat. 13 Eliz. c. 12. 14 Car. II. c. 4 (Act of Uniformity, 1662). 1 Geo. I. c. 6 (1714).

<sup>w</sup> Stat. 1 Eliz. c. 2.

days in one year from a benefice belonging to a popish patron, to which the clerk was presented by either of the universities;<sup>x</sup> in all which and similar cases<sup>y</sup> the benefice is *ipso facto* void, without any formal sentence of deprivation.

§ 526. 6. **Curates.**—A curate is the lowest degree in the church; being in the same state that a vicar was formerly an officiating temporary minister; instead of the proper incumbent. Though there are what are called *perpetual* curacies, where all the tithes are appropriated, and no vicarage endowed (being for some particular reasons<sup>z</sup> exempted from the statute of Hen. IV), but, instead thereof, such perpetual curate is appointed by the appropriator. With regard to the other species of curates, they are the objects of some particular statutes, which ordain, that such as serve a church during its vacancy shall [394] be paid such stipend as the ordinary thinks reasonable, out of the profits of the vacancy; or, if that be not sufficient, by the successor within fourteen days after he takes possession:<sup>a</sup> and that, if any rector or vicar nominates a curate to the ordinary to be licensed to serve the cure in his absence, the ordinary shall settle his stipend under his hand and seal, not exceeding 50*l.* *per annum* nor less than 20*l.*, and on failure of payment may sequester the profits of the benefice.<sup>b</sup>

§ 527. **Inferior ecclesiastical officers.**—Thus much of the clergy, properly so called. There are also certain inferior ecclesiastical officers of whom the common law takes notice; and that, principally, to assist the ecclesiastical jurisdiction, where it is deficient in powers. On which officers I shall make a few cursory remarks.

§ 528. 1. **Churchwardens.**—Churchwardens are the guardians or keepers of the church and representatives of the body of the

<sup>x</sup> Stat. 1 W. & M. c. 26 (Benefices, 1689).

<sup>y</sup> 6 Rep. 29, 30.

<sup>z</sup> 1 Burn. Eccl. Law. 427.

<sup>a</sup> Stat. 28 Hen. VIII. c. 11 (First-fruits, 1536).

<sup>b</sup> Stat. 12 Ann. St. 2. c. 12 (1713).



parish.<sup>c</sup> They are sometimes appointed by the minister, sometimes by the parish, sometimes by both together, as custom directs. They are taken, in favor of the church, to be for some purposes a kind of corporation at the common law; that is, they are enabled by that name to have a property in goods and chattels, and to bring actions for them, for the use and profit of the parish. Yet they may not waste the church goods, but may be removed by the parish, and then called to account by action at the common law; but there is no method of calling them to account, but by first removing them; for none can legally do it, but those who are put in their place. As to lands, or other real property, as the church, churchyard, etc., they have no sort of interest therein; but if any damage is done thereto, the parson only or vicar shall have the action. Their office also is to repair the church, and make rates and levies for that purpose: but these are recoverable only in the ecclesiastical court. They are also joined with the overseers in the care and maintenance of the poor. They are to levy<sup>d</sup> a shilling forfeiture on all such as do not repair to church on Sundays and holidays, and are [395] empowered to keep all persons orderly while there; to which end it has been held that a churchwarden may justify the pulling off a man's hat without being guilty of either an assault or trespass.<sup>e</sup> There are also a multitude of other petty parochial powers committed to their charge by divers acts of parliament.<sup>f</sup>

§ 529. 2. Parish clerks and sextons.—Parish clerks and sextons are also regarded by the common law, as persons who have freeholds in their offices; and therefore though they may be punished, yet they cannot be deprived, by ecclesiastical censures.<sup>g</sup> The parish clerk was formerly very frequently in holy orders, and some are so to this day. He is generally appointed by the incumbent, but by custom may be chosen by the inhabitants; and if such cus-

<sup>c</sup> In Sweden they have similar officers, whom they call *kiorckiwariandes*. Stiernhook. l. 3. c. 7.

<sup>d</sup> Stat. 1 Eliz. c. 2 (Act of Uniformity, 1558).

<sup>e</sup> 1 Lev. 196.

<sup>f</sup> See Lambard of Churchwardens, at the end of his *Eirenarcha*; and Dr. Burn. tit. Church, Churchwardens, Visitations.

<sup>g</sup> 2 Roll. Abr. 234.

tom appears, the court of king's bench will grant a *mandamus* to the archdeacon to swear him in, for the establishment of the custom turns it into a temporal or civil right.<sup>h 4</sup>

<sup>h</sup> Cro. Car. 589.

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<sup>4</sup> The government of the Church of England has been modified by many modern statutes. The subject is fully treated in 2 Stephen's Comm. (16th ed.), 753 ff.

## CHAPTER THE TWELFTH.

[396]

### OF THE CIVIL STATE.

§ 530. **The civil, military, and maritime states.**—The lay part of his majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime.

§ 531. **The civil state.**—That part of the nation which falls under our first and most comprehensive division, the civil state, includes all orders of men from the highest noblemen to the meanest peasant, that are not included under either our former division, of clergy, or under one of the two latter, the military and maritime states: and it may sometimes include individuals of the other three orders; since a nobleman, a knight, a gentleman, or a peasant, may become either a divine, a soldier, or a seaman.

§ 532. 1. **The nobility and commonalty.**—The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or lords temporal, as forming (together with the bishops) one of the supreme branches of the legislature, I have before sufficiently spoken: we are here to consider them according to their several degrees, or titles of honor.

§ 533. 2. **The nobility.**—All degrees of nobility and honor are derived from the king as their fountain:<sup>a</sup> and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquises, earls, viscounts and barons.<sup>b</sup>

§ 534. a. **Dukes.**—<sup>[397]</sup> A *duke*, though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family.<sup>c</sup> Among the Saxons

<sup>a</sup> 4 Inst. 363.

<sup>b</sup> For the original of these titles on the Continent of Europe, and their subsequent introduction into this island, see Mr. Selden's *Titles of Honor*.

<sup>c</sup> Camden. Britan. tit. Ordines.

the Latin name of dukes, *duces*, is very frequent, and signified, as among the Romans, the commanders or leaders of their armies, whom in their own language they called heretoga;<sup>d</sup> and in the laws of Henry I (as translated by Lambard) we find them called *heretochii*. But after the Norman Conquest, which changed the military polity of the nation, the kings themselves continuing for many generations *dukes* of Normandy, they would not honor any subjects with the title of duke, till the time of Edward III; who, claiming to be king of France, and thereby losing the ducal in the royal dignity, in the eleventh year of his reign created his son, Edward the Black Prince, Duke of Cornwall: and many, of the royal family especially, were afterwards raised to the like honor. However, in the reign of Queen Elizabeth, A. D. 1572,<sup>e</sup> the whole order became utterly extinct; but it was revived about fifty years afterwards by her successor, who was remarkably prodigal of honors, in the person of George Villiers, Duke of Buckingham.

§ 535. *b. Marquises.*—A *marquise*, *marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom; which were called the marches, from the Teutonic word, *marche*, a limit: as, in particular, were the marches of Wales and Scotland, while each continued to be an enemy's country. The persons, who had command there, were called lords marchers, or marquises; whose authority was abolished by statute 27 Hen. VIII, c. 27 (Court of Augmentations, 1535): though the title had long before been made a mere ensign of honor; Robert Vere, Earl of Oxford, being created marquise of Dublin, by Richard II, in the eighth year of his reign (1384).<sup>f</sup>

§ 536. *c. Earls.*—[398] An *earl* is a title of nobility so ancient, that its original cannot clearly be traced out. Thus much seems tolerably certain: that among the Saxons they were called *ealdormen*, *quasi* (as it were) elder men, signifying the same as *senior* or *senator* among the Romans; and also *schiremen*, because they

<sup>d</sup> This is apparently derived from the same root as the German hertzog, the ancient appellation of dukes in that country. Seld. Tit. Hon. 2. 1. 12.

<sup>e</sup> Camden. Britan. tit. Ordines. Spelman. Gloss. 191.

<sup>f</sup> 2 Inst. 5.

had each of them the civil government of a several division or shire. On the irruption of the Danes, they changed the name to *eorles*, which, according to Camden,<sup>g</sup> signified the same in their language.<sup>1</sup> In Latin they are called *comites* (earls) (a title first used in the empire) from being the king's attendants; "*a societate nomen sumpserunt, reges enim tales sibi associant* (they received their name from their society, because they were the king's companions)."<sup>h</sup> After the Norman Conquest they were for some time called *counts*, or *countees*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. It is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes*. In writs, and commissions, and other formal instruments, the king, when he mentions any peer of the degree of an earl, usually styles him "trusty and well-beloved *cousin*": an appellation as ancient as the reign of Henry IV: who being either by his wife, his mother, or his sisters, actually related or allied to every earl in the kingdom, artfully and constantly acknowledged that connection in all his letters and other public acts: from whence the usage has descended to his successors, though the reason has long ago failed.

§ 537. d. Viscounts.—The name of *vice-comes* or *viscount* was afterwards made use of as an arbitrary title of honor, without any shadow of office pertaining to it, by Henry the Sixth; when, in the eighteenth year of his reign (1439), he created John Beaumont a

<sup>g</sup> Britan. t. Ordines.

<sup>h</sup> Bracton. l. 1. c. 8. Flet. l. 1. c. 5.

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<sup>1</sup> Title of earl.—Pollock and Maitland (1 Hist. Eng. Law, 32) say: "The noble by birth is an 'eorl.' This word came later, under Danish influence, to denote a specific office of state, and our present 'earl' goes back to it in that sense. The Latin equivalent *comes* got specialized in much the same way. But such was not its ancient meaning. Special relations to the king's person or service produced another and somewhat different classification. '*Gesið*' was the earliest English equivalent, in practical as well as literal meaning, of *comes* as employed by Tacitus; it signified a well-born man attached to the king by the general duty of warlike service, though not necessarily holding any special office about his person."



peer, by the name of Viscount Beaumont, which was the first instance of the kind.<sup>1</sup>

§ 538. **e. Barons.**—A *baron's* is the most general and universal title of nobility; for originally every one of the peers of superior rank [399] had also a barony annexed to his other titles.<sup>k</sup> But it hath sometimes happened that, when an ancient baron hath been raised to a new degree of peerage, in the course of a few generations the two titles have descended differently; one perhaps to the male descendants, the other to the heirs general; whereby the earldom or other superior title hath subsisted without a barony: and there are also modern instances, where earls and viscounts have been created without annexing a barony to their other honors: so that now the rule doth not hold universally that all peers are barons. The original and antiquity of baronies has occasioned great inquiries among our English antiquaries. The most probable opinion seems to be, that they were the same with our present lords of manors; to which the name of court baron (which is the lord's court, and incident to every manor), gives some countenance. It may be collected from King John's *magna carta*,<sup>1</sup> that originally all lords of manors, or barons, that held of the king *in capite* (in chief, i. e., directly of the king), had seats in the great council or parliament: till about the reign of that prince the conflux of them became so large and troublesome, that the king was obliged to divide them, and summon only the greater barons in person; leaving the small ones to be summoned by the sheriff, and (as it is said) to sit by representation in another house; which gave rise to the separation of the two houses of parliament.<sup>m 2</sup> By degrees

<sup>1</sup> 2 Inst. 5.

<sup>k</sup> 2 Inst. 5, 6.

<sup>1</sup> Cap. 14.

<sup>m</sup> Gilb. Hist. of Exch. c. 3. Seld. Tit. of Hon. 2. 5. 21.

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2 **The baronage.**—The barons, together with the earls, have become an estate of the realm, and to make a man a member of this estate it is not sufficient that he should be a military tenant in chief of the crown. A line has been drawn which cuts the body of such tenants into two classes. The question by what means and in accordance with what principle that line was drawn has been much debated. We shall probably be near the truth if, in accordance

the title came to be confined to the greater barons, or lords of parliament only; and there were no other barons among the peerage but such as were summoned by writ, in respect of the tenure of their lands or baronies, till Richard the Second first made it a mere title of honor, by conferring it on divers persons by his letters patent.<sup>a</sup>

§ 539. **f. Creation of peers.**—Having made this short inquiry into the original of our several degrees of nobility, I shall next consider the manner in which they may be created. The right of peerage seems to have been originally territorial; that is, annexed to lands, honors, castles, manors, and the like, the proprietors and possessors of which were (in right of those estates) allowed to be [400] peers of the realm, and were summoned to parliament to do suit and service to their sovereign: and, when the land was alienated, the dignity passed with it as appendant. Thus the bishops still sit in the house of lords in right of succession to certain ancient baronies annexed, or supposed to be annexed, to their episcopal lands:<sup>o</sup> and thus, in 11 Hen. VI (1433), the possession of the castle of Arundel was adjudged to confer an earldom on its possessor.<sup>p</sup> But afterwards, when alienations grew to be fre-

<sup>a</sup> 1 Inst. 9. Seld. Jan. Angl. 2. § 68.      <sup>p</sup> Seld. Tit. of Hon. b. 2. c. 9. § 5.

<sup>o</sup> Glan. l. 7. c. 1.

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with recent writers, we regard the distinction as one that is gradually introduced by practice and has no precise theory behind it. The heterogeneous mass of military tenants in chief could not hold together as an estate of the realm. The greater men dealt directly with the king, paid their dues directly to the exchequer, brought their retainers to the host under their own banners, were summoned to do suit in the king's court by writs directed to them by name; the smaller men dealt with the sheriff, paid their dues to him, fought under his banner, were summoned through him and by general writs. Then two rules emphasized the distinction: the knight's fee paid a fixed relief of 100 shillings, the baron made the best bargain he could for his barony; the practice of summoning the greater people by name, the smaller by general writs was consecrated by the charter of 1215. The greater people are *maiores barones*, or simply *barones*, the lesser are for a while *barones secundæ dignitatis*, and then lose the title altogether; the estates of the greater people are baronies, those of the smaller are not; but the line between great and small has been drawn in a rough empirical way and is not the outcome of any precise principle.—POLLOCK & MAITLAND, 1 Hist. of Eng. Law (2d ed.), 280.

quent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal. Actual proof of a tenure by barony became no longer necessary to constitute a lord of parliament; but the record of the writ of summons to him or his ancestors was admitted as a sufficient evidence of the tenure.

Peers are now created either by writ, or by patent; for those who claim by prescription must suppose either a writ or patent made to their ancestors: though by length of time it is lost. The creation by writ, or the king's letter, is a summons to attend the house of peers, by the style and title of that barony, which the king is pleased to confer: that by patent is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way; but a man is not ennobled thereby, unless he actually take his seat in the house of lords: and some are of opinion that there must be at least two writs of summons, and a sitting in two distinct parliaments, to evidence an hereditary barony:<sup>a</sup> and therefore the most usual, because the surest, way is to grant the dignity by patent, which inures to a man and his heirs according to the limitations thereof, though he never himself makes use of it.<sup>r</sup> Yet it is frequent to call up the eldest son of a peer to the house of lords by writ of summons, in the name of his father's barony: because in that case there is no danger of his children's losing the nobility in case he never takes his seat; for they will succeed to their grandfather. Creation by writ has also one advantage over that by patent: for a person created by writ holds the dignity to him *and his* [401] *heirs*, without any words to that purport in the writ; but in letters patent there must be words to direct the inheritance, else the dignity inures only to the grantee for life.<sup>s</sup> For a man or woman may be created noble for their own lives, and the dignity not descend to their heirs at all, or descend only to some particular heirs: as where a peerage is limited to a man, and the heirs male of his body by Elizabeth his present lady, and not to such heirs by any former or future wife.<sup>3</sup>

<sup>a</sup> Whitelocke of Parl. c. 114.

<sup>s</sup> Co. Litt. 9. 16.

<sup>r</sup> Co. Litt. 16.

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<sup>3</sup> Privileges of peerage.—It must, however, be noticed that, though the crown may create a life dignity of this kind, that dignity will not of itself make

§ 540. g. **Incidents of nobility.**—Let us next take a view of a few of the principal incidents attending the nobility, exclusive of their capacity as members of parliament, and as hereditary counselors of the crown; both of which we have before considered. And first we must observe, that in criminal cases a nobleman shall be tried by his peers.<sup>4</sup> The great are always obnoxious to popular envy: were they to be judged by the people, they might be in danger from the prejudice of their judges; and would moreover be deprived of the privilege of the meanest subjects, that of being tried by their equals, which is secured to all the realm by *magna carta*, c. 29. It is said that this does not extend to bishops; who, though they are lords of parliament, and sit there by virtue of their baronies which they hold *jure ecclesiæ* (by right of the church), yet are not ennobled in blood, and consequently not peers with the nobility.<sup>ss 5</sup> As to peeresses, there was no precedent for their trial when accused of treason or felony, till after Eleanor, Duchess of Gloucester, wife to the lord protector, was accused of

ss 3 Inst. 30, 31.

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the holder a lord of parliament; this point having been clearly decided in 1856 in the Wensleydale Peerage Case, when the committee of privileges of the house of lords declared that the letters patent granted to Mr. Baron Parke, creating him Lord Wensleydale for life, did not entitle him to sit and vote in parliament. But now, under the Appellate Jurisdiction Acts, 1876 and 1887, every lord of appeal in ordinary appointed to aid the house of lords in the hearing and determination of appeals, if he is not otherwise entitled to sit as a member of the house of lords, becomes, by virtue of his appointment, entitled during his life to rank as a baron, and to sit and vote in the house of lords. A peerage, however, is, except in the case last mentioned, always now conferred by letters patent in such a way as to give an hereditary dignity; sometimes to the heirs male of the body of the grantee, sometimes to the heirs female of his body, and sometimes to the heirs general of his body. It may even be made to descend to some particular heirs male.—STEPHEN, 2 Comm. (16th ed.), 704.

4 This holds good in cases of treason and felony, but not in case of libel, perjury, conspiracy, and other misdemeanors.

5 The house of lords in 1692 resolved "that bishops are only lords of parliament but not peers, for they are not of trial by nobility." E. May, Treatise on Parliament, p. 15. Whatever force such a resolution may legally have, it is of no historical authority; for it is certain that from the beginning of the use of the term "peers" the bishops were recognized as peers, and that it was by one of them, Archbishop Stratford, that the right of trial was chiefly

treason and found guilty of witchcraft, in an ecclesiastical synod, through the intrigues of Cardinal Beaufort. This very extraordinary trial gave occasion to a special statute, 20 Hen. VI, c. 9 (Trial of Peeress, 1442), which declares<sup>t</sup> the law to be that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers: but if she be only noble by marriage, then by a second marriage with a commoner, she loses her dignity; for as by marriage it is gained, by marriage it is also lost.<sup>u</sup> Yet if a duchess dowager [<sup>402</sup>] marries a baron, she continues a duchess still; for all the nobility are *pares* (peers or equals), and therefore it is no degradation.<sup>uu</sup> <sup>6</sup> A peer, or peeress (either in her own right or by marriage) cannot be arrested in civil cases:<sup>v</sup> and they have also many peculiar privileges annexed to their peerage in the course of judicial proceedings. A peer, sitting in judgment, gives not his verdict upon oath, like an ordinary jurymen, but upon his honor:<sup>w</sup> he answers also to bills in chancery upon his honor, and not upon his oath;<sup>x</sup> but, when he is examined as a witness either in civil or criminal cases, he must be sworn:<sup>y</sup> for the respect, which the law shows to the honor of a peer, does not extend so far as to overturn a settled maxim, that *in judicio non creditur nisi juratis* (no one is believed in court but upon his oath).<sup>z</sup> The

<sup>t</sup> Moor. 769. 2 Inst. 50. 6 Rep. 52. Staundf. P. C. 152.

<sup>u</sup> Dyer. 79. Co. Litt. 16.

<sup>uu</sup> 2 Inst. 50.

<sup>v</sup> Finch. L. 355. 1 Vent. 298.

<sup>w</sup> 2 Inst. 49.

<sup>x</sup> 1 P. Wms. 146.

<sup>y</sup> Salk. 512.

<sup>z</sup> Cro. Car. 64.

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won. The doctrine of ennobled blood, by which this theory has been supported, is historically a mere absurdity; it is impossible to regard the blood as ennobled by law, when the nobility of the blood is restricted to the bearer of the title and does not extend even to his younger children.—STUBBS, 3 Const. Hist. 443, n. 2.

<sup>6</sup> All dowager peeresses, though afterwards married to commoners, are ordinarily, through courtesy, addressed by their former title. A divorced peer cannot restrain by legal proceedings his former wife, upon her marriage with a commoner, from using her former title. *Cowley v. Cowley*, [1901] App. Cas. 450.



honor of peers is, however, so highly tendered by the law, that it is much more penal to spread false reports of them and certain other great officers of the realm, than of other men: scandal against them being called by the peculiar name of *scandalum magnatum* (scandal of the peers), and subjected to peculiar punishments by divers ancient statutes.<sup>a 7</sup>

§ 541. **h. Loss of nobility.**—A peer cannot lose his nobility, but by death or attainder; though there was an instance in the reign of Edward the Fourth, of the degradation of George Nevile, Duke of Bedford, by act of parliament,<sup>b</sup> on account of his poverty, which rendered him unable to support his dignity.<sup>c</sup> But this is a singular instance: which serves at the same time, by having happened, to show the power of parliament; and, by having happened but once, to show how tender the parliament hath been, in exerting so high a power. It hath been said indeed,<sup>d</sup> that if a baron wastes his estate, so that he is not able to support the degree, the *king* may degrade him: but it is expressly held by later authorities,<sup>e</sup> that a peer cannot be degraded but by act of *parliament*.<sup>8</sup>

<sup>a</sup> 3 Edw. I. c. 34 (Slander, 1275). 2 Rich. II. st. 1. c. 5 (Slander, 1378). 12 Rich. II. c. 11 (Slander, 1388).

<sup>b</sup> 4 Inst. 355.

<sup>c</sup> The preamble to the act is remarkable; “forasmuch as oftentimes it is seen, that when any lord is called to high estate, and hath not convenient livelihood to support the same dignity, it induceth great poverty and indigence, and causeth oftentimes great extortion, embracery, and maintenance to be had; to the great trouble of all such countries where such estate shall happen to be: therefore, etc.”

<sup>d</sup> Moor. 678.

<sup>e</sup> 12 Rep. 107. 12 Mod. 56.

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<sup>7</sup> These statutes were all repealed by Statute Law Revision Act, 1887.

<sup>8</sup> **Different varieties of peerages.**—The privileges of peerage, it is lastly to be observed, are not extended by the law to such persons as hold foreign titles of nobility; who are in this country no more than commoners. But, since the union with Scotland, all the peers of Scotland are peers of Great Britain, and, save a seat in the house of lords, have all the attendant privileges; and since the union with Ireland all peers of Ireland, with the exception of such as are elected members of the house of commons, have all the privileges of peerage, save only the right to a seat in the house of lords. Therefore, the peerage, regarded as a dignity, presents the following varieties, that is to say: (1) peerages which in their creation were peerages of England; (2) peerages which in their creation were peerages of the United Kingdom of Great Britain;

§ 542. 3. Orders of the commonalty.—[403] The commonalty, like the nobility, are divided into several degrees; and, as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers, in respect of their want of nobility.<sup>f</sup>

§ 543. a. Vidames.—The first name of dignity, next beneath a peer, was anciently that of *vidames*, *vice-domini*, or *valvasors*:<sup>g</sup> who are mentioned by our ancient lawyers<sup>h</sup> as *virī magnæ dignitatis* (men of great dignity); and Sir Edward Coke<sup>i</sup> speaks highly of them. Yet they are now quite out of use; and our legal antiquaries are not agreed upon even their original or ancient office.<sup>9</sup>

§ 544. b. Knights.—Now, therefore, the first personal dignity, after the nobility, is a *knight* of the order of St. George, or of the *garter*; first instituted by Edward III, A. D. 1344.<sup>k</sup> Next (but not till after certain *official* dignities, as privy counselors, the chancellors of the exchequer and duchy of Lancaster, the chief justice of the king's bench, the master of the rolls, and the other English judges) follows a *knight banneret*; who, indeed, by statutes 5 Rich. II, st. 2, c. 4 (Parliament, 1382), and 14 Rich. II, c. 11 (Justices of the Peace, 1390), is ranked next after barons: and his precedence before the younger sons of viscounts was confirmed to him by order of King James I, in the tenth year of his reign (1612).<sup>l</sup> But, in order to entitle himself to this rank, he must have been created by the king in person, in the field, under the royal banners, in time of open war.<sup>m</sup> Else he ranks after *baronets*; who are the next order: which title is a dignity of inheritance, created by letters patent, and usually descendable to the

<sup>f</sup> 2 Inst. 29.

<sup>g</sup> Camden. Britan. t. Ordines.

<sup>h</sup> Bracton. l. 1. c. 8.

<sup>i</sup> 2 Inst. 667.

<sup>k</sup> Seld. Tit. of Hon. 2. 5. 41.

<sup>l</sup> *Ibid.* 2. 11. 3.

<sup>m</sup> 4 Inst. 6.

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(3) peerages which in their creation were peerages of the United Kingdom of Great Britain and Ireland; (4) peerages which in their creation were peerages of Scotland; and (5) peerages which in their creation were peerages of Ireland.—STEPHEN, 2 Comm. (16th ed.), 707.

<sup>9</sup> On this subject one may consult 1 Poll. & Mait. Hist. Eng. Law (2d ed.), 545.

issue male. It was first instituted by King James the First, A. D. 1611, in order to raise a competent sum for the reduction of the province of Ulster in Ireland; for which reason all baronets have the arms of Ulster superadded to their family coat. Next follow *knights of the bath*; an order instituted by King Henry IV [404] and revived by King George the First.<sup>10</sup> They are so called from the ceremony of bathing, the night before their creation. The last of these inferior nobility are *knights bachelors*; the most ancient, though the lowest, order of knighthood amongst us: for we have an instance<sup>a</sup> of King Alfred's conferring this order on his son, Athelstan. The custom of the ancient Germans was to give their young men a shield and a lance in the great council: this was equivalent to the *toga virilis* (the gown of manhood) of the Romans: before this they were not permitted to bear arms, but were accounted as part of the father's household; after it, as part of the community.<sup>o</sup> Hence some derive the usage of knighting, which has prevailed all over the western world, since its reduction by colonies from those northern heroes. Knights are called in Latin *equites aurati*: *aurati*, from the gilt spurs they wore; and *equites*, because they always served on horseback: for it is observable<sup>p</sup> that almost all nations call their knights by some appellation derived from an horse. They are also called in our law *milites*, because they formed a part, or indeed the whole, of the royal army, in virtue of their feudal tenures; one condition of which was, that everyone who held a knight's fee (which in Henry the Second's time<sup>q</sup> amounted to 20*l. per annum*) was obliged to be knighted, and attend the king in his wars, or fine for his noncompliance. The exertion of this prerogative, as an expedient to raise money in the reign of Charles the First, gave great offense; though warranted by law, and the recent example of Queen Elizabeth: but it was, at the restoration, together with all other military branches of the feudal law, abolished; and this kind of knighthood has, since that time, fallen into great disregard.

These, Sir Edward Coke says,<sup>r</sup> are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*.

<sup>a</sup> Will. Malmsb. lib. 2.

<sup>q</sup> Glanvill. l. 9. c. 4.

<sup>o</sup> Tac. de Morib. Germ. 13.

<sup>r</sup> 2 Inst. 667.

<sup>p</sup> Camden. *Ibid.* Co. Litt. 74.

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<sup>10</sup> They were newly regulated in the reign of Queen Victoria.

But before these last the heralds rank all <sup>[405]</sup> colonels, serjeants at law, and doctors in the three learned professions.\*

\* **Table of precedence.**—The rules of precedence in England may be reduced to the following table: in which, those marked \* are entitled to the rank here allotted them, by statute 31 Hen. VIII. c. 10 (Parliament (Precedence), 1539); ——— marked †, by statute 1 W. & M. c. 21 (Great Seal, 1689); ——— marked ||, by letters patent 9, 10, and 14 Jac. I., which see in Seld. Tit. of Hon. II. 5. 46. and II. 11. 3; ——— marked ‡, by ancient usage and established custom; for which see (among others) Camden's *Britannia*, tit. *Ordines*. Milles' *Catalogue of Honor*, edit. 1610, and Chamberlayne's *Present State of England*. b. 3. c. 3.

## TABLE OF PRECEDENCE.

* The king's children and grandchildren.	* Secretary of state, if a baron.
* The king's brethren.	* Barons.
* ——— uncles.	† Speaker of the house of commons.
* ——— nephews.	† Lords commissioners of the great seal.
* Archbishop of Canterbury.	‡ Viscounts' eldest sons.
* Lord chancellor or keeper, if a baron.	‡ Earls' younger sons.
* Archbishop of York.	‡ Barons' eldest sons.
* Lord treasurer.	Knights of the garter.
* Lord president of the council. } if barons.	Privy counselors.
* Lord privy seal. }	Chancellor of the exchequer.
* Lord great chamberlain. } above all peers of their own degree.	Chancellor of the duchy.
But see private stat. 1 Geo. I. c. 3.	Chief justice of the king's bench.
* Lord high constable.	Master of the rolls.
* Lord marshal.	Chief justice of the common pleas.
* Lord admiral.	Chief baron of the exchequer.
* Lord steward of the household.	Judges, and Barons of the coif.
* Lord chamberlain of the household.	Knights bannerets, royal.
	Viscounts' younger sons.
	Barons' younger sons.
	Baronets.
* Dukes.	Knights bannerets.
* Marquises.	‡ Knights of the bath.
‡ Dukes' eldest sons.	‡ Knights bachelors.
* Earls.	Baronets' eldest sons.
‡ Marquises' eldest sons.	Knights' eldest sons.
‡ Dukes' younger sons.	Baronets' younger sons.
* Viscounts.	Knights' younger sons.
‡ Earls' eldest sons.	‡ Colonels.
‡ Marquises' younger sons.	‡ Serjeants at law.
* Secretary of state, if a bishop.	‡ Doctors.
* Bishop of London.	‡ Esquires.
* ——— Durham.	‡ Gentlemen.
* ——— Winchester.	‡ Yeomen.
* Bishops.	‡ Tradesmen.
	‡ Artificers.
	‡ Laborers.

N. B. Married women and widows are entitled to the same rank among each other, as their husbands would respectively have borne between themselves, except such rank is merely professional, or official;—and unmarried women to the same

§ 545. c. Esquires, gentlemen and yeomen.—[406] Esquires and gentlemen are confounded together by Sir Edward Coke, who observes,<sup>ss</sup> that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armor, the grant of which adds gentility to a man's family: in like manner as civil nobility, among the Romans, was founded in the *jus imaginum*, or having the image of one ancestor at least, who had borne some curule office. It is indeed a matter somewhat unsettled, what constitutes the distinction, or who is a real *esquire*: for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately; and he reckons up four sorts of them: '1. The eldest sons of knights, and their eldest sons, in perpetual succession: "2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession: both which species of esquires Sir Henry Spelman entitles *armigeri natalitii* (esquires by birth)."<sup>w</sup> 3. Esquires created by the king's letters patent, or other investiture; and their eldest sons. 4. Esquires by virtue of their offices; as justices of the peace, and others who bear any office of trust under the crown. To these may be added<sup>11</sup> the esquires of knights of the bath, each of whom constitutes three at his installation: and all foreign, nay, Irish peers; for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must so be named in all legal proceedings.\* As for *gentlemen*, says Sir Thomas Smith,<sup>y</sup> they be made good cheap in this kingdom: for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and (to be short) who can live idly, and without manual labor, and will bear the port, charge, and countenance of a gentleman, he shall be called master, and shall be taken for a gen-

rank as their eldest brothers would bear among men, during the lives of their fathers. [The following changes are now to be made in Blackstone's table: Prime minister comes after Archbishop of York; law lords' children come after barons' younger sons; chief justice of the common pleas and chief baron of the exchequer are now obsolete.]

<sup>ss</sup> 2 Inst. 668.

<sup>t</sup> *Ibid.*

<sup>u</sup> 2 Inst. 667.

<sup>w</sup> Gloss. 43.

<sup>x</sup> 3 Inst. 30. 2 Inst. 667.

<sup>y</sup> Commonw. of Eng. b. 1. c. 20.

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<sup>11</sup> Barristers-at-law are to be included among esquires.



tleman. A *yeoman* is he that hath free land of forty shillings by the year; who is thereby qualified to serve on juries, vote for knights of the [407] shire, and do any other act, where the law requires one that is *probus et legalis homo* (a true and lawful man).<sup>2</sup>

§ 546. d. Rest of the commonalty.—The rest of the commonalty are *tradesmen, artificers, and laborers*; who (as well as all others) must in pursuance of the statute 1 Hen. V, c. 5 (Legal Procedure, 1413), be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry may be awarded; in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.<sup>12</sup>

<sup>2</sup> 2 Inst. 668.

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<sup>12</sup> But under the law as it now stands, no indictment is insufficient for error in, or lack of, the estate or description of the defendant.

## CHAPTER THE THIRTEENTH. [408]

### OF THE MILITARY AND MARITIME STATES.

§ 547. **The military state.**—The military state includes the whole of the soldiery; or, such persons as are peculiarly appointed among the rest of the people for the safeguard and defense of the realm.

In a land of liberty it is extremely dangerous to make a distinct order of the profession of arms. In absolute monarchies this is necessary for the safety of the prince, and arises from the main principle of their constitution, which is that of governing by fear: but in free states the profession of a soldier, taken singly and merely as a profession, is justly an object of jealousy. In these no man should take up arms, but with a view to defend his country and its laws: he puts not off the citizen when he enters the camp; but it is because he is a citizen, and would wish to continue so, that he makes himself for awhile a soldier. The laws, therefore, and constitution of these kingdoms know no such state as that of a perpetual standing soldier, bred up to no other profession than that of war: and it was not till the reign of Henry VII (1485–1509) that the kings of England had so much as a guard about their persons.

§ 548. **1. Military system of the Saxons.**—In the time of our Saxon ancestors, as appears from Edward the Confessor's laws,<sup>a</sup> the military force of this kingdom was in the hands of the dukes or heretochs, who were constituted through every province and county in the kingdom; being taken out of the principal nobility, and such as were most remarkable for being "*sapientes, fideles, et animosi* (wise, faithful and brave)." Their duty was to lead and regulate the English armies, with a very unlimited power; "*prout eis visum fuerit, ad honorem coronæ et utilitatem regni* (as it should seem to them, for the honor of the crown and the advan-

<sup>a</sup> C. de heretochiis (of heretochs or leaders).

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<sup>1</sup> Schmid, Gesetze der Angelsachsen, c. 32 a. Edward Jenks, Esq., says that "the meaning of the passage is very doubtful; and, in any case, it is poor evidence of Anglo-Saxon usage." <sup>2</sup> Stephen's Comm. (16th ed.), 683 n.

tage of the kingdom).” And because of this great power they were elected by the people in their full assembly, or folkmote, in the same manner as sheriffs were elected: [409] following still that old fundamental maxim of the Saxon constitution, that where any officer was entrusted with such power, as if abused might tend to the oppression of the people, that power was delegated to him by the vote of the people themselves.<sup>b</sup> So, too, among the ancient Germans, the ancestors of our Saxon forefathers, they had their dukes, as well as kings, with an independent power over the military, as the kings had over the civil state. The dukes were elective, the kings hereditary: for so only can be consistently understood that passage of Tacitus,<sup>c</sup> “*reges ex nobilitate, duces ex virtute sumunt* (they chose their kings for their nobility, their leaders for their valor)”; in constituting their kings, the family or blood royal was regarded; in choosing their dukes or leaders, warlike merit: just as Cæsar relates of their ancestors in his time, that whenever they went to war, by way either of attack or defense, they *elected* leaders to command them.<sup>d</sup> This large share of power, thus conferred by the people, though intended to preserve the liberty of the subject, was perhaps unreasonably detrimental to the prerogative of the crown: and accordingly we find a very ill use made of it by Edric, Duke of Mercia, in the reign of King Edmund iron-side; who, by his office of duke or heretoch, was entitled to a large command in the king’s army, and by his repeated treacheries at last transferred the crown to Canute, the Dane.

§ 549. 2. **King Alfred’s militia.**—It seems universally agreed by all historians, that King Alfred first settled a national militia

<sup>b</sup> “*Isti vero viri eliguntur per commune consilium, pro communi utilitate regni, per provincias et patrias universas, et per singulos comitatus, in pleno folkmote, sicut et vice-comites provinciarum et comitatum eligi debent.* (These men are chosen for the general benefit of the kingdom, by the common council, by the provinces, the whole country, and by each county in full assembly, as also the sheriffs of provinces and counties should be elected.)” LL. Edw. Confess. *Ibid.* See also Bede, Eecl. Hist. l. 5. c. 10.

<sup>c</sup> De Morib. German. 7.

<sup>d</sup> “*Quum bellum civitas aut illatum defendit aut infert, magistratus qui ei bello præsint deliguntur.* (When a city is engaged either in an offensive or defensive war, magistrates qualified to direct that war are chosen.)” De Bell. Gall l. 6. c. 22.

in this kingdom, and by his prudent discipline made all the subjects of his dominion soldiers: but we are unfortunately left in the dark as to the particulars of this his so celebrated regulation; though, from what was last observed, the dukes seem to have been left in possession of too large and independent a power: which enabled Duke Harold on the death of Edward the Confessor, though a stranger to the royal blood, to mount for a short space the throne of this kingdom, in prejudice of Edgar Atheling, the rightful heir.

§ 550. 3. Military part of the feudal system.—[410] Upon the Norman Conquest the feudal law was introduced here in all its rigor, the whole of which is built on a military plan. I shall not now enter into the particulars of that constitution, which belongs more properly to the next part of our Commentaries; but shall only observe, that, in consequence thereof, all the lands in the kingdom were divided into what were called knight's fees, in number above sixty thousand;<sup>2</sup> and for every knight's fee a knight or soldier, *miles*, was bound to attend the king in his wars, for forty days in a year; in which space of time, before war was reduced to a science, the campaign was generally finished, and a kingdom either conquered or victorious.\* By this means the king had, without any expense, an army of sixty thousand men always ready at his command. And accordingly we find one, among the laws of William the Conqueror,<sup>†</sup> which in the king's name commands and firmly enjoins the personal attendance of all knights and others; "*quod habeant et teneant se semper in armis et equis, ut decet et oportet: et quod semper sint prompti et parati ad servitium suum integrum nobis explendum et peragendum, cum opus adfuerit, secundum quod debent de feodis et tenementis suis de jure nobis facere* (that they keep and hold themselves always well furnished with arms and horses, as is suitable and proper: and be always

\* The Poles are, even at this day, so tenacious of their ancient constitution, that their *pospolite*, or militia, cannot be compelled to serve above six weeks, or forty days, in a year. *Mod. Un. Hist.* xxxiv. 12.

† C. 58. See *Co. Litt.* 75, 76.

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<sup>2</sup> Professor Maitland suggests five thousand as a more probable number. (*Domesday Book*, 511.)

well prepared for fulfilling and performing their entire service to us when need shall be; according to what they are by law bound to do for us by reason of their fees and tenements).” This personal service in process of time degenerated into pecuniary commutations or aids, and at last the military part of the feudal system was abolished at the restoration, by statute 12 Car. II, c. 24 (Military Tenures, 1660).

§ 551. 4. The militia from reign of Henry II.—In the meantime we are not to imagine that the kingdom was left wholly without defense in case of domestic insurrections, or the prospect of foreign invasions. Besides those, who by their military tenures were bound to perform forty days’ service in the field, first the assize of arms, enacted 27 Hen. II (1181),<sup>g</sup> and afterwards the statute of Winchester,<sup>h</sup> under Edward I, obliged every man, according to his estate and degree, to provide a determinate quantity of such arms as were then in use, in order to keep the peace: and constables were appointed in all hundreds by the latter statute, to see that such [<sup>411</sup>] arms were provided. These weapons were changed, by the statute 4 & 5 Ph. & M., c. 2 (Military Service, 1557), into others of more modern service: but both this and the former provisions were repealed in the reign of James I.<sup>i</sup> While these continued in force, it was usual from time to time for our princes to issue commissions of array, and send into every county officers in whom they could confide, to muster and array (or set in military order) the inhabitants of every district; and the form of the commission of array was settled in parliament in the 5 Hen. IV (1403), so as to prevent the insertion therein of any new penal clauses.<sup>k</sup> But it was also provided<sup>l</sup> that no man should be compelled to go out of the kingdom at any rate, nor out of his shire but in cases of urgent necessity; nor should provide soldiers unless by consent of parliament. About the reign of King Henry the

<sup>g</sup> Hoved. A. D. 1181.

<sup>h</sup> 13 Edw. I. c. 6 (1285).

<sup>i</sup> Stat. 1 Jac. I. c. 25 (1603). 21 Jac. I. c. 28 (Continuation of Statutes, 1623).

<sup>k</sup> Rushworth. part 3. page 662. 667. See 8 Rym. 374, etc.

<sup>l</sup> Stat. 1 Edw. III. st. 2. c. 5. & 7 (Military Service and Conveyance of Soldiers, 1326). 25 Edw. III. st. 5. c. 8 (Finding of Men at Arms, 1351).



Eighth, his children or lieutenants began to be introduced,<sup>m</sup> as standing representatives of the crown, to keep the counties in military order; for we find them mentioned as known officers in the statute 4 & 5 Ph. & M., c. 3 (Military Service, 1557), though they had not been then long in use, for Camden speaks of them<sup>n</sup> in the time of Queen Elizabeth, as extraordinary magistrates constituted only in times of difficulty and danger. But the introduction of these commissions of lieutenancy, which contained in substance the same powers as the old commissions of array, caused the latter to fall into disuse.

In this state things continued till the repeal of the statutes of armor in the reign of King James the First: after which, when King Charles the First had, during his northern expeditions, issued commissions of lieutenancy and exerted some military powers, which, having been long exercised, were thought to belong to the crown, it became a question in the long parliament, how far the power of the militia did inherently reside in the king; being now unsupported by any statute, and founded only upon immemorial usage. This question, long agitated, with great heat and resentment on both [<sup>412</sup>] sides, became at length the immediate cause of the fatal rupture between the king and his parliament: the two houses not only denying this prerogative of the crown, the legality of which claim perhaps might be somewhat doubtful; but also seizing into their own hands the entire power of the militia, the illegality of which step could never be any doubt at all.

§ 552. 5. Reorganization of the militia.—Soon after the restoration of King Charles the Second, when the military tenures were abolished, it was thought proper to ascertain the power of the militia, to recognize the sole right of the crown to govern and command them, and to put the whole into a more regular method of military subordination:<sup>nn</sup> and the order, in which the militia now stands by law, is principally built upon the statutes which were then enacted. It is true the two last of them are apparently

<sup>m</sup> 15 Rym. 75.

<sup>n</sup> Brit. 103. Edit. 1594.

<sup>nn</sup> 13 Car. II. c. 6 (Militia, 1661). 14 Car. II. c. 3 (Militia, 1662). 15 Car. II. c. 4 (Militia, 1663).

repealed; but many of their provisions are re-enacted, with the addition of some new regulations, by the present militia laws: the general scheme of which is to discipline a certain number of the inhabitants of every county, chosen by lot for three years, and officered by the lord lieutenant, the deputy lieutenants, and other principal landholders, under a commission from the crown. They are not compellable to march out of their counties, unless in case of invasion or actual rebellion within the realm (or any of its dominions or territories<sup>o</sup>), nor in any case compellable to march out of the kingdom. They are to be exercised at stated times: and their discipline in general is liberal and easy; but, when drawn out into actual service, they are subject to the rigors of martial law, as necessary to keep them in order. This is the constitutional security, which our laws<sup>p</sup> have provided for the public peace, and for protecting the realm against foreign or domestic violence.<sup>3</sup>

§ 553. 6. Martial law.—When the nation was engaged in war, more veteran troops and more regular discipline were esteemed to be necessary, than could be expected from a mere militia. And therefore at such times more rigorous methods were put in use for the [413] raising of armies and the due regulation and discipline of the soldiery: which are to be looked upon only as temporary excrescences bred out of the distemper of the state; and not as any part of the permanent and perpetual laws of the kingdom. For martial law, which is built upon no settled principles, but is entirely arbitrary in its decisions, is, as Sir Matthew Hale observes,<sup>pp</sup> in truth and reality no law, but something indulged rather than allowed as a law. The necessity of order and discipline in an army is the only thing which can give it countenance; and therefore it ought not to be permitted in time of peace, when

<sup>o</sup> Stat. 16 Geo. III. c. 3 (Militia, 1775).

<sup>p</sup> 2 Geo. III. c. 20 (Militia, 1761). 9 Geo. III. c. 42 (Militia, 1768). 16 Geo. III. c. 3.

<sup>pp</sup> Hist. C. L. c. 2.

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<sup>3</sup> There has been recently an entire reorganization of the auxiliary forces of Great Britain under the provisions of the Territorial and Reserve Forces Act, 1907. This subject is briefly treated in 2 Stephen's Comm. (16th ed.), 687 ff.

the king's courts are open for all persons to receive justice according to the laws of the land. Wherefore, Thomas, Earl of Lancaster, being condemned at Pontefract, 15 Edw. II (1321), by martial law, his attainder was reversed 1 Edw. III (1326), because it was done in time of peace.<sup>a</sup> And it is laid down,<sup>r</sup> that if a lieutenant, or other, that hath commission of martial authority, doth in time of peace hang or otherwise execute any man by color of martial law, this is murder; for it is against *magna carta*.<sup>s</sup>

§ 554. 7. Quartering troops.—And the petition of right<sup>t</sup> enacts, that no soldier shall be quartered on the subject without his own consent;<sup>u</sup> and that no commission shall issue to proceed within this land according to martial law. And whereas, after the restoration, King Charles the Second kept up about five thousand regular troops, by his own authority, for guards and garrisons; which King James the Second by degrees increased to no less than thirty thousand, all paid from his own civil list; it was made one of the articles of the bill of rights,<sup>v</sup> that the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of parliament, is against law.

§ 555. 8. A standing army.—But, as the fashion of keeping standing armies (which was first introduced by Charles VII, in France, A. D. 1445<sup>w</sup>), has of late years universally prevailed over Europe (though [414] some of its potentates, being unable themselves to maintain them, are obliged to have recourse to richer powers, and receive subsidiary pensions for that purpose) it has also for many years past been annually judged necessary by our legislature, for the safety of the kingdom, the defense of the possessions of the crown of Great Britain, and the preservation of the balance of power in Europe, to maintain even in time of peace

<sup>a</sup> 2 Brad. Append. 59.

<sup>r</sup> 3 Inst. 52.

<sup>s</sup> Cap. 29.

<sup>t</sup> 3 Car. I (1627). See also Stat. 31 Car. II. c. 1 (Taxation, 1679).

<sup>u</sup> Thus, in Poland, no soldier can be quartered upon the gentry, the only free-men in that republic. Mod. Univ. Hist. xxxiv. 23.

<sup>v</sup> Stat. 1 W. & M. st. 2. c. 2 (Bill of Rights, 1689).

<sup>w</sup> Robertson, Chap. V. i. 64.

a standing body of troops, under the command of the crown; who are, however, *ipso facto* disbanded at the expiration of every year, unless continued by parliament. And it was enacted by statute 10 W. III, c. 1 (Taxation, 1698), that not more than twelve thousand regular forces should be kept on foot in Ireland, though paid at the charge of that kingdom; which permission is extended by statute 8 Geo. III, c. 13 (Army in Ireland, 1767), to 16,235 men, in time of peace.

To prevent the executive power from being able to oppress, says Baron Montesquieu,<sup>\*</sup> it is requisite that the armies with which it is entrusted should consist of the people, and have the same spirit with the people; as was the case at Rome, till Marius new-modeled the legions by enlisting the rabble of Italy, and laid the foundation of all the military tyranny that ensued. Nothing then, according to these principles, ought to be more guarded against in a free state than making the military power, when such a one is necessary to be kept on foot, a body too distinct from the people. Like ours, therefore, it should wholly be composed of natural subjects; it ought only to be enlisted for a short and limited time; the soldiers also should live intermixed with the people; no separate camp, no barracks, no inland fortresses should be allowed. And perhaps it might be still better, if, by dismissing a stated number and enlisting others at every renewal of their term, a circulation could be kept up between the army and the people, and the citizen and the soldier be more intimately connected together.

§ 556. 9. The annual mutiny act.—To keep this body of troops in order, an annual act of parliament likewise passes, “to punish mutiny and desertion, [<sup>415</sup>] and for the better payment of the army and their quarters.” This regulates the manner in which they are to be dispersed among the several innkeepers and victualers throughout the kingdom; and establishes a law martial for their government. By this, among other things, it is enacted, that if any officer or soldier shall excite, or join any mutiny, or, knowing of it, shall not give notice to the commanding officer; or shall desert, or list in any other regiment, or sleep upon his post, or leave it before he is relieved, or hold correspondence with a rebel

<sup>\*</sup> Sp. L. 11. 6.

or enemy, or strike or use violence to his superior officer, or shall disobey his lawful commands: such offender shall suffer such punishment as a court-martial shall inflict, though it extend to death itself.

§ 557. 10. *Military offenses.*—However expedient the most strict regulations may be in time of actual war, yet, in times of profound peace, a little relaxation of military rigor would not, one should hope, be productive of much inconvenience. And, upon this principle, though by our standing laws<sup>y</sup> (still remaining in force, though not attended to) desertion in time of war is made felony, without benefit of clergy, and the offense is triable by a jury and before justices at the common law; yet, by our militia laws before mentioned, a much lighter punishment is inflicted for desertion in time of peace. So, by the Roman law also, desertion in time of war was punished with death, but more mildly in time of tranquillity.<sup>z</sup> But our mutiny act makes no such distinction: for any of the faults above mentioned are, equally at all times, punishable with death itself, if a court-martial shall think proper. This discretionary power of the court-martial is indeed to be guided by the directions of the crown; which, with regard to military offenses, has almost an absolute legislative power. “His majesty, says the act, may form articles of war, and constitute courts-martial, with power to try any crime by such articles, and inflict such penalties as the articles direct.” A vast and most important trust! An unlimited power to create crimes, and annex to them any punishments, not extending to life or limb! These are indeed forbidden to be inflicted, [416] except for crimes declared to be so punishable by this act; which crimes we have just enumerated, and, among which, we may observe that any disobedience to lawful commands is one. Perhaps in some future revision of this act, which is in many respects hastily penned, it may be thought worthy the wisdom of parliament to ascertain the limits of military subjection, and to enact express articles of war for the government of the army, as is done for the government

<sup>y</sup> Stat. 18 Hen. VI. c. 19 (Soldiers, 1439). 2 & 3 Edw. VI. c. 2 (Soldiers, 1548).

<sup>z</sup> Ff. 49. 16. 5.



of the navy: especially as, by our present constitution, the nobility and gentry of the kingdom, who serve their country as militia officers, are annually subjected to the same arbitrary rule, during their time of exercise.

§ 558. 11. **Danger of slavery.**—One of the greatest advantages of our English law is, that not only the crimes themselves which it punishes, but also the penalties which it inflicts, are ascertained and notorious: nothing is left to arbitrary discretion: the king by his judges dispenses what the law has previously ordained: but is not himself the legislator. How much, therefore, is it to be regretted that a set of men, whose bravery has so often preserved the liberties of their country, should be reduced to a state of servitude in the midst of a nation of freemen! For Sir Edward Coke will inform us,<sup>a</sup> that it is one of the genuine marks of servitude, to have the law, which is our rule of action, either concealed or precarious: “*misera est servitus ubi jus est vagum aut incognitum* (wretched is the thralldom where the law is either uncertain or unknown).” Nor is this state of servitude quite consistent with the maxims of sound policy observed by other free nations. For, the greater the general liberty is which any state enjoys, the more cautious has it usually been in introducing slavery in any particular order or profession. These men, as Baron Montesquieu observes,<sup>b</sup> seeing the liberty which others possess and which they themselves are excluded from, are apt (like eunuchs in the eastern seraglios) to live in a state of perpetual envy and hatred towards the rest of the community; and indulge a malignant pleasure in contributing to destroy those privileges, to which they can never be admitted. Hence have many free states, by departing from this rule, been endangered by the revolt of [417] their slaves: while, in absolute and despotic governments where no real liberty exists, and consequently no invidious comparisons can be formed, such incidents are extremely rare. Two precautions are therefore advised to be observed in all prudent and free governments: 1. To prevent the introduction of slavery at all: or, 2. If it be already introduced, not to entrust those slaves with arms; who will then find themselves an overmatch for the freemen. Much less ought

<sup>a</sup> 4 Inst. 332.

<sup>b</sup> Sp. L. 15. 12.

the soldiery to be an exception to the people in general, and the only state of servitude in the nation.

§ 559. 12. Privileges of soldiers.—But as soldiers, by this annual act, are thus put in a worse condition than any other subjects, so by the humanity of our standing laws, they are in some cases put in a much better. By statute 43 Eliz., c. 3. (Disabled Soldiers, 1601), a weekly allowance is to be raised in every county for the relief of soldiers that are sick, hurt, and maimed: not forgetting the royal hospital at Chelsea for such as are worn out in their duty. Officers and soldiers, that have been in the king's service, are by several statutes, enacted at the close of several wars, at liberty to use any trade or occupation they are fit for, in any town in the kingdom (except the two universities) notwithstanding any statute, custom, or charter to the contrary. And soldiers in actual military service may make nuncupative wills, and dispose of their goods, wages, and other personal chattels, without those forms, solemnities, and expenses, which the law requires in other cases.<sup>c</sup> Our law does not, indeed, extend this privilege so far as the civil law; which carried it to an extreme that borders upon the ridiculous. For if a soldier, in the article of death, wrote anything in bloody letters on his shield, or in the dust of the field with his sword, it was a very good military testament.<sup>d</sup> And thus much for the military state, as acknowledged by the laws of England.<sup>4</sup>

§ 560. The maritime state.—The *maritime* state is nearly related to the former: though much more agreeable to the principles

<sup>c</sup> Stat. 29 Car. II. c. 3 (Statute of Frauds, 1677). 5 W. III. c. 21. § 6 (1693).

<sup>d</sup> *Si milites quid in clypeo literis sanguine suo rutilantibus adnotaverint, aut in pulvere inscripserint gladio suo, ipso tempore quo, in prælio, vitæ sortem derelinquunt, hujusmodi voluntatem stabilem esse oportet.* Cod. 6. 21. 15.

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<sup>4</sup> The existing military code of Great Britain, known as the Army Act, contains regulations for the manner in which troops are to be enlisted and billeted, that is dispersed, among the innkeepers and victualers throughout the kingdom, for the government of the army, and for every person subject to military law. It likewise contains provisions for the regulation of courts-martial. A fuller account of this subject may be found in 2 Stephen's Comm. (16th ed.), 691 ff.

of our free [418] constitution. The royal navy of England hath ever been its greatest defense and ornament; it is its ancient and natural strength; the floating bulwark of the island; an army, from which, however strong and powerful, no danger can ever be apprehended to liberty: and accordingly it has been assiduously cultivated, even from the earliest ages. To so much perfection was our naval reputation arrived in the twelfth century, that the code of maritime laws, which are called the laws of Oleron, and are received by all nations in Europe as the ground and substruction of all their marine constitutions, was confessedly compiled by our King Richard the First, at the Isle of Oleron on the coast of France, then part of the possessions of the crown of England.<sup>e</sup> <sup>5</sup> And yet, so vastly inferior were our ancestors in this point to the present age, that even in the maritime reign of Queen Elizabeth, Sir Edward Coke<sup>f</sup> thinks it matter of boast, that the royal navy of England then consisted of *three and thirty ships*.

§ 561. 1. Navigation acts.—The present condition of our marine is in great measure owing to the salutary provisions of the statutes, called the navigation acts; whereby the constant increase of English shipping and seamen was not only encouraged, but rendered unavoidably necessary. By the statute 5 Rich. II, c. 3 (1381), in order to augment the navy of England, then greatly diminished, it was ordained, that none of the king's liege people should ship any merchandise out of or into the realm but only in ships of the king's ligeance, on pain of forfeiture. In the next year, by statute 6 Rich. II, c. 8 (1382), this wise provision was enervated, by only obliging the merchants to give English ships (if able and sufficient) the preference. But the most beneficial statute for the trade and commerce of these kingdoms is that navigation act, the rudiments of which were first framed in 1650,<sup>g</sup> with a narrow partial view: being intended to mortify our own sugar

<sup>e</sup> 4 Inst. 144. Coutumes de la Mer. 2.      <sup>g</sup> Scobell. 132.

<sup>f</sup> 4 Inst. 50.

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<sup>5</sup> The laws of Oleron have been held in peculiar respect by England, and incorporated into her maritime jurisprudence. Story, J., 2 Mason, 548.—HAMMOND.

islands, which were disaffected to the parliament and still held out for Charles II by stopping the gainful trade which they then carried on with the Dutch;<sup>h</sup> and at the same time to clip the wings of those our opulent and aspiring neighbors. This prohibited all ships of foreign nations from trading with any English plantations [419] without license from the council of state. In 1651<sup>i</sup> the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms; or in the ships of that European nation of which the merchandise imported was the genuine growth or manufacture. At the restoration, the former provisions were continued, by statute 12 Car. II, c. 18 (Shipping and Navigation, 1660), with this very material improvement, that the master and three-fourths of the mariners shall also be English subjects.

§ 562. 2. The royal navy.—Many laws have been made for the supply of the royal navy with seamen; for their regulation when on board: and to confer privileges and rewards on them during and after their service.

§ 563. a. Recruiting the navy.—First, for their supply. The power of impressing seafaring men for the sea service by the king's commission, has been a matter of some dispute, and submitted to with great reluctance: though it hath very clearly and learnedly been shown, by Sir Michael Foster,<sup>j</sup> that the practice of impressing, and granting powers to the admiralty for that purpose, is of very ancient date, and hath been uniformly continued by a regular series of precedents to the present time: whence he concludes it to be part of the common law.<sup>k</sup> The difficulty arises from hence, that no statute has expressly declared this power to be in the crown, though many of them very strongly imply it. The statute 2 Rich. II, c. 4 (1378), speaks of mariners being arrested and retained for the king's service, as of a thing well known, and practiced without dispute; and provides a remedy against their running

<sup>h</sup> Mod. Un. Hist. xli. 289.

<sup>j</sup> Rep. 154.

<sup>i</sup> Scobell. 176.

<sup>k</sup> See also Comb. 245. Barr. 334.

away. By a later statute,<sup>1</sup> if any waterman, who uses the River Thames, shall hide himself during the execution of any commission of pressing for the king's service, he is liable to heavy penalties.<sup>6</sup> By another,<sup>m</sup> no fisherman shall be taken by the queen's commission to serve as a mariner;<sup>7</sup> but the commission shall be first brought to two justices of the peace, inhabiting near the seacoast where the mariners are to be taken, to the intent that the justices may [420] choose out and return such a number of able-bodied men, as in the commission are contained, to serve her majesty. And, by others,<sup>n</sup> especial protections are allowed to seamen in particular circumstances, to prevent them from being impressed. And ferry-men are also said to be privileged from being impressed, at common law.<sup>o</sup> All which do most evidently imply a power of impressing to reside somewhere; and, if anywhere, it must from the spirit of our constitution, as well as from the frequent mention of the king's commission, reside in the crown alone.

But, besides this method of impressing (which is only defensible from public necessity, to which all private considerations must give way), there are other ways that tend to the increase of seamen, and manning the royal navy. Parishes may bind out poor boys apprentices to masters of merchantmen, who shall be protected from impressing for the first three years; and if they are impressed afterwards, the masters shall be allowed their wages:<sup>p</sup> great advantages in point of wages are given to volunteer seamen in order to induce them to enter into his majesty's service:<sup>q</sup> and every foreign seaman, who during a war shall serve two years in any man-of-war, merchantman, or privateer, is naturalized *ipso facto*.<sup>r</sup> About the middle of King William's reign, a scheme was

<sup>1</sup> Stat. 2 & 3 Ph. & M. c. 16 (Thames Watermen, 1555).

<sup>m</sup> Stat. 5 Eliz. c. 5 (Maintenance of the Navy, 1562).

<sup>n</sup> Stat. 7 & 8 W. III. c. 21 (Greenwich Hospital, etc., 1695). 2 Ann. c. 6 (1703). 4 & 5 Ann. c. 19 (1705). 13 Geo. II. c. 17 (Navy, 1739), etc.

<sup>o</sup> Sav. 14.

<sup>p</sup> Stat. 2 Ann. c. 6 (1703).

<sup>q</sup> Stat. 31 Geo. II. c. 10 (Navy, 1757).

<sup>r</sup> Stat. 13 Geo. II. c. 3 (Supply of Seamen, 1739).

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<sup>6</sup> This statute was repealed by 7 & 8 Geo. IV, c. 75, § 1 (1827).

<sup>7</sup> Repealed by the Sea Fisheries Act, 1868.



set on foot<sup>a</sup> for a register of seamen to the number of thirty thousand, for a constant and regular supply of the king's fleet; with great privileges to the registered men, and, on the other hand, heavy penalties in case of their nonappearance when called for: but this registry, being judged to be ineffectual as well as oppressive, was abolished by statute 9 Ann., c. 21 (1710).<sup>8</sup>

§ 564. *b. Discipline in the navy.*—The method of ordering seamen in the royal fleet, and keeping up a regular discipline there, is directed by certain express rules, articles, and orders, first enacted by the authority of parliament soon after the restoration;<sup>t</sup> but since [421] new-modeled and altered, after the peace of Aix la Chapelle,<sup>u</sup> to remedy some defects which were of fatal consequence in conducting the preceding war. In these articles of the navy almost every possible offense is set down, and the punishment thereof annexed: in which respect the seamen have much the advantage over their brethren in the land service: whose articles of war are not enacted by parliament, but framed from time to time at the pleasure of the crown. Yet from whence this distinction arose, and why the executive power, which is limited so properly with regard to the navy, should be so extensive with regard to the army, it is hard to assign a reason: unless it proceeded from the perpetual establishment of the navy, which rendered a permanent law for their regulation expedient: and the temporary duration of the army, which subsisted only from year to year, and might therefore with less danger be subjected to discretionary government. But, whatever was apprehended at the first formation of the mutiny act, the regular renewal of our standing force at the entrance of every year has made this distinction idle. For, if from experience past we may judge of future events, the army is now lastingly engrafted into the British constitution; with this singularly fortunate circumstance, that any branch of the legis-

<sup>a</sup> Stat. 7 & 8 W. III. c. 21 (Greenwich Hospital, etc., 1695).

<sup>t</sup> Stat. 13 Car. II. st. 1. c. 9 (Navy, 1661).

<sup>u</sup> Stat. 22 Geo. II. c. 23 (National Debt, 1749).

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<sup>8</sup> The royal navy is, for the most part, supplied by voluntary enlistment. Naval Enlistment Acts, 1835, 1853, 1884.

lature may annually put an end to its legal existence, by refusing to concur in its continuance.<sup>9</sup>

§ 565. c. **Privileges of sailors.**—With regard to the privileges conferred on sailors, they are pretty much the same with those conferred on soldiers; with regard to relief, when maimed, or wounded, or superannuated, either by county rates or the royal hospital at Greenwich; with regard also to the exercise of trades, and the power of making nuncupative testaments: and further,<sup>w</sup> no seaman aboard his majesty's ships can be arrested for any debt, unless the same be sworn to amount to at least twenty pounds; though, by the annual mutiny acts, a soldier may be arrested for a debt which extends to half that value, but not to a less amount.

<sup>w</sup> Stat. 31 Geo. II. c. 10 (Navy, 1757).

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<sup>9</sup> The government of the British navy is now regulated by the Naval Discipline Act of 1866, as amended in 1884 and subsequent statutes, a brief account of which may be found in 2 Stephen's Comm. (16th ed.), 696 ff.

## CHAPTER THE FOURTEENTH. [422]

### OF MASTER AND SERVANT.

§ 566. **The domestic relations.**—Having thus commented on the rights and duties of persons, as standing in the *public* relations of magistrates and people, the method I have marked out now leads me to consider their rights and duties in *private* economical relations.

The three great relations in private life are, 1. That of *master and servant*;<sup>1</sup> which is founded in convenience, whereby a man is directed to call in the assistance of others, where his own skill and labor will not be sufficient to answer the cares incumbent upon him. 2. That of *husband and wife*; which is founded in nature, but modified by civil society: the one directing man to continue and multiply his species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. That of *parent and child*, which is consequential to that of marriage, being its

1 **Service and agency discriminated.**—The relation of master and servant has been known to the English law from a very early period; indeed, its doctrines date back, as Judge Holmes has shown (*Common Law*, pp. 15, 16), to the time when the servant was the property of the master, and it is still founded in all its essential features upon the notion that the master has a control of the servant, and can direct his action irrespective of any contract between them. This doctrine has been obscured of late years by being mixed up with another of very different origin. The law of principal and agent is derived from the canon law, and has only been introduced into the common law in recent times. If the older books of English law are examined, no such words as “principal and agent” will be found in them. Whenever any question is discussed which would now be treated under that head, it is treated of as master and servant. Principal and agent does not occur in Viner’s *Abridgment*, or those preceding it; and it is only at the end of the eighteenth century that we find it beginning to appear as a separate title, as yet of very limited application. Even Blackstone treats it only as one of the minor forms of contract, and of very little importance in comparison with the older relation. It is to explain the master’s liability that he quotes (p. \*429) Coke’s maxim, *qui facit per alium facit per se*, which has of late been used so often less appropriately in a sense that Coke never thought of as the principle governing agency.

But from his time to the present, or at least to that of Judge Story, there is a rapid change in the relative treatment of the two topics. Agency becomes

principal end and design: and it is by virtue of this relation that infants are protected, maintained, and educated. But, since the parents, on whom this care is primarily incumbent, may be snatched away by death before they have completed their duty, the law has therefore provided a fourth relation; 4. That of *guardian and ward*, which is a kind of artificial parentage, in order to supply the deficiency, whenever it happens, of the natural. Of all these relations in their order.

the rubric under which almost everything is ranged that relates either to the contracts or the torts, formed or committed by one person at the instance of another. In our American digests it occupies much the greater space. (In the United States Digest, one hundred and four pages to eleven for master and servant, while the latest English one [Mews'] gives fifty to sixty-four. I take these as examples rather than the text-books, although showing the same facts, because the digests represent more exactly the common usage of the terms in the reports, unaffected by any theories of the writers.) And since Judge Story's time, it has been the general custom to use the words without distinction, and to speak of the liability of a master or principal, of an agent or servant, as if it made no difference which term was used.

"The foundation of this branch of the law [agency], is avowedly in the maxim of the Romans, *Qui facit per alium facit per se*, 4 Inst. tit. 5 [*sic!*]; namely, that the agency of a servant is but an instrument; and that any man having *authority over the actions of another*, who either expressly commands him to do an act, or by the absence of a due care or control, either previously in the choice of his servant, or immediately in the act itself, negligently suffers him to do an injury, shall be responsible for the act of his servant as if it were the act of himself." (Note to *Weyland v. Elkins*, 1 Holt N. P. 227, quoted Story on Agency, p. 548.)

The attribution of this maxim to the Romans is as strange as the confusion between the rules stated, which are clearly applicable to service, and the conclusion drawn from them as to the law of agency; even "the agency of a servant," as it is expressed. A glance at the original sources of Roman law would have shown the author that instead of recognizing any such maxim, they held it *iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisque damnosam esse* (Gaii Com., lib. 4, 75, et seq.); i. e., unjust to demand of a master for a servant's wrongs, any compensation beyond the mere surrender of the servant.

The blunder by which Blackstone's citation of 4 Inst. 109, was turned into 4 Inst., tit. 5, and credited to Justinian instead of Coke, may not be the author's fault. It could hardly have been Judge Story's.

In some cases, this usage leads to no difficulty; it makes no difference whether we express the relation as one of service or of agency, since either will express clearly enough the facts put in evidence, and lead to correct conclusions. But

§ 567. **Master and servant.**—<sup>[423]</sup> In discussing the relation of *master* and *servant*, I shall, first, consider the several sorts of servants, and how this relation is created and destroyed: secondly, the effect of this relation with regard to the parties themselves: and, lastly, its effect with regard to other persons.

§ 568. **1. Classes of servants.**—As to the several sorts of servants: I have formerly observed<sup>a</sup> that pure and proper slavery does not, nay cannot, subsist in England; such I mean, whereby an absolute and unlimited power is given to the master over the life and fortune of the slave. And, indeed, it is repugnant to reason, and the principles of natural law, that such a state should subsist anywhere.

§ 569. **a. Slavery.**—The three origins of the right of slavery, assigned by Justinian,<sup>b</sup> are all of them built upon false foundations.<sup>c</sup> As, first, slavery is held to arise “*jure gentium* (by the law

<sup>a</sup> Pag. 127.

<sup>b</sup> *Servi aut flunt, aut nascuntur: flunt jure gentium, aut jure civili: nascuntur ex ancillis nostris.* (Slaves are either born or made so: they are made slaves by the law of nations, or by the civil law; they are born slaves as the children of our female captives). Inst. 1. 3. 4.

<sup>c</sup> Montesq. Sp. L. xv. 2.

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this is by no means always true. The two relations connote different things, and the use of one for the other frequently leads to false reasoning. It is desirable to point out a few of these distinctions.

1. The relation of master and servant is essentially one of *status*. The master's liability for the servant's acts does not depend upon any contract between them; otherwise there would be no such liability in the many cases where the servant is a minor. The only question bearing upon the rights and duties of third persons is, “Does the relation exist? Is the one actually engaged in the service of the other in the act from which the liability arises?”

On the other hand, principal and agent is essentially a contractual relation, as was the *mandate* of the civil law from which indirectly we took it. It is still so defined in all our books, and although they often speak of agency when service is meant, I think none of them have yet used such a term as the *status* of agency. The powers and duties of the agent, and the liability of the principal for his contracts, are always traced back to and measured by the contract in which the relation begins, whether expressed or implied. That *service* is a relation of status and not one of contract is clearly shown in *Corbin v. American Mills*, 27 Conn. 274, 71 Am. Dec. 63, where an employee hired by the



of nations),” from a state of captivity in war; whence slaves are called *mancipia*, *quasi manu capti*. The conqueror, say the civilians, had a right to the life of his captive; and, having spared that, has a right to deal with him as he pleases. But it is an untrue position, when taken generally, that, by the law of nature or nations, a man may kill his enemy: he has only a right to kill him, in particular cases; in cases of absolute necessity, for self-defense; and it is plain this absolute necessity did not subsist, since the victor did not actually kill him, but made him prisoner. War is itself justifiable only on principles of self-preservation; and therefore it gives no other right over prisoners but merely to disable them from doing harm to us, by confining their persons: much less can it give a right to kill, torture, abuse, plunder, or even to enslave an enemy, when the war is over. Since, therefore, the right of

day was held to be not a servant, while engaged in laying a wall for his employers with stone which he and his men were removing from a ledge under a contract with the town. “Payment by the day is a circumstance to be considered, but not the criterion. So, also, of actual present control and supervision. To get at the truth we must see if the person is acting at the time for and in the place of his master, in accordance with and representing his master’s will and not his own. It must be strictly his master’s business he is doing, and not in any respect his own.” (Ellsworth, J., p. 63.) The master’s control over the *mode* of work is the test. (Cincinnati v. Stone, 5 Ohio St. 38.)

2. The relation of master and servant always implies a control over the act to be done of a different character from that in agency. The master may direct, not only what the servant is to do, but how he is to do it. As a rule, even the contract of service does not interfere with this: it allows the master to recall his orders, to change his mind, to undo what has been done, without making himself liable to the servant for breach of contract.

Agency, on the other hand, implies an agreement to do certain things in the agent’s own method. So long as he performs the exact contract between them, the principal cannot complain. He is entitled, like any other contracting party, to his own discretion as to the means he shall use, unless they have been expressly agreed upon between them, or are governed by some known custom; so if the principal changes his mind, or undoes what has been done for him, it is a breach of the contract discharging the agent or entitling him to damages. This distinction is well illustrated by the numerous cases upon willful or malicious wrongs by a servant. No question of the kind arises in a case of agency proper. An agent is supposed to act as an independent person, limited only by the terms of his contract; the servant to act as his master tells him to. (Wharton on Agency, §§ 479, 482, 538.) Hence it has been held that for a willful act of the servant a master is not liable, as its willfulness shows that the servant

making slaves by captivity, depends on a supposed right of slaughter, that foundation failing, the consequence drawn from it must fail likewise. But, secondly, it is said that slavery may begin "*jure civili* (by the civil law)"; when one man sells himself to another. This, if only meant of contracts to serve or work for another, is very [424] just: but when applied to strict slavery, in the sense of the laws of old Rome or modern Barbary, is also impossible. Every sale implies a price, a *quid pro quo* (value for value), an equivalent given to the seller in lieu of what he transfers to the buyer: but what equivalent can be given for life, and liberty, both of which (in absolute slavery) are held to be in the master's disposal? His property also, the very price he seems to receive, devolves *ipso facto* to his master, the instant he becomes his slave. In this case, therefore, the buyer gives nothing, and the

is not acting in the scope of his employment. This is fully argued in *Wright v. Wilcox*, 19 Wend. 343, 32 Am. Dec. 507; and see cases in note, p. 511. (M. and S. riding together, S. whipped up horses and threw boy off.) But the doctrine now generally held is that the willfulness is an evidential, not an ultimate fact; i. e., that it goes to the jury, who are to determine under all the circumstances whether the act was within the scope of the master's employment. Some cases go further, and disregard the willful or malignant character of the act, "if within the scope of employment" (*Perkins v. M. K. & T. R. Co.*, 55 Mo. 201), and even hold that the latter need not be alleged in pleading (*Travers v. K. P. Ry. Co.*, 63 Mo. 421); but these can only be sustained where the harm done the plaintiff is a breach of some special duty owed him by the master, of which the servant's act is a breach or omission.

It is well said in a recent case that where the master's liability is for his own negligence, he is answerable in damages to the same extent as though the relation of master and servant did not exist (*Lorentz v. Robinson*, 61 Md. 64); and alike to servants and strangers. (*Allen, J.*, in 64 N. Y. 8.) He cannot contract for immunity from such liability, either to the stranger or to the servant; it would be against public policy. (*Roesner v. Hermann*, 10 Biss. 486.)

The liability of an employer for willful torts of his servants towards persons with whom the employer has some peculiar contract (as distinguished from third persons in general to whom no special duty is due) is stated in *Angell & Ames on Corporations*, § 388, p. 404, and in *Goddard v. G. T. R. Co.*, 57 Me. 202, 2 Am. Rep. 39, 10 Am. Law Reg. 17, 21; citing a number of cases, e. g., *Railroad v. Finney*, 10 Wis. 388; *Railway v. Hinds*, 53 Pa. St. 512; 7 Am. Law Reg. 14 (passenger's arm broken by fellow-passengers); *Flint v. Transportation Co.*, 34 Conn. 554 (similar case); *Nieto v. Clark*, 1 Cliff. 145 (assault by steward of a ship on female passenger); *Railroad v. Blocker*, 27 Md. 277.

It is an old and well-settled doctrine of the common law that the possession

seller receives nothing: of what validity, then, can a sale be, which destroys the very principles upon which all sales are founded? Lastly, we are told, that besides these two ways by which slaves “*fiunt*,” or are acquired they may also be hereditary: “*servi nascuntur* (they are born slaves)”; the children of acquired slaves are, *jure naturæ* (by the law of nature) by a negative kind of birth-right, slaves also. But this, being built on the two former rights, must fall together with them. If neither captivity, nor the sale of one’s self, can by the law of nature and reason reduce the parent to slavery, much less can they reduce the offspring.

§ 570. (1) No slavery in England.—Upon these principles the law of England abhors, and will not endure the existence of, slavery within this nation: so that when an attempt was made to introduce it, by statute 1 Edw. VI, c. 3 (Poor Relief, 1547), which or-

of the servant is the possession of the master. This has many important consequences, but no one would think of applying it in all cases of agency. In a large proportion of those cases, e. g., those of factors, bailees, etc., the exact contrary is true. The independent possession of the agent is an essential mark of the relation. (Story on Agency, § 401a, and citations there; Wharton on Agency, § 766, and cases. Many cases are collected in 18 Am. Dec. 549.) A statute validating pledges by an agent in possession will not cover such a pledge by a servant. (*Lamb v. Attenborough*, 1 Best & S. 831; 8 Jur., N. S., 280.)

3. The relation of master and servant has legal effects, whether the work done is lawful or unlawful. The servant does not cease to be one if he commits a wrong in his master’s employ. Agency, on the other hand, can exist only for lawful purposes. From its very nature as a contract, it can only be formed for such ends. A contract of agency for the performance of an unlawful act, or the commission of a crime, would be as void as any other such contract. Story himself states this rule, although he goes on directly to speak of the torts of agents and the liabilities of principals therefor. “Although a person may do an unlawful act, it is clear that he cannot delegate authority to another person to do it, for it is against the policy of the law to allow any such authority, and therefore the appointment is utterly void. It imports neither duty nor obligation nor responsibility on either side, although it may involve both in punishment.” (Story on Agency, § 11. And see §§ 235, 261. But compare the language of §§ 308 and 451.) But his latest editor, Mr. C. P. Greenough, seems to have perceived the inconsistency of the two positions, and has pointed out in a very modest way the fact that it is service and not agency which makes the master liable. (Note 1 to § 451.)

“In regard to the liability of the principal to third persons for the torts of his agent, there is a distinction to be made between those torts that spring

dained, that all idle vagabonds should be made slaves, and fed upon bread, water, or small drink, and refuse meat; should wear a ring of iron round their necks, arms, or legs; and should be compelled by beating, chaining, or otherwise, to perform the work assigned them, were it never so vile; the spirit of the nation could not brook this condition, even in the most abandoned rogues; and therefore this statute was repealed in two years afterwards.<sup>d</sup> And now it is laid down,<sup>e</sup> that a slave or negro, the instant he lands in England, becomes a freeman; that is, the law will protect him in the enjoyment of his person, and his property. Yet, with regard to any right which the master may have lawfully acquired to the

<sup>d</sup> Stat. 3 & 4 Edw. VI. c. 16 (Vagrancy, 1550).

<sup>e</sup> Salk. 666.

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from the subject matter of the agency, and affect those with whom the agent deals on behalf of his principal through such person's relationship to the subject matter of the agency, and those torts which arise from the manner in which the agency is transacted, and which affect those who are in other respects strangers to it, or, if they affect those with whom the agent deals, yet affect them as they might be affected were they strangers. In the first class of cases the maxim, *qui facit per alium, facit per se*, applies. The principal, if liable at all, is liable for his own act performed by his agent. To the second class of cases the maxim has no application. The principal, if liable, is liable not for his own act, but for the act of another. His liability rests on grounds of expediency, and is in derogation of the rule, which, with this exception, is universal, that a person is answerable for his own acts only.

"In this second class of cases he is not liable, unless another relation, *that of master and servant*, is superimposed upon the relation of principal and agent. The cases appear to warrant the conclusion that this additional relation does not exist, unless the agent would be *legally*\* *bound to obey* an order of the principal to abstain from the injurious act, or from the injurious mode of performing the act. When this relation exists, the master appears to be liable, provided the servant at the time is acting within the general scope of his employment, and is not obeying the directions of a third person (*Murphy v. Caralli*, 3 Hurl. & C. 462; *Coomes v. Houghton*, 102 Mass. 211; *Kimball v. Cushman*, 103 Mass. 194; *McLaughlin v. Pryor*, 4 Scott N. R. 655), who has some title to give directions (*Garretzen v. Duenckel*, 50 Mo. 104), such person not being

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\* *Sed quere* as to the need of the servant being *legally* bound to obey. This would exclude all cases of service without binding contract, etc. The cases hold it sufficient that he be actually in the employment, and under the master's orders. If this is so, the master may be liable even for an act amounting to felony, *qua* master. (*Osborn v. Gillet*, Law R. 8 Ex. 88.)—HAMMOND.

perpetual service of John or Thomas,<sup>2</sup> this will remain exactly in the same state as before: [425] for this is no more than the same state of subjection for life, which every apprentice submits to for the space of seven years, or sometimes for a longer term. Hence, too, it follows, that the infamous and unchristian practice of withholding baptism from negro servants, lest they should thereby gain their liberty, is totally without foundation, as well as without excuse. The law of England acts upon general and extensive principles: it gives liberty, rightly understood, that is, protection to a Jew, a Turk, or a heathen, as well as to those who profess the true religion of Christ; and it will not dissolve a civil obligation between master and servant, on account of the alteration of faith in either of the parties: but the slave is entitled to the same protection in England before, as after, baptism; and, whatever service the heathen negro owed of right to his American master, by general not by local law, the same (whatever it be) is he bound to render when brought to England and made a Christian.

an intermediate agent of the master (*Stone v. Cartwright*, 6 Tenn. 411; *Brown v. Lent*, 20 Vt. 529), and is not willfully acting for himself instead of for his master. (*Mitchell v. Crassweller*, 13 Com. B. 237; *Storey v. Ashton*, Law R. 4 Q. B. 476.)"—HAMMOND.

2 Is perpetual service legal.—Can a freeman by contract alienate his freedom? If not, why not? Can he let his services to a master for his entire life? The question has been mooted, at least from the time of the glossators, *utrum liber homo possit in perpetuum operas suas locare*. Irnerius is said to have denied it, as an infringement of the natural right of liberty, arguing from Dig. de cond et dem. 35, 1, 1. Titio, section 2, which ends "*potior est legato libertas: ergo contractu potior*."

But Azo thinks the contrary, giving as his reason that the contract may be enforced in damages, or the labor of another equally good workman given in place of the *locator operæ*, provided his own be not demanded specifically. But all the force of this is destroyed at once by saying that all the doctors of Bologna agreed that the performance could be so enforced in person. (Azo, *Summa in Cod.* 4, 65, p. 613.) Struve (*Syntagma J. C.*; Exerc. 24, par. 4, ad Dig. 19, 2, note y; Tom. I., p. 1667), quotes authors on both sides at some length; the majority of DD. favoring the power, and this is even said by some to be the *sententia communis*, or weight of authority, though Struve only rests it on the weak ground (of Azo) that the contract can be fulfilled by paying damages, *interesse præstando*.

The English doctrine on the same subject is stated in 1 S. L. C. 443, as settled in favor of the contract, "though in some countries a restraint so extensive has been considered inconsistent with individual liberty, and accordingly



§ 571. **b. Menial servants.**—The first sort of servants, therefore, acknowledged by the laws of England, are *menial servants*; so called from being *intra mania* (within the walls), or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general without any particular time limited, the law construes it to be a hiring for a year;<sup>f</sup> upon a principle of natural equity, that the servant shall serve, and the master maintain him, throughout all the revolutions of the respective seasons; as well when there is work to be done as when there is not;<sup>g</sup> but the contract may be made for any larger or smaller term. All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry or certain specific trades, for the promotion of honest industry; and no master can put away his servant, or servant leave his master, after being so retained, either before or at the end of his term, without a quarter's warning; unless upon reasonable [<sup>426</sup>] cause to be allowed by a justice of the peace;<sup>h</sup> but they may part by consent, or make a special bargain.

<sup>f</sup> Co. Litt. 42.

<sup>g</sup> F. N. B. 168.

<sup>h</sup> Stat. 5 Eliz. c. 4 (Artificers and Apprentices, 1562).

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forbidden." But the cases cited do not warrant the statement "that the question is long since settled in our law." (1 S. L. C. 443).

In America, the leaning is the other way. (Schouler on Dom. Rel., § 460, and cases cited.) Clark's Case, 1 Blackf. 122, 12 Am. Dec. 213, holds a contract to serve for twenty years invalid; and also that contracts of service cannot be specifically enforced. Note on latter subject with American cases *contra*. (Parsons v. Trask, 7 Gray, 473, 66 Am. Dec. 502.) A contract for services indefinite as to their character and place of performance is void.

In the opinion Thomas, J., said: Such a contract, it is scarcely necessary to say, is against the policy of our institutions and laws. If such a sale of service could be lawfully made for five years, it might for the same reasons, for ten, and so for the term of one's life. The door would thus be opened for a species of servitude inconsistent with the first and fundamental article of our declaration of rights, which, *proprio vigore*, not only abolished every vestige of slavery then existing in the commonwealth, but rendered every form of it thereafter legally impossible. That article has always been regarded, not simply as the declaration of an abstract principle, but as having the active force and conclusive authority of law.—HAMMOND.

§ 572. *c. Apprentices.*—Another species of servants are called *apprentices* (from *apprendre*, to learn) and are usually bound for a term of years, by deed indented or indentures, to serve their masters, and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery; and sometimes very large sums are given with them, as a premium for such their instruction: but it may be done to husbandmen, nay to gentlemen, and others. And<sup>1</sup> children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-four years of age, to such persons as are thought fitting; who are also compellable to take them: and it is held, that gentlemen of fortune, and clergymen, are equally liable with others to such compulsion:<sup>k</sup> for which purposes our statutes have made the indentures obligatory, even though such parish apprentice be a minor.<sup>1</sup> Apprentices to trades may be discharged on reasonable cause, either at the request of themselves or masters, at the quarter sessions, or by one justice, with appeal to the sessions;<sup>m</sup> who may, by the equity of the statute, if they think it reasonable, direct restitution of a ratable share of the money given with the apprentice:<sup>n</sup> and parish apprentices may be discharged in the same manner, by two justices.<sup>o</sup> But if an apprentice, with whom less than ten pounds hath been given, runs away from his master, he is compellable to serve out his time of absence, or make satisfaction for the same, at any time within seven years after the expiration of his original contract.<sup>p</sup>

§ 573. *d. Laborers.*—A third species of servants are *laborers*, who are only hired by the day or the week, and do not live *intra mœnia*, as [<sup>427</sup>] part of the family; concerning whom the statutes

<sup>1</sup> Stat. 5 Eliz. c. 4 (Artificers and Apprentices, 1562). 43 Eliz. c. 2 (Poor Relief, 1601). 1 Jac. I. c. 25 (1603). 7 Jac. I. c. 3 (Apprentice, 1609). 8 & 9 W. & M. c. 30 (Poor Relief, 1697). 2 & 3 Ann. c. 6 (Navigation, 1703). 4 Ann. c. 19 (1705). 17 Geo. II. c. 5 (Justices' Commitment, 1743).

<sup>k</sup> Salk. 57. 491.

<sup>1</sup> Stat. 5 Eliz. c. 4. 43 Eliz. c. 2. Cro. Car. 179.

<sup>m</sup> Stat. 5 Eliz. c. 4.

<sup>n</sup> Salk. 67.

<sup>o</sup> Stat. 20 Geo. II. c. 19 (Regulation of Servants and Apprentices, 1746).

<sup>p</sup> Stat. 6 Geo. III. c. 26 (1765).

before cited<sup>a</sup> have made many very good regulations; 1. Directing that all persons who have no visible effects may be compelled to work: 2. Defining how long they must continue at work in summer and in winter: 3. Punishing such as leave or desert their work: 4. Empowering the justices at sessions, or the sheriff of the county, to settle their wages: and 5. Inflicting penalties on such as either give, or exact, more wages than are so settled.

§ 574. e. Stewards, factors and bailiffs.—There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity; such as *stewards*, *factors*, and *bailiffs*: whom, however, the law considers as servants *pro tempore* (for a time), with regard to such of their acts, as affect their master's or employer's property. Which leads me to consider,

§ 575. 2. Relation of service.—The manner in which this relation of service affects either the master or servant. And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days.<sup>r</sup> In the next place persons, serving seven years as apprentices to any trade, have an exclusive right to exercise that trade in any part of England.<sup>s</sup> This law, with regard to the exclusive part of it, has by turns been looked upon as a hard law, or as a beneficial one, according to the prevailing humor of the times: which has occasioned a great variety of resolutions in the courts of law concerning it; and attempts have been frequently made for its repeal, though hitherto without success. At common law every man might use what trade he pleased; but this statute restrains that liberty to such as have served as apprentices: the adversaries to which provision say, that all restrictions (which tend to introduce monopolies) are pernicious to trade; the advocates for it allege, that unskillfulness in trades is equally detrimental to the public, as monopolies. This reason indeed only extends to such trades, [428] in the exercise whereof skill is required: but another of their arguments goes much further; viz., that apprenticeships are useful to the commonwealth, by employ-

<sup>a</sup> Stat. 5 Eliz. c. 4 (1562). 6 Geo. III. c. 26.

<sup>r</sup> See pag. 364.

<sup>s</sup> Stat. 5 Eliz. c. 4. § 31.

ing of youth, and learning them to be early industrious; but that no one would be induced to undergo a seven years' servitude, if others, though equally skillful, were allowed the same advantages without having undergone the same discipline: and in this there seems to be much reason. However, the resolutions of the courts have in general rather confined than extended the restriction. No trades are held to be within the statute, but such as were in being at the making of it:<sup>t</sup> for trading in a country village, apprenticeships are not requisite:<sup>u</sup> and following the trade seven years is sufficient without any binding; for the statute only says, the person must serve *as* an apprentice, and does not require an actual apprenticeship to have existed.<sup>w</sup>

§ 576. a. **Master's right of correction.**—A master may by law correct his apprentice for negligence or other misbehavior, so it be done with moderation:<sup>x</sup> though, if the master or master's wife beats any other servant of full age, it is good cause of departure.<sup>y</sup> But if any servant, workman, or laborer assaults his master or dame,<sup>z</sup> he shall suffer one year's imprisonment, and other open corporal punishment, not extending to life or limb.<sup>z</sup>

§ 577. b. **Servant's wages.**—By service all servants and laborers, except apprentices, become entitled to wages: according to their

<sup>t</sup> Lord Raym. 514.

<sup>u</sup> 1 Vent. 51. 2 Keb. 583.

<sup>w</sup> Lord Raym. 1179.

<sup>x</sup> 1 Hawk. P. C. 130. Lamb. Eiren. 127. Cro. Car. 179. 2 Show. 289.

<sup>y</sup> F. N. B. 168. Bro. Abr. tit. Laborers, 51. Trespass, 349.

<sup>z</sup> Stat. 5 Eliz. c. 4.

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3 **Assault on master.**—The statute here cited might be common law in America by its date (5 Eliz., c. 4, 1563), but our courts have never regarded it as such (2 Kent Comm. 258, and notes), or held that any common-law distinction between master and servant as men of different ranks existed here. A crime committed by either against the other would be of the same nature and degree; the servant's assault upon the master would be judged precisely like the master's assault upon the servant under the same circumstances. The last vestige of a different doctrine disappeared with slavery. The control exercised by the master over the servant is an incident to their temporary relation, not a right of one class of men over another. A may be the master of B in one relation, and servant in another; as when a lawyer conducts an action for his coachman as a client.—HAMMOND.

agreement, if menial servants; or according to the appointment of the sheriff or sessions, if laborers or servants in husbandry: for the statutes for regulation of wages extend to such servants only;<sup>a</sup> it being impossible for any magistrate to be a judge of the employment of menial servants, or of course to assess their wages.

§ 578. *c. Relation of service as to third persons.*—Let us, lastly, see how strangers may be affected by this relation of master and servant: or how a master may [429] behave towards others on behalf of his servant; and what a servant may do on behalf of his master.

And, first, the master may *maintain*, that is, abet and assist his servant in any action at law against a stranger: whereas, in general, it is an offense against public justice to encourage suits and animosities, by helping to bear the expenses of them, and is called in law *maintenance*.<sup>b</sup> A master also may bring an action against any man for beating or maiming his servant: but in such case he must assign, as a special reason for so doing, his own damage by the loss of his service; and this loss must be proved upon the trial.<sup>c</sup> A master likewise may justify an assault in defense of his servant, and a servant in defense of his master:<sup>d</sup> the master, because he has an interest in his servant, not to be deprived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master.<sup>e</sup> Also if any person do hire or retain my servant, being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them: but if the new master did not know that he is my servant, no action lies; unless he afterwards refuse to restore him upon information and demand.<sup>f</sup> The reason and foundation, upon which all this doctrine is built, seem to be the

<sup>a</sup> 2 Jones, 47.

<sup>b</sup> 2 Roll. Abr. 115.

<sup>c</sup> 9 Rep. 113.

<sup>d</sup> 2 Roll. Abr. 546.

<sup>e</sup> In like manner, by the laws of King Alfred, c. 38, a servant was allowed to fight for his master, a parent for his child, and a husband or father for the chastity of his wife or daughter.

<sup>f</sup> F. N. B. 167, 168.



property that every man has in the service of his domestics; acquired by the contract of hiring, and purchased by giving them wages.

§ 579. (1) **Responsibility of master.**—As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle, that the master is answerable for the act of his servant, if done by his command, either expressly given, or implied: *nam qui facit per alium, facit per se* (for he who does a thing by the agency of another, does it himself).<sup>4</sup> Therefore,

§ 4 Inst. 109.

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4 **The law of fellow-servant.**—The recognized rule of the common law was that a master was liable for the acts, neglects, and defaults of his servants in the course of the service. It is stated in a classical case by Willes, J., thus: "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved." *Barwick v. Eng. Joint Stock Bank*, L. R. 2 Ex. 259, 265. "No reason for the rule, at any rate no satisfactory one, is commonly given in our books. Its importance belongs altogether to the modern law, and it does not seem to be illustrated by any early authority. Blackstone is short in his statement, and has no other reason to give than the fiction of an 'implied command.' It is currently said, *respondet superior*, which is a dogmatic statement, not an explanation. It is also said, *qui facit per alium facit per se*; but this in terms applicable only to authorized acts that, although done by the agent or servant 'in the course of the service,' are specifically authorized or even forbidden." *Pollock, Torts* (9th ed.), 78. Chief Justice Shaw gives the following explanation of the master's liability: "This rule is obviously founded on the great principle of social duty, that every man in the management of his own affairs, whether by himself or his servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." *Farwell v. Boston & W. R. Corp.*, 4 Met. (Mass.) 49, 55, 38 Am. Dec. 339.

An exception or modification to this rule of the master's liability is recognized in the case where the person injured is himself in the same master's service. The exception is known as the "fellow-servant rule." The first evidence of the rule is in the case of *Priestley v. Fowler*, 3 M. & W. 1, decided in the English exchequer chamber in 1837. The ground on which the servant was refused recovery from the master for an injury caused by the neglect of a fellow-servant in a common employment was, in the words of Lord Abinger, that "to allow this sort of action to prevail would be an encouragement to the servant to omit that diligence and caution which he is in duty bound to exercise on the behalf of his master, to protect him against the misconduct or negligence

if the [430] servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it: not that the servant is excused, for he is only to obey his master in matters that are honest and lawful. If an innkeeper's servants rob his guests, the master is bound to restitution:<sup>b</sup> for as there is a confidence reposed in him, that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam, qui non prohibet, cum prohibere possit, jubet* (for he who

<sup>b</sup> Noy's Max. c. 43.

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of others who serve him, and which diligence and caution, while they protect the master, are a much better security against any injury the servant may sustain by the negligence of others engaged under the same master, than any recourse against his master for damages could possibly afford." A like result was reached in South Carolina in 1841, but without any reference to the English case. *Murray v. S. C. R. Co.*, 1 McMull. (S. C.) 385, 36 Am. Dec. 268. And then in 1842, in the Massachusetts case of *Farwell v. Boston & W. R. Corp.*, 4 Met. (Mass.) 49, 38 Am. Dec. 339, Chief Justice Shaw laid down the rule in "a judgment which is the fountain-head of all the later decisions" (Pollock, Torts (9th ed.), 101), and has been judicially recognized in England as "the most complete exposition of what constitutes common employment" (Sir Francis Jeune in *The Petrel*, [1893] P. 320, 323).

The doctrine underlying the fellow-servant rule is thus laid down by Chief Justice Shaw: "When the object to be accomplished is one and the same, when the employers are the same, and the several persons employed derive their authority and their compensation from the same source, it would be extremely difficult to distinguish what constitutes one department and what a distinct department of duty. It would vary with the circumstances of every case. If it were made to depend upon the nearness or distance of the persons from each other, the question would immediately arise, how near or how distant must they be, to be in the same or different departments. In a blacksmith's shop, persons working in the same building, at different fires, may be quite independent of each other, though only a few feet distant. In a ropewalk, several may be at work on the same piece of cordage, at the same time, at many hundred feet distant from each other, and beyond the reach of sight and voice, and yet acting together. Besides, it appears to us, that the argument rests upon an assumed principle of responsibility which does not exist. The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the *implied contract* of the master does not extend to indemnify the servant against the negligence of anyone but himself; and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a

does not forbid a crime while he may, sanctions it). So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master: 'for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

1 1 Roll. Abr. 95.

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stranger, but is one whose rights are regulated by contract express or implied." *Farwell v. Boston & W. R. Corp.*, 4 Met. (Mass.) 49, 60, 38 Am. Dec. 339.

As to who are fellow-servants, it is said that "the rule quoted by the greatest number of adjudged cases is that all who serve a common master, work under the same control, derive authority and compensation from the same common source, and are engaged in the same general business, though it may be in different grades or departments of it, are fellow-servants, who, under the rule under consideration, are deemed to take the risk of each other's negligence." 4 *Thompson, Negligence*, § 4917.

Chief Baron Pollock has advised that "we must not over-refine, but look at the common object, and not at the common immediate object." *Morgan v. Vale of Neath R. Co.*, L. R. 1 Q. B. 149, 155. But this subject has become a difficult and intricate one, and all that it seems desirable now is to mention a few important cases on the general principle of the subject. *Hough v. Ry. Co.*, 100 U. S. 213, 25 L. Ed. 612; *New England R. Co. v. Conroy*, 175 U. S. 323, 44 L. Ed. 181, 20 Sup. Ct. Rep. 85; *Barlow v. Standard Steel Casting Co.*, 154 Pa. 130, 26 Atl. 12; *Murphy v. Boston & A. R. Co.*, 88 N. Y. 146, 42 Am. Rep. 240; *Casey's Admr. v. Louisville & N. R. Co.*, 84 Ky. 79; *Houston & T. C. R. Co. v. Marcelles*, 59 Tex. 334; *Brown v. Sennet*, 68 Cal. 225, 9 Pac. 74; *Young v. Boston & M. R. R.*, 168 Mass. 219, 46 N. E. 624.

**Employers' Liability Acts.**—In a Nebraska case in 1894, it was said: "When the law of fellow-servant was first announced, business enterprises were comparatively small and simple. The servants of one master were not numerous; they were all engaged in the pursuit of a simple and common undertaking. Now things have changed. Large enterprises are conducted by persons or corporations employing vast numbers of servants, divided into classes, each pursuing a different portion of the work, and each practically independent of the other. The old reasons do not apply to the new conditions." *Union Pac. Ry. Co. v. Erickson*, 41 Neb. 1, 59 N. W. 347, 350. This argument points to the importance of the adoption of statutory modifications in the fellow-servant doctrine. One of the chief ways in which modifications have been introduced has been through the medium of "employers' liability acts." The first general act was passed in England in 1880. "It is confined in its operation to certain specified causes of injury; and only certain kinds of servants are entitled to the benefit of it, and then upon restrictive conditions as to notice of action, mode of trial, and amount of compensation, which are unknown to the common

§ 580. (2) **Scope of employment.**—In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it: if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must pay

law, and with a special period of limitation. The effect is that a 'workman' within the meaning of the act is put as against his employer in approximately the same position as an outsider as regards the safe and fit condition of the material instruments, fixed or movable, of the master's business. He is also entitled to compensation for harm incurred through the negligence of another servant exercising superintendence, or by the effect of specific orders or rules issued by the master or someone representing him; and there is a special wider provision for the benefit of railway servants, which virtually abolishes the master's immunity as to railway accidents in the ordinary sense of that term. So far as the act has any principle, it is that of holding the employer answerable for the conduct of those who are in delegated authority under him." Pollock, *Torts* (9th ed.), 107. It has, however, mitigated some of the harshest and most objectionable features of the common law. 5 Labatt, *Master and Servant* (2 ed.), section 1656, where the act is set out in full. The text of the English act of 1880, together with a digest of the decisions thereon, is also given in Pollock, *Torts* (9th ed.), 587 ff.

A number of the American states have passed statutes modeled on the English act. These may be found in 5 Labatt, *Master and Servant* (2d ed.), sections 1657-1661.

The United States Congress passed a federal employers' liability act in 1906. This act was, however, declared unconstitutional on the ground that its provisions were not confined within the scope of federal powers, that is to say, that they applied to carriers engaged in intrastate commerce, and not merely to carriers while engaged in interstate commerce. *Howard v. Illinois Cent. R. Co.*, 207 U. S. 463, 52 L. Ed. 297, 28 Sup. Ct. Rep. 141. This decision was rendered on January 6, 1908. On April 22, 1908, Congress passed a new law, the Employers' Liability Act of 1908. This act, as amended in 1910, provides for the liability of common carriers engaged in interstate or foreign commerce to their employees injured in such commerce, or in case of death it gives a right of action to their personal representatives for the benefit of the surviving widow or husband and children of such employee, and if none, then of such employee's parents, and if none, then of the next of kin dependent upon such employee. Only one recovery, however, may be had for one and the same injury. *St. Louis, I. M. & S. Ry. Co. v. Hesterly*, 228 U. S. 702, 57 L. Ed. 1031, 33 Sup. Ct. Rep. 703. This act does away with the fellow-servant rule and changes the doctrine of contributory negligence by adopting the rule of so-called comparative negligence, whereby the damages recoverable are diminished in proportion to the negligence of the employee. It likewise abolishes the rule

it over again. If a steward lets a lease of a farm, without the owner's knowledge, the owner must stand to the bargain; for this is the steward's business. A wife, a friend, a relation, that use

that an employee is held to have assumed the risk of his employment in any case where the violation by the carrier of any statute enacted for the safety of employees contributed to the injury or death of the employee. *Second Employers' Liability Cases*, 223 U. S. 1, 56 L. Ed. 327, 32 Sup. Ct. Rep. 169.

**Workmen's Compensation Acts.**—A workmen's compensation act was passed in Great Britain in 1897, and superseded by the act of 1906. With few exceptions, it places an obligation upon every employer of labor to make pecuniary compensation to a limited extent, whenever death or disablement happens to a workman in the course of his employment. Every employment is within the act where a contract of service or apprenticeship exists, whether the work involved is manual labor, clerical work, or otherwise, except those employments which are in terms excluded in the act itself. Germany first enacted a compensation law in 1884. This, with the various amendments thereto, was brought into a new act in 1911. Compensation acts with varying provisions have been passed in many of the European countries. Under the English act, the defense of contributory negligence, of voluntary assumption of risk, and of the negligence of a fellow-servant is abolished.

More or less modeled upon the English act, compensation laws have been enacted in a large number of the American states.

Under both employers' liability laws and workmen's compensation acts, the employer is personally liable for the compensation to be paid to an injured worker. In the case of compensation acts, however, the only negligence recognized on the part of either employer or employee, speaking generally, is that of willful negligence. Where the employer is guilty of willful negligence, he is penalized; where the employee is guilty, he is denied his compensation or is penalized or has his compensation reduced. The amount of the compensation is determined within a maximum and minimum limit by specified schedules of compensation in the law. These schedules are graded on a basis of a certain percentage of the loss or impairment of the injured worker's average weekly wage. Jury trials are either largely or wholly dispensed with, and the compensation allowed is determined by a board of arbitration, by a judge of some court, or by a board of awards, as may be provided in the act.

The first compensation law in the United States was passed by Maryland in 1902, restricted in its application to miners. This act was declared unconstitutional by a lower court, and the question was never carried to a court of appeal. Montana, in 1909, likewise passed a compensation law relating to miners, and this was also declared unconstitutional. *Cunningham v. Northwestern Imp. Co.*, 44 Mont. 180, 119 Pac. 554. Congress passed a compensation act in 1908, applicable to certain specified government employees. This has been extended by subsequent acts, but is not yet universal in its application. New York, in 1910, passed a compulsory compensation act, applicable to certain dangerous employments. The act was declared unconstitutional, on



to transact business for a man, are *quoad hoc* (as to this) his servants; and the principal must answer for their conduct: for the law implies, that they act under a general command; and without

the grounds that the parties could not be denied the right of trial by jury, that an employee could not be compelled by the legislature to accept less than his common-law damages, and that an employer could not be forced to pay damages when he was nowise at fault. In the view of the court these privileges were guaranteed by constitutional provisions that no person should be deprived of life, liberty and property without due process of law. *Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271, 94 N. E. 431.

To avoid the objections of the New York court, New Jersey proceeded to adopt an elective or optional workmen's compensation law. By this elective feature employers were permitted to elect whether they would accept the principles of the compensation act and agree to pay their workmen the schedule of compensation provided in the law in all instances where they were injured or killed, or would stand on their common-law rights, in which latter event the law provided that all the common-law defenses of assumption of risk, contributory negligence, and negligence of fellow-servant should be denied to the employer. Compensation laws, according to the elective plan, but with variations as to the manner in which the election is made, have been adopted in a large number of states. The New Jersey act has been upheld in *Sexton v. Newark Dist. Tel. Co.*, 84 N. J. L. 85, 86 Atl. 451, affirmed in court of errors and appeals, 91 Atl. 1070. An Ohio law has been sustained. *State v. Creamer*, 85 Ohio St. 349, 97 N. E. 602. Also, the Washington law: *State v. Clausen*, 65 Wash. 156, 117 Pac. 1101; *Stoll v. Pac. Coast S. S. Co.*, 205 Fed. 169; the Wisconsin law: *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209; and the Massachusetts law: *In re Opinion of Justices*, 209 Mass. 607, 96 N. E. 308.

The Wisconsin court summarized the law before it, and stated the purpose thereof, in the following extracts from its opinion: "It creates an administrative board to carry its provisions into effect. It divides all private employers of labor into two classes: (1) Those who elect to come under the law; and (2) those who do not so elect. It takes away the defenses of assumption of risk, and negligence of a coemployee from the second class (except that where there are less than four coemployees the latter defense is not disturbed), but leaves both defenses intact to the first class. It prescribes the manner in which an employer may elect to come under its terms, and how an employee may make his election, and when silence on the part of the employee will be considered an election; but it does not in terms compel either employer or employee to submit to its provisions. It then provides a comprehensive scheme by which, after both parties have so elected, any substantial injury, whether the result be fatal or not, received by the employee in the course of or incidental to his employment (except those caused by willful misconduct) shall be compensated for by the employer according to certain definite rules, which rules are to be administered by the administrative board aforesaid by means of simple procedure definitely laid down, which gives to both parties fair notice and hearing,

such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready

and results in findings and an award which may be filed in the circuit court and become a judgment. It further provides that the findings of fact shall be conclusive and the award subject to review only by action in the circuit court of Dane county, in which it can be set aside only (1) if the commission acted without or in excess of its powers; (2) if the award was procured by fraud; or (3) if the award is not supported by the findings of fact. It then provides that the judgment thus rendered shall be subject to appeal to the supreme court.

"For all the essential purposes of this discussion, it may truly be said that this is the law which is before us, and the question is simply whether there is any vital part of it which the legislature may not enact because the Constitution forbids it. It is matter of common knowledge that this law forms the legislative response to an emphatic, if not a peremptory, public demand. It was admitted by lawyers, as well as laymen, that the personal injury action brought by the employee against his employer to recover damages for injuries sustained by reason of the negligence of the employer had wholly failed to meet or remedy a great economic and social problem which modern industrialism has forced upon us, namely, the problem of who shall make pecuniary recompense for the toll of suffering and death which that industrialism levies and must continue to levy upon the civilized world. This problem is distinctly a modern problem. In the days of manual labor, the small shop, with few employees, and the stage-coach, there was no such problem, or, if there was, it was almost negligible. Accidents there were in those days, and distressing ones; but they were relatively few, and the employee who exercised any reasonable degree of care was comparatively secure from injury. There was no army of injured and dying, with constantly swelling ranks marching with halting step and dimming eyes to the great hereafter. This is what we have with us now, thanks to the wonderful material progress of our age, and this is what we shall have with us for many a day to come. Legislate as we may in the line of stringent requirements for safety devices or the abolition of employers' common-law defenses, the army of the injured will still increase, and the price of our manufacturing greatness will still have to be paid in human blood and tears. To speak of the common-law personal injury action as a remedy for this problem is to jest with serious subjects, to give a stone to one who asks for bread. The terrible economic waste, the overwhelming temptation to the commission of perjury, and the relatively small proportion of the sums recovered which comes to the injured parties in such actions, condemn them as wholly inadequate to meet the difficulty." *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 214.

**Workmen's Industrial Insurance Acts.**—"In many of the states the compensation acts require the companies to issue policies giving a direct remedy to employees. It is obvious, from the wording of some of the statutes, that the

money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant: but if I usually send him upon trust, or sometimes on

various legislatures have not fully understood this subject. They have, in some instances, given to the employees the same right to recover against the insurance company that the employer has. Of course, this inadequately protects the rights of the employee. If they go a little further and say that the employee shall have the same right to recover against the insurer that the employer would have had if he had paid the compensation to the employee, this will be better. But even this is not entirely satisfactory, where the policy contains a provision that the insurer shall be liable only upon payment by the employer of a judgment entered *after a trial of the issues*. Because the employee may still find himself enmeshed in a net of technicalities by the requirement that the liability of the insurer must be predicated upon a judgment after a trial. Such a provision might be appropriate in common law, or so-called employers' liability cases, as distinguished from workmen's compensation controversies, but it is utterly unfitted for the latter, in which periodical payments are the rule.

"The necessity of some form of insurance in compensation cases is obvious. Under the old rule a judgment for the full amount could be enforced at once when the case finally went to judgment. In compensation cases the payments are distributed over a long period of time, not infrequently for ten or fifteen years. A good many employers become insolvent every year. Unless insured in some way the result would be that while compensation payments were awarded they would be uncollectible, in many cases, after a certain number of payments had been made. Dependents of workmen who had been killed, as well as injured workmen themselves, would therefore find themselves without redress if there was not some method of securing the payment of such benefits. This has been recognized in all of the more recent laws and is becoming a fixed policy in most of the American states.

"Up to this time two methods of insuring such payments have been devised. One is to compel the employer to demonstrate that he is of sufficient financial ability to insure such payments himself. This rule would apply to large corporations, such as railroads, where even if they should go into the hands of a receiver the preference in favor of such claims would be sufficient to insure their payment in most cases. The other is to compel the employer to take insurance either in a stock company or in a mutual association or in a state insurance fund. These problems are comparatively new, and are now being worked out in a number of states, especially New York, Massachusetts, Michigan, California, Ohio, Washington and Connecticut.

"The old employers' insurance policies were invariably limited in amount. That is, it was specified that the company should not be liable for a sum in excess of \$5,000 by reason of the injury to or death of one employee, and not more than \$10,000 because of any one accident in which two or more employees were injured or killed. Of course, these amounts were sometimes increased. For example, policies were written with limitations of \$10,000 and \$20,000.

trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.<sup>k</sup>

§ 581. (3, Negligence of servant.—<sup>[431]</sup> If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect: if a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant.<sup>5</sup> But in these cases the damage must be done, while he is actually employed in the master's service; otherwise the ser-

<sup>k</sup> Dr. & Stud. d. 2. c. 42. Noy's Max. c. 44.

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Policies were also written with an initial limitation of \$10,000 and a second limitation of from \$25,000 to \$100,000. Such policies are still so written, even in the compensation states, unless the law itself requires them to be unlimited. The first law to require the companies to write unlimited policies was that of Massachusetts. That has been followed by similar laws in a number of other states, notably New York, Michigan, Connecticut, California and Texas. In New Jersey the employers are not required to insure, and the policies which have been written in that state have usually been limited in amount and have been in the form of the old employers' liability policies without right on the part of employees to sue the companies direct."—BRADBURY, 1 Workman's Compensation, 960.

5 Primitive notion of legal liability.—The original notion of a tort to one's person or property was an injury caused by an act of a stranger, in which the plaintiff did not in any way participate. A battery, an asportation of a chattel, an entry upon land, were the typical torts. If, on the other hand, one saw fit to authorize another to come into contact with his person or property, and damage ensued, there was, without more, no tort. The person injured took the risk of all injurious consequences, unless the other expressly assumed the risk himself, or unless the peculiar nature of one's calling, as in the case of the smith, imposed a customary duty to act with reasonable skill. This conception is well shown by the remarks of the judges in a case against a horse-doctor. Newton, C. J.: "Perhaps he applied his medicines *de son bon gre*, and afterwards your horse died; now, since he did it *de son bon gre*, you shall not have an action. . . . My horse is ill, and I come to a horse-doctor for advice, and he tells me that one of his horses had a similar trouble, and that he applied a certain medicine, and that he will do the same for my horse, and does so, and the horse dies; shall the plaintiff have an action? I say, No." Paston, J.: "You have not shown that he is a common surgeon to cure such horses, and so, although he killed your horse by his medicines, you shall have no action against him without an *assumpsit*." Newton, C. J.: "If I have a sore on my hand, and he applies a medicine to my heel, by which negligence my hand is maimed,

vant shall answer for his own misbehavior. Upon this principle, by the common law,<sup>1</sup> if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master; because this negligence happened in his service: otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house; for there he is not in his master's immediate service: and must himself answer the damage personally. But now the common law is, in the former case, altered by statute 6 Ann., c. 3 (1707), which ordains that no action

<sup>1</sup> Noy's Max. c. 44.

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still I shall not have an action unless he undertook to cure me." The court accordingly decided that a traverse of the *assumpsit* made a good issue.

It is believed that the view here suggested will explain the following passage in Blackstone, which has puzzled many of his readers: "If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant." This is of course, not law to-day, and probably had ceased to be law when written. Blackstone simply repeated the doctrine of the Year-Books. The servant had not expressly assumed to shoe carefully; he was, therefore, no more liable than the surgeon, the barber, and the carpenter, who had not undertaken in the cases already mentioned. This primitive notion of legal liability has, of course, entirely disappeared from the law. An *assumpsit* is no longer an essential allegation in these actions of tort, and there is, therefore, little or no semblance of analogy between these actions and actions of contract.—AMES, Lect. on Leg. Hist., 131.

"In the sixteenth century, therefore, one who was injured either by or because of the act of others, when their relation was not contractual, could recover both when he did not know of the danger and when he knew of and voluntarily encountered it; but, when the relation resulted from an agreement or understanding, the injured party could not recover, save for injuries caused by a breach of the agreement. Consequently he could not recover when the contract was silent, if he was injured by a danger he knew was peculiar to the undertaking. Ames, Hist. Assump.; 3 Select Essays, 260. In other words, as the law was understood at that time, the reciprocal duties of the parties depended on how the relation between them was created. It was the duty of everyone to use care not to injure or damage those with whom he came in contact. 1 Bl. Comm. 40. It was the duty of those brought together by virtue of a contract to use care not to injure or damage each other in what they agreed to do. The following from Blackstone illustrates this view of the law: 'If a smith's servant lames a horse while he is shoeing him, an action lies against the master, but not against the servant.' 1 Bl. Comm. 431. If an action lies against the master, why not against the servant whose misconduct lamed the horse? Obviously, because the owner of the horse had no contract with the servant, and



shall be maintained against any, in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness.<sup>6</sup> But if such fire happens through negligence of any servant (whose loss is commonly very little) such servant shall forfeit 100*l.* to be distributed among the sufferers; and, in default of payment, shall be committed to some workhouse and there kept to hard labor for eighteen months.<sup>m</sup> A master is, lastly, chargeable if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual, or the common

<sup>m</sup> Upon a similar principle, by the law of the twelve tables at Rome, a person by whose negligence any fire began was bound to pay double to the sufferers; or, if he was not able to pay, was to suffer a corporal punishment.

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the horse came rightfully under the servant's control, in such cases there could be no recovery, because there was neither wrongful possession nor breach of contract. The owner of the horse had a contract with the blacksmith, which made it his duty to use care in shoeing the horse; consequently he was liable for a failure to perform that duty. 2 Harv. Law Rev. 1, 18. This view of imposed duties prevailed until the middle of the nineteenth century, and during all that time it was necessary to know how the relation which brought the parties together was created in order to determine their rights and liabilities. Special rules were gradually adopted and applied to the more common relations, as landlord and tenant, and carrier and passenger. These rules were all based upon the proposition that, when the relation was created by contract, neither of the parties owed the other any duty as to known dangers. Priestley v. Fowler, 3 M. & W. 1." Kambour v. Boston & M. R. R. Co., 86 Atl. (N. H.) 624, 627.

<sup>6</sup> All the earlier American cases cite this passage or adopt Blackstone's view of the statute. Clark v. Foot, 8 Johns. (N. Y.) 421; Lehigh Bridge Co. v. Lehigh Nav. Co., 4 Rawle (Pa.), 9, *semble*, per Gibson, J., pp. 24-25; Bachelder v. Heagan, 18 Me. 32; Tourtellot v. Rosebrook, 11 Met. (52 Mass.) 460; Stuart v. Hawley, 22 Barb. (N. Y.) 619; Fahn v. Reichart, 8 Wis. 255, 76 Am. Dec. 237. It is the view of these American cases that 6 Anne, c. 3, and amendatory statutes, constitute a part of the American common law. In Lausing v. Stone, 37 Barb. (N. Y.) 15, 17, Blackstone's view is carried to its logical conclusion, and it is held that a defendant is not liable for the spread of a fire started in his room, even by his negligence.

But in 1847 in the English case of Filliter v. Phippard, 11 A. & E. (N. S.) 347, Lord Denman said "it would appear that Blackstone had drawn a conclusion from the enactment cited (Stat. 6 Ann., c. 3), which it by no means sustains." See Bohlen, Cases on Torts, 559 n; Boston Ice Co. v. Boston & M. R. Co., 86 Atl. (N. H.) 356.

nuisance of his majesty's liege people:<sup>n</sup> for the master hath the superintendence and charge of all his household. And this also agrees with the civil law;<sup>o</sup> which holds, that the *pater familias* (head of the family), in this and similar cases, "*ob alterius culpam tenetur, sive servi, sive liberi* (is held accountable for the fault of another, whether of his servant, or his child)."

[432] We may observe, that in all the cases here put, the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer: he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. The reason of this is still uniform and the same; that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that no man shall be allowed to make any advantage of his own wrong.

<sup>n</sup> Noy's Max. c. 44.

<sup>o</sup> Ff. 9. 3. 1. Inst. 4. 5. 1.

## OF HUSBAND AND WIFE.

§ 582. **Marriage.**—The second private relation of persons is that of marriage, which includes the reciprocal rights and duties of husband and wife;<sup>1</sup> or as most of our elder law books call them, of *baron* and *feme*. In the consideration of which I shall in the first place inquire, how marriages may be contracted or made; shall next point out the manner in which they may be dissolved; and shall, lastly, take a view of the legal effects and consequence of marriage.

1 **The domestic relations in law and ethics.**—The difference between Blackstone's theory of law and that now current is clearly seen in these chapters upon the domestic relations when compared with the doctrine of modern cases: for Blackstone regarding ethics or natural law a part of his subject, has devoted much space to the duties of husband and wife, parent and child, to each other, which are not strictly enforceable by law and can rarely become the subject of litigation. No fault can be found with him for this mode of treatment, because it was the necessary result of the definitions with which he commences his work: but a modern judge or writer, to whom law deals only with such rights and duties as can, by their very nature, be enforced by the power of the state, goes entirely beyond his province when he lays down the rules by which the conduct of the parents toward the child, or of one spouse toward the other, is to be governed in the tribunal of his own conscience, or as a matter of paternal or conjugal duty.

And even the legal duties of a parent or a husband, in the supply of subsistence, or clothing, or education, must be distinguished from those to which an absolute right corresponds in the object of the duty. These duties may be enforced indirectly by punishing a parent or husband for neglect, or, in some cases, by giving to third persons a right of action for goods furnished or moneys laid out in supply of their deficiencies. But the law gives no action to the wife or child, directly, for any breach of the husband's or the parent's duty.

One illustration of the consequences produced by neglecting this distinction may, perhaps, seem more ludicrous than instructive or useful. The statement of the commentator (p. \*444) that the husband, by the old law, might give the wife moderate correction, has often been used, of late, to point criticisms upon the supposed barbarism of that law, and, by implication, if not expressly, to exalt our own. But the truth is that, if we confine ourselves to the strict rule of law, there has been no change in it from the earliest time. The rule referred to by Blackstone is that ethical rule which pointed out to the husband the

§ 533. 1. Marriage, a civil contract—a. Ecclesiastical jurisdiction over marriage.—Our law considers marriage in no other light than as a civil contract. The holiness of the matrimonial state is left entirely to the ecclesiastical law:<sup>2</sup> the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, or annulling, of incestuous or other unscriptural marriages, is the province of the spiritual courts; which act *pro salute animæ* (for

proper method of governing his own household, as he should answer for the souls committed to his charge at the great day: and it was not the law of England, so much as the law of God, that was supposed to give him this wholesome means of fulfilling his responsibilities, just as it admonished the parent not to spare the rod. The only rule of the common law bearing on the subject was that which denied to the wife as well as the child an action for assault and battery, which any stranger might bring for such a correction. That rule of the common law remains unchanged so far as England and most of our American states are concerned to the present day. But in the "Body of Liberties," enacted by the Gen. Court of Mass., A. D. 1641, which was probably the first colonial legislation that exercised any considerable influence upon the development of American law, it was expressly provided that: "80. Every married woman shall be free from bodily correction or stripes by her husband, unless it be in his own defense upon her assault. If there be any just cause of correction, complaint shall be made to authority assembled in some court, from which only she shall receive it."

No doubt many of the diversities between American and English common law which are usually accounted for by mere changes of custom might be traced back to distinct legislation of the colonies. But the denial of any common law extending over all the states prevents us from reasoning from these colonial statutes to other states. If the common law, as we now understand it, had been the foundation of Blackstone's remark, it should have been made in the present tense and not in the preterit. It was only because Blackstone's conception of his theme included "ethics or natural law," that he stated a rule of personal conduct with which the common law, in our sense, had nothing to do: and it is a change in ethics, and in the teachings of the church, not in the common law, that has done away with it.—HAMMOND.

2 Marriage in the ecclesiastical law.—The law of marriage as laid down in our older books is subject to some peculiar difficulties, beside those common to all older law. Much of it was formed in the spiritual courts, which had exclusive jurisdiction of the subject (except so far as property rights grew out of it), and many rules now accepted in America as part of the common law were really formed in these courts, which in most respects are treated as of no common-law authority. (1 Bishop on Marriage and Divorce, §§ 56, 58, 68, 71.) The court of equity had no jurisdiction whatever of the subject. (1 Bishop on Marriage and Divorce, § 69, n. 6.) The legality of a marriage shall never be

the welfare of the soul).<sup>a</sup> And, taking it in this civil light, the law treats it as it does all other contracts: allowing it to be good and valid in all cases, where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

§ 584. b. Consent of the parties.—<sup>[434]</sup> First, they must be *willing* to contract. "*Consensus non concubitus, facit nuptias*

<sup>a</sup> Salk. 121.

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agitated in equity, especially after sentence in the spiritual court, although the proceedings in the spiritual court were only faint and collusive. (Halfeld v. Halfeld, MS. case, 1715; cited, 5 Vin. Abr. 262, tit. "Marriage," G. 8. Cf. Burtis v. Burtis, Hopk. Ch. 557.)

The common-law courts could issue a writ of prohibition to the spiritual courts when they exceeded their jurisdiction, or otherwise transgressed the law of the land; but otherwise had to recognize their judgments as conclusive upon such questions as *unques accoupli in loied mat.* marriage or no marriage, etc.

As a rule, the church courts throughout the middle ages held that there could be no lawful marriage without the sanction of the church, and that wherever that sanction was regularly given, the marriage was indissoluble and even incontestable in the lay tribunals. Hence the common-law courts recognized many marriages as binding that would not now be considered so, because there had been an actual ceremony, and no question of it in the spiritual courts. It is even said that if a man espouse his mother, they are *baron* and *feme* until it is defeated (4 Viner [340], 35; citing, Y. B. 9 Hen. VI, 34); or his sister. (4 Viner [340], 35; citing Y. B. 39 Edw. III, 31 b.) So if a priest take wife, or a nun take husband, impediments that then rated among the highest (Viner, *ubi supra*); but in Comyn will be found rulings the other way. (B. & F. B. 6.) If an idiot *a nativitate* take wife, they are *baron* and *feme*, and their issue legitimate. (Viner, citing MS. case of Still v. West, 3 Jac.) About the only point on which the common-law courts assumed to treat a marriage as null, without reference to the court Christian, was the case of a prior undissolved marriage. (Viner, B. & F. A. 2; Comyn B. & F. B. 6.)

As the common-law courts in England had no jurisdiction of marriage or divorce, it becomes a question whether those of America can act on the precedents of the ecclesiastical courts in such matters, as common-law authority. The leading case in the negative is Burtis v. Burtis, 1 Hopk. Ch. 557, 14 Am. Dec. 563, where Sanford, Ch., held that the ecclesiastical law of England was no part of the common law, and never adopted as such in New York, and consequently that the only causes of divorce in New York were those given by statute; and he refused a divorce for impotence because not given by statute.



(Consent, not cohabitation, makes the marriage),”<sup>3</sup> is the maxim of the civil law in this case:<sup>b</sup> and it is adopted by the common lawyers,<sup>c</sup> who indeed have borrowed (especially in ancient times) almost all their notions of the legitimacy of marriage from the canon and civil laws.

<sup>b</sup> Ff. 50. 17. 30.

<sup>c</sup> Co. Litt. 33.

(See, also, *Hamaker v. Hamaker*, 18 Ill. 137, 65 Am. Dec. 705.) *Contra*, *Crump v. Morgan*, 3 Ired. Eq. 91, 40 Am. Dec. 447, holds that the civil and canon laws as administered in the ecclesiastical courts are part of the common law (citing 1 Bl. Comm. 79; Hale Hist. Com. Law, 27, 32), and adopted by us with it, in testamentary and matrimonial causes. (*Redmond v. Collins*, 4 Dev. 330, 27 Am. Dec. 208; *Wightman v. Wightman*, 4 Johns. Ch. 343.) A third view is possible; that even though the English precedents are common law, yet they are set aside by the statutes of a state “which have virtually repealed the whole body of the ecclesiastical and common law on the subject,” as was said by that great judge, Lumpkin, C. J., in *Brown v. Westbrook*, 27 Ga. 102, 106, quoted by Bishop in 1 Marriage and Divorce, 137.—HAMMOND.

3 *Consensus non concubitus facit nuptias*.—This maxim has so often been quoted as proving the binding force of a mere marriage by consent, without form, that it is worth while to inquire into its origin and true meaning. (For such quotations, see 2 Kent, Comm., 86; Bishop on Marriage and Divorce.) Schouler on Domestic Relations, section 25, criticises by implication former writers for assuming that the *consensus* means mere volition: he would interpret it by “a simple expression of mutual consent and no more.” But does this improve the matter?

The maxim is usually quoted from L. 30 Dig. de Regulis Juris, where it stands as above, credited to Ulpianus, lib. 36, ad Sabinum. But it is found in another place (L. 15 Dig. de cond. et dem. 15, 1, credited to lib. 35, of same work, no doubt a mere error in the one number or the other) and here we have the context from which we learn what Ulpian really meant by it. “When a legacy has been left under this condition, *if married in the family*, the condition seems performed as soon as the wife is led home, although she may not have yet come into her husband’s bed-chamber, for not *concubitus*, but *consensus* makes the marriage.”

“Led home” (*ducta*) might be translated by “as soon as the ceremony is performed,” for it evidently refers to the solemn procession from the bride’s home to that of the husband, which was the most public part of the rite. Ulpian’s meaning evidently is that the ceremony, evidencing the consent of parties, is a complete marriage, even before it is consummated by intercourse. The passage with its context shows this; still more when read in connection with the numerous other passages defining the same word; *nuptias contrahunt justas qui secundum præcepta legum coeunt* (Inst. tit. de Nuptiis pr.) and those which require the consent of all *qui coeunt, quorumque in potestate sunt*.

§ 585. **c. Capacity of the parties.**—Secondly, they must be *able* to contract. In general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities, and incapacities. What those are, it will here be our business to inquire.

§ 586. (1) **Disabilities** — (a) **Canonical disabilities.**—Now, these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court; but these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are pre-contract; consanguinity, or relation

(L. 2 D. *de ritu nupt.* and others collected by Pothier, *Pandectæ*, lib. 1, tit. 17, cap. 4, § 1, art. 2, par. 379, etc.) The same doctrine is now held to be the law in Scotland, where the Roman law has preserved a more direct influence than in England or the United States. So stated by Lord Campbell in *Hamilton v. Hamilton*, 9 Clark & F. 326.—HAMMOND.

**Marriage as a contract.**—The conception of marriage as a contract is purely modern, unknown to either Germanic or Roman ancient law. Its popularity probably dates only from Donellus, *Com.*, lib. 13, c. 18; Glück, lib. 23, tit. 2, p. 122. The Romans never applied the term *contractus* to this or any other institute of the *jus personarum*. Donellus acknowledges this, but makes a formal argument from the phrase *nuptias contrahi* (*Inst. de Nuptiis*), and the text calling marriage *societas*, that marriage is a kind of partnership, and like all partnerships belongs to the *consensual* contracts. The French *contrat de mariage* is a marriage settlement, not the marriage itself. (Glück, p. 123.) Even the *coemptio* was not a contract between the married parties. (Gaius, i. 113.) The derivation of our wedlock from *wed* might seem to identify it with contract; but *wed* was not a contract proper; it was only the conception out of which the German form of contract subsequently grew.

In England it is now settled *doctrine* that a celebration was always an essential requisite of valid marriage, even before the statutory requirement of 26 Geo. II, c. 33. (Reg. v. Millis, 10 Clark & F. 534, where the subject is discussed very fully.) But the historical fact is clearly otherwise, and we know that for centuries in England the same rule prevailed as in other Catholic countries, which made the marriage binding without religious celebration until the council of Trent. (*Dalrymple v. Dalrymple*, 2 Hagg. Ecc. 54; *Hallett v. Collins*, 10 How. 174.) And it is said that the courts in Canada differ from the House of Lords on this point. (*Breakey v. Breakey*, 2 Up. Can. Q. B. 349.)

"Marriage is more than a contract. It is not a mere matter of pecuniary consideration. It is a great public institution, giving character to our whole civil polity." (Per Stewart, J., in *Noel v. Ewing*, 9 Ind. 37.) It is a status, a domestic relation resulting from a consummated contract to marry. (Ditson

by blood; and affinity, or relation by marriage; and some particular corporal infirmities. And these canonical disabilities are either grounded upon the express words of the divine law, or are consequences plainly deducible from thence: it therefore being sinful in the persons, who labor under them, to attempt to contract matrimony together, they are properly the object of the ecclesiastical magistrate's coercion; in order to separate the offenders, and inflict penance for the offense, *pro salute animarum* (for the welfare of their souls). But such marriages not being void *ab initio* (from the beginning), but voidable only by sentence of separation, they are esteemed valid to all civil purposes, unless such separation is actually made during the life of the parties. For, after the death of either of them, the courts of common law will not suffer the spiritual court to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties.<sup>d</sup> And therefore when a man had married his first wife's sister,<sup>4</sup> and after her death the bishop's court was proceeding [435] to annul the marriage and bastardize the issue, the court of king's

<sup>d</sup> *Ibid.*

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v. Ditson, 4 R. I. 87; *People v. Darnell*, 25 Mich. 247.) Therefore, "to give jurisdiction in a divorce suit, the plaintiff must be a resident of the state where the divorce is obtained. This fact gives jurisdiction of [his] person, and renders the divorce (notice having been given to the defendant by publication or otherwise) valid as to the plaintiff; and being valid as to one, public policy demands that it should be valid as to both parties." (Per Perkins, C. J., in *State v. Hood*, S. C. Indiana; 9 Ch. L. N. 376, citing *Falen v. Falen*, 2 Blackf. 407; *Jenners v. Jenners*, 24 Ind. 355; *Ewing v. Ewing*, 24 Ind. 468; *Ditson v. Ditson*, 4 R. I. 87.)—HAMMOND.

<sup>4</sup> **Deceased wife's sister.**—Before the 28th August, 1907 (*Deceased Wife's Sister's Marriage Act, 1907*), a marriage with a deceased wife's sister or half-sister was void as being within the prohibited degrees of affinity. It is now provided that no such marriage, whether contracted before or after that date, within the realm or without, shall be deemed to have been or shall be void or voidable as a civil contract by reason only of such affinity, provided that in case any such marriage was, before the 28th August, 1907, annulled, or that either party thereto, after the marriage and during the life of the other party, did before that date lawfully marry another person, it is to be deemed to have become void upon and after the day on which it was so annulled, or on which either party so lawfully married another person.—HALSBURY, 16 *Laws of Eng.* 284.

bench granted a prohibition *quoad hoc* (as to this); but permitted them to proceed to punish the husband for incest.<sup>e</sup> These canonical disabilities being entirely the province of the ecclesiastical courts, our books are perfectly silent concerning them. But there are a few statutes, which serve as directories to those courts, of which it will be proper to take notice. By statute 32 Hen. VIII, c. 38 (Marriage, 1540), it is declared, that all persons may lawfully marry, but such as are prohibited by God's law; and that all marriages contracted by lawful persons in the face of the church, and consummate with bodily knowledge, and fruit of children, shall be indissoluble. And (because in the times of popery a great variety of degrees of kindred were made impediments to marriage, which impediments might, however, be bought off for money) it is declared by the same statute, that nothing (God's law except) shall impeach any marriage, but within the Levitical degrees; the furthest of which is that between uncle and niece.<sup>f</sup> By the same statute all impediments, arising from pre-contracts to other persons, were abolished and declared of none effect, unless they had been consummated with bodily knowledge: in which case the canon law holds such contract to be a marriage *de facto*. But this branch of the statute was repealed by statute 2 & 3 Edw. VI, c. 23 (Marriage, 1548). How far the act of 26 Geo. II, c. 33 (Clandestine Marriages, 1753), (which prohibits all suits in ecclesiastical courts to compel a marriage, in consequence of any contract) may collaterally extend to revive this clause of Henry VIII's statute, and abolish the impediment of pre-contract, I leave to be considered by the canonists.<sup>5</sup>

§ 587. (b) Civil disabilities.—The other sort of disabilities are those which are created, or at least enforced, by the municipal

<sup>e</sup> Salk. 548.

<sup>f</sup> Gilb. Rep. 158.

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<sup>5</sup> Civil and canonical disabilities.—Canonical disabilities, as such, have practically disappeared, the inability to procreate children being the only one that remains in that category. The disability arising from precontract had ceased to be any disability at all by virtue of Lord Hardwicke's Marriage Act of 1753 (26 Geo. II, c. 33, repealed and re-enacted on this point by the Marriage Act of 1823). The disabilities resulting from consanguinity and affinity, enumerated by Blackstone as canonical, were made civil disabilities by the Marriage Act, 1835. See 2 Stephen's Comm. (16th ed.), 384.

laws. And, though some of them may be grounded on natural law, yet they are regarded by the laws of the land, not so much in the light of any moral offense, as on account of the civil inconveniences they draw after them. These civil disabilities<sup>6</sup> make the contract void *ab initio* (from the beginning), and not merely voidable; not that they [436] dissolve a contract already formed, but they render the parties incapable of forming any contract at all: they do not put asunder those who are joined together, but they previously hinder the junction. And, if any persons under these legal incapacities come together, it is a meretricious, and not a matrimonial, union.

§ 588. (i) Existing prior marriage.—The first of these legal disabilities is a prior marriage, or having another husband or wife living;<sup>7</sup> in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void:<sup>8</sup> polygamy being condemned both by the law of the New Testament, and the policy of all prudent states, especially in these northern climates. And Justinian, even in the climate of modern Turkey, is express,<sup>9</sup> that “*duas uxores eodem tempore habere non licet* (it is not lawful to have two wives at one time).”

<sup>6</sup> Bro. Abr. tit. Bastardy, pl. 8.

<sup>9</sup> Inst. l. 1. c. 6.

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<sup>6</sup> Except the disability arising from want of age.

<sup>7</sup> Disappearance of spouse.—Continuous absence of one spouse unheard from for seven years (or such term as may be fixed by state law) exempts the other from the penalty of bigamy, but does not make the second marriage lawful. (*Glass v. Glass*, 114 Mass. 563.) *Quere* as to effect of 1 Jac. I, c. 11, 1604, which may be common law in this country.

In some states the marriage is made valid. (Rev. Stats. Ky. 380; *Strode v. Strode*, 3 Bush, 227.) In others the marriage is null only from the time of a decree annulling it. (*Cropsey v. McKinney*, 30 Barb. 47.) And generally when the former spouse disappears and is never heard of again, the presumption in favor of the second marriage will sustain it, even though less than the statutory period has elapsed between the marriages (*Kelly v. Drew*, 12 Allen, 107; *Yates v. Houston*, 3 Tex. 433); and though the party involved may have been the one to blame in the separation. (*White v. Lowe*, 1 Redf. 376.) Very commonly the children of such a marriage are legitimate by statute, though the marriage itself is invalid.—HAMMOND.



§ 589. (ii) **Want of age.**—The next legal disability is want of age. This is sufficient to avoid all other contracts, on account of the imbecility of judgment in the parties contracting; *a fortiori*, therefore, it ought to avoid this, the most important contract of any. Therefore, if a boy under fourteen, or a girl under twelve years of age, marries, this marriage is only inchoate and imperfect; and, when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. This is founded on the civil law.<sup>1</sup> But the canon law pays a greater regard to the constitution than the age of the parties:<sup>k</sup> for if they are *habiles ad matrimonium* (fit for marriage), it is a good marriage, whatever their age may be. And in our law it is so far a marriage, that, if at the age of consent they agree to continue together, they need not be married again.<sup>1</sup> If the husband be of years of discretion, and the wife under twelve, when she comes to years of discretion he may disagree as well as she may: for in contracts the obligation must be mutual;<sup>s</sup> both must be bound, or neither: and so it is, *vice versa*, when the wife is of years of discretion and the husband under.<sup>m</sup>

§ 590. (iii) **Nonconsent of parents.**—[<sup>437</sup>] Another incapacity arises from want of consent of parents or guardians. By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid: and

<sup>1</sup> Leon. Constit. 109.

<sup>1</sup> Co. Litt. 79.

<sup>k</sup> Decretal. l. 4. tit. 2. qu. 3.

<sup>m</sup> *Ibid.*

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<sup>8</sup> **Disagreement to marriage of infant.**—The reason given is hardly a good one, as Professor Christian has pointed out. An infant's right to disown his contract at majority does not prevent it from binding the other party if of full age. The true reason, doubtless, why both had the option to disagree in the case of marriage was that neither party could judge of the infant's fitness or attractiveness as a spouse until the marriageable age was reached. In an age when the espousals were often made in early childhood, it was but just that either party should have an opportunity of withdrawal when the child had grown up. It would have been a doubtful favor to the infant, especially if a female, to compel the adult to marry her when her person or disposition did not please him.—HAMMOND.

this was agreeable to the canon law. But, by several statutes,<sup>n</sup> penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns (which may give notice to parents or guardians) or without a license, to obtain which the consent of parents or guardians must be sworn to. And by the statute 4 & 5 Ph. & M., c. 8 (Abduction, 1558), whosoever marries any woman child under the age of sixteen years, without consent of parents or guardians, shall be subject to fine, or five years' imprisonment: and her estate during the husband's life shall go to and be enjoyed by the next heir. The civil law, indeed, required the consent of the parent or tutor at all ages; unless the children were emancipated, or out of the parents' power:<sup>o</sup> and if such consent from the father was wanting, the marriage was null, and the children illegitimate;<sup>p</sup> but the consent of the mother or guardians, if unreasonably withheld, might be redressed and supplied by the judge, or the president of the province:<sup>q</sup> and if the father was *non compos*, a similar remedy was given.<sup>r</sup> These provisions are adopted and imitated by the French and Hollanders, with this difference: that in France the sons cannot marry without consent of parents till thirty years of age, nor the daughters till twenty-five;<sup>s</sup> and in Holland, the sons are at their own disposal at twenty-five, and the daughters at twenty.<sup>t</sup> Thus hath stood, and thus at present stands, the law in other neighboring countries. And it has lately been thought proper to introduce somewhat of the same policy into our laws, by statute 26 Geo. II, c. 33 (Clandestine Marriages, 1753), whereby it is enacted that all marriages celebrated by license (for banns suppose notice) where either of the parties is under twenty-one (not being [438] a widow or widower, who are supposed emancipated), without the consent of the father, or, if he be not living, of the mother or guardians, shall be absolutely void. A like provision is made as in the civil law, where the mother

<sup>n</sup> 6 & 7 Will. III. c. 6 (Duties on Marriages, 1694). 7 & 8 W. III. c. 35 (Marriage Without Banns, 1695). 10 Ann. c. 19 (Customs and Excise, 1711.)

<sup>o</sup> Inst. 1. 1. § 18.

<sup>p</sup> *Id.* 1. 5. 11.

<sup>q</sup> *Cod.* 5. 4. 1, & 20.

<sup>r</sup> *Inst.* 1. 10. 1.

<sup>s</sup> *Domat. of Dowries.* § 2. *Montesq. Sp. L.* 23. 7.

<sup>t</sup> *Vinnius in Inst.* 1. 1. t. 10.

or guardian is *non compos*, beyond sea, or unreasonably froward, to dispense with such consent at the discretion of the lord chancellor: but no provision is made, in case the father should labor under any mental or other incapacity. Much may be, and much has been, said both for and against this innovation upon our ancient laws and constitution. On the one hand, it prevents the clandestine marriages of minors, which are often a terrible inconvenience to those private families wherein they happen. On the other hand, restraints upon marriages, especially among the lower class, are evidently detrimental to the public, by hindering the increase of people; and to religion and morality, by encouraging licentiousness and debauchery among the single of both sexes; and thereby destroying one end of society and government, which is *concubitu prohibere vago* (to forbid a promiscuous intercourse). And of this last inconvenience the Roman laws were so sensible, that at the same time that they forbade marriage without the consent of parents or guardians, they were less rigorous upon that very account with regard to other restraints: for, if a parent did not provide a husband for his daughter, by the time she arrived at the age of twenty-five, and she afterwards made a slip in her conduct, he was not allowed to disinherit her upon that account; "*quia non sua culpa, sed parentum, id commisisse cognoscitur* (because she was considered to have committed it, not through her own fault, but that of her parents)." <sup>u</sup>

§ 591. (iv) **Mental incapacity.**—A fourth incapacity is want of reason; <sup>9</sup> without a competent share of which, as no other, so neither can the matrimonial contract, be valid.<sup>w</sup> It was formerly adjudged that the issue of an idiot was legitimate, and consequently

<sup>u</sup> Nov. 115. § 11.

<sup>w</sup> 1 Roll. Abr. 357.

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<sup>9</sup> **Insanity as avoiding marriage.**—That insanity makes the marriage void and null *ab initio* is clearly shown by Chancellor Kent in *Wightman v. Wightman*, 4 Johns Ch. 343; *Ewell's L. C. in Coverture*, 602, though at the same time he holds that the nullity should be declared by some court of appropriate jurisdiction "for the sake of the good order of society, and the quiet and relief of the party," and holds also that the court of chancery is the appropriate court. Whether that court have power to declare a marriage *null* in cases where the statute gives no ground of divorce, he leaves undetermined.

that his marriage was valid. A strange determination, since consent is absolutely requisite to matrimony, and neither idiots nor lunatics are capable of consenting to anything. And therefore the civil law judged much more sensibly when it made such deprivations of reason a previous impediment, [439] though not a cause of divorce, if they happened after marriage.\* And modern resolutions have adhered to the reason of the civil law, by determining<sup>7</sup> that the marriage of a lunatic, not being in a lucid interval, was absolutely void. But as it might be difficult to prove the exact state of the party's mind at the actual celebration of the nuptials,

\* Ff. 23. tit. 1. l. 8, & tit. 2. l. 16.

<sup>7</sup> Morrison's Case. Coram. Delegat.

As to the use of the terms "void" and "voidable," see Professor Ewell's note, page 609.

Insanity at the time of marriage is not necessarily fatal to the *status*, where the cohabitation is continued. If the party recovers sanity, the cohabitation will affirm the invalid contract without any new solemnization. (Campbell v. Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570; Cole v. Cole, 5 Sneed, 57, 70 Am. Dec. 275. Allis v. Billings, 6 Met. 415, 39 Am. Dec. 744, though quoted to this point, is a case on the ratification of a deed. It may be read for the criticism on "void" and "voidable.")

What degree of insanity is sufficient to avoid the marriage? The old decisions that *no* degree was sufficient for the purpose rested unquestionably on the doctrine, that marriage was a sacrament and fell with it. (True v. Ranney, 21 N. H. 52, 53 Am. Dec. 165.) Some cases go to the other extreme and hold that a valid marriage may be formed in a condition that would invalidate any other contract. (Ex parte Glen, 4 Des. (S. C.) 546.) But in England it seems settled that the only question for the court is whether the mind of the contracting party was diseased or not at the time of the contract; if the evidence establishes that fact, the court will not enter into the consideration of the extent of the derangement. If disease is shown, the court has no means of gauging the extent of the derangement consequent upon it, or of affirming the limits within which the disease might operate to obscure or divest the mental power. (Peaty v. Peaty, L. R. 1 P. D. 335.) But some American cases hold that the question is whether the party is sane enough to marry: that the court *must* look to the effect of the disease in this particular consequence. "It is not altogether a question of brain quantity, or of brain quality in the abstract; . . . it is whether the alleged insane acted rationally regarding marriage, and the particular marriage; not indeed whether he acted wisely, but whether he acted from the impulse of a mind *sane as respects the thing done*." (1 Bishop on Marriage and Divorce, §§ 128, 129, and cases cited, few of which, however, discriminate between general incompetence and incompetence *quoad hoc*. See, also, cases collected 44 Am. Dec. 55, 56.)—HAMMOND.

upon this account (concurring with some private family<sup>2</sup> reasons) the statute 15 Geo. II, c. 30 (Marriage of Lunatics, 1741), has provided, that the marriage of lunatics and persons under frenzies (if found lunatics under a commission, or committed to the care of trustees by any act of parliament) before they are declared of sound mind by the lord chancellor or the majority of such trustees, shall be totally void.

§ 592. *d. Celebration of marriage.*—Lastly, the parties must not only be willing and able to contract, but actually must contract themselves in due form of law,<sup>10</sup> to make it a good civil marriage. Any contract made, *per verba de præsentī*, or in words of the present tense, and in case of cohabitation *per verba de futuro* (in

<sup>2</sup> See private acts 23 Geo. II. c. 6 (1749).

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<sup>10</sup> *Marriage formal or by reputation.*—The contract of marriage is tripartite, the husband, the wife, and the state being parties thereto; and it can neither be entered into nor dissolved except by the consent of and in the manner prescribed by the state. (It necessarily follows that no admission by either party to the contract, however conclusive upon such party, can be conclusive upon the state in a suit for dissolution of the contract.) (Summerbell v. Summerbell, 37 N. J. Eq. 603, 605; Roche v. Washington, 19 Ind. 53, 81 Am. Dec. 376; Cabell v. Cabell, 1 Met. (Ky.) 319.)

Marriage is not merely a civil contract, but something more. “The two parties whose consent is indispensable, *with the consent of the state*, whose concurrence also is indispensable, proceed to take upon themselves obligations of a solemn and indissoluble character.” (Per Gantt, J., in Dyer v. Brannock, 2 Mo. App. 432, 449. The passage of this opinion, pp. 444–449, should be read as an admirable statement of the true legal nature of marriage as a relation. See, also, to same effect, remarks of Wright, J., in Lucas v. Sawyer, 17 Iowa, 522, and cases cited.)

The earlier American cases usually hold that there must be a formal marriage before a clergyman or civil officer (except in the case of Quakers, Jews, etc.), though his presence seems to be all that the law required, and no form or ceremony was essential. (Milford v. Worcester, 7 Mass. 48, 1807.) A few states still adhere to the requirement of a formal marriage. (Commonwealth v. Munson, 127 Mass. 459, 34 Am. Rep. 411; State v. Hodgskins, 19 Me. 155, 36 Am. Dec. 742; Estill v. Rogers, 1 Bush (Ky.), 62; Robertson v. State, 42 Ala. 509; Port v. Port, 70 Ill. 484.) But the United States supreme court holds that this is not a requirement of the common law, and that state statutes are not inconsistent with it, unless they go further than to prescribe a form of marriage, by *expressly* avoiding marriages where that form is not observed. (Meister v. Moore, 96 U. S. 76, 24 L. Ed. 826. The same question had been



words of the future tense) also, between persons able to contract, was before the late act deemed a valid marriage to many purposes; and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiæ* (in the face of the church). But these verbal contracts are now of no force, to compel a future marriage.<sup>a</sup> Neither is any marriage at present valid that is not celebrated in some parish church or public chapel, unless by dispensation from the Archbishop of Canterbury. It must also be preceded by publication of banns, or by license from the spiritual judge. Many

<sup>a</sup> Stat. 26 Geo. II. c. 33 (Clandestine Marriages, 1753).

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left unanswered by an equal division of the court in *Jewell's Lessee v. Jewell*, 1 How. 219, 11 L. Ed. 108.)

The courts of some states (e. g., New York, Missouri) have gone very far in indulging a presumption of marriage from cohabitation and reputation, declarations of the parties, etc., even where there was no pretense of showing an actual ceremony or formal contract of marriage. (*Fenton v. Reed*, 4 Johns. 52, 4 Am. Dec. 244; *Jackson v. Claw*, 18 Johns. 345; *Clayton v. Wardell*, 4 N. Y. 230; *O'Gara v. Eisenlohr*, 38 N. Y. 296; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460.) Note that in most of these cases the question arose after the death of one party, or both, and the cohabitation had lasted until death, and the rights of children or of the survivors were to be protected. *Aliter* as between the parties themselves. (See *Collins v. Collins*, 71 N. Y. 269, 80 N. Y. 1.) Such a presumption has been made even where it was clear that the parties cohabited at first without marriage (first two cases above; *Rose v. Clark*, 8 Paige (N. Y.), 574), or where there was a subsequent actual marriage (*Starr v. Peck*, 1 Hill (N. Y.), 270; *Betsinger v. Chapman*, 88 N. Y. 487); and it is not necessary to show any precise time to which the presumption of a change from illicit to lawful connection attaches. (*Caujolle v. Ferrie*, 23 N. Y. 90; *Badger v. Badger*, 88 N. Y. 547, 42 Am. Rep. 263.) The same presumption from acts abroad or at sea, where there is no evidence of law different from that of the *forum* (even though it is known to be so). (*Hynes v. McDermott*, 82 N. Y. 41, 37 Am. Rep. 538.)

Cohabitation and reputation of being husband and wife must *both* exist before a presumption of marriage can be raised. Either alone is not sufficient for that purpose. (*Cargile v. Wood*, 63 Mo. 501, 513; following, 1 Bishop on Marriage and Divorce, § 438; 1 Greenleaf on Evidence, § 107. This was the case of a child born in 1861 of parents who had cohabited since 1853, and had been indicted for adultery in 1859, the father pleading guilty.) And where the cohabitation is at first notoriously illicit, it will not support such a presumption. (Lord Eldon, in *Cunningham v. Cunningham*, 2 Dow. P. C. 482.) If it is alleged that it subsequently changed to a lawful one, the burden of proof is on the party to show at what time it became lawful. (*Clayton v.*

other formalities are likewise prescribed by the act; the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage, that it be performed by a person in orders;<sup>b</sup> though the intervention of a priest to solemnize this contract is merely *juris positivi* (of positive law), and not *juris naturalis aut divini* (of natural or divine law): it being said that Pope Innocent the Third was the first who ordained the celebration of marriage in the church;<sup>c</sup> before [440] which it was totally a civil contract.<sup>11</sup> And, in the times of the grand rebellion, all

<sup>b</sup> Salk. 119.

<sup>c</sup> Moor. 170.

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Wardell, 4 N. Y. 230; Matter of Taylor, 9 Paige (N. Y.), 611; Rose v. Clark, 8 Paige (N. Y.), 574.) But an executory contract of marriage followed by cohabitation does not establish a marriage at common law (Cheney v. Arnold, 15 N. Y. 345, 69 Am. Dec. 609; Duncan v. Duncan, 10 Ohio St. 181; Queen v. Millis, 10 Clark & F. 534; Beamish v. Beamish, 9 H. L. Cas. 274); though it may be *prima facie* evidence of a marriage *de præsenti*. (Peck v. Peck, 12 R. I. 485, 34 Am. Rep. 702).

There are dicta and even cases which sustain a marriage *per verba de futuro* by a promise to marry, followed by cohabitation. In states where an actual marriage may be presumed from cohabitation there is of course no objection to such an inference of fact from these circumstances. But to argue its validity as a conclusion of law depends on an entire mistake. Such a promise could have a legal effect only in a system where espousals are regarded as legally binding, as they were in the canon law. (C. 30, X. *de sponsalibus*, iv. 1; C. 1, 3, 6, X. *de cond. appos.* iv. 5.) That law consistently gave an action for the enforcement of the promise, though if the party refused to perform it, it did not compel the marriage, but only imposed penance and compensation. (C. 10, 17, 22, *de spons.* iv. 1.) Only when cohabitation had followed, it treated the marriage as already complete. Even if the doctrine had passed from the church courts to those of the common law in England, it would have been abrogated by the marriage act; and in this country there has never been any logical basis for it, although Mr. Bishop, in *Marriage and Divorce*, sections 253, 265, seems to hold otherwise.—HAMMOND.

11 Absence of ceremony in canonical marriage.—The one contract, which, to our thinking, should certainly be formal, had been made the most formless of all contracts. It is true that from a very early time the church had insisted that Christian spouses should seek a blessing for their union, should acknowledge their contract publicly and in face of the church. The ceremonies required by temporal law, Jewish, Roman or Germanic, were to be observed, and a new religious color was given to those rites; the veil and the ring were sanctified. In the little Anglo-Saxon tract which describes a betrothal—without any good warrant it has been treated as belonging to the laws of King

marriages were performed by the justices of the peace; and these marriages were declared valid, without any fresh solemnization, by statute 12 Car. II, c. 33 (Confirmation of Marriages, 1660). But, as the law now stands, we may upon the whole collect, that no marriage by the temporal law is *ipso facto void*, that is celebrated by a person in orders,—in a parish church or public chapel (or elsewhere, by special dispensation)—in pursuance of banns or a license,—between single persons,—consenting,—of sound mind,—and of the age of twenty-one years;—or of the age of fourteen in males and twelve in females, with consent of parents or guardians,

Edmund—we see the mass priest present; but the part that is assigned to him is subordinate. After we have read how a solemn treaty is made between the bridegroom and the kinsmen of the bride, we read how at the delivery, the tradition, of the woman, a mass priest should be present, and confirm the union with God's blessing. But the variety of the marriage customs current among the Christian nations prevented the church from singling out any one rite as essential. From drastic legislation she was withstrained by the fear that she would thereby multiply sins. It was not well that there should be marriages contracted in secret and unblessed by God; still, better these than concubinage and unions dissoluble at will. And so, though at times she seemed to be on the point of decreeing that the marriage contracted without a due observance of religious ceremonies is no marriage at all, she held her hand. For example, soon after the Norman Conquest, Lanfranc issued a constitution condemning in strong words him who gives away his daughter or kinswoman without a priestly benediction. He says that the parties to such an union are fornicators; but it is very doubtful whether he says or means that the union is no indissoluble marriage. At all events, in the twelfth century, though the various churches have by this time evolved marriage rituals—rituals which have borrowed many a phrase and symbol from ancient Germanic custom—it becomes clear that the formless, the unblessed, marriage, is a marriage. In 1200 Archbishop Hubert Walter, with a salvo for the honor and privilege of the Roman church, published in a council at Lambeth a constitution which declared that no marriage was to be celebrated until after a triple publication of the church's ban. No persons were to be married save publicly in the face of the church and in the presence of a priest. Persons who married in other fashion were not to be admitted into a church without the bishop's license. At the Lateran Council of 1215 Innocent III extended over the whole of western Christendom the custom that had hitherto obtained in some countries of "publishing the banns of marriage," that is, of calling upon all and singular to declare any cause or just impediment that could be urged against the proposed union. From that time forward a marriage with banns had certain legal advantages over a marriage without banns, which can only be explained below when we speak of "putative" marriages. But still the formless, the unblessed, marriage is a

or without it, in case of widowhood. And no marriage is *voidable* by the ecclesiastical law, after the death of either of the parties; nor during their lives, unless for the canonical impediments of pre-contract, if that indeed still exists; of consanguinity; and of affinity, or corporal imbecility, subsisting previous to the marriage.

§ 593. e. **Dissolution of marriage.**—I am next to consider the manner in which marriages may be dissolved; and this is either by death, or divorce.

§ 594. (1) **Divorce**—(a) **Divorce a vinculo.**—There are two kinds of divorce, the one total, the other partial;<sup>12</sup> the one a *vin-*

marriage. This seems the origin of the belief that Innocent III “was the first who ordained the celebration of marriage in the church.” This belief is stated by Blackstone, Comm., I, 439, and was in his time traditional among English lawyers. Apparently it can be traced to Dr. Goldingham, a civilian who was consulted in the case of *Bunting v. Lepingwell* (Moore’s Reports, 169). See Friedberg, *Recht der Eheschliessung*, 314.)—POLLOCK & MAITLAND, 2 Hist. Eng. Law (2d ed.), 369.

<sup>12</sup> **The law of divorce.**—Divorce was entirely unknown to the courts of common law in England until long after the latest date at which the American law diverged from the parent system. The only divorce from the bond of marriage was given by the legislative power by a private bill in each case. The ecclesiastical courts granted divorce from the bond of matrimony only in cases where the marriage was originally null, and divorce from bed and board only (therefore without the privilege of marrying again to either party) for adultery and other causes. In the United States divorces were formerly granted by acts of the state legislatures; but in most of the states this is now forbidden by constitutional provision, and the power to dissolve the bonds of matrimony is in the courts of law by a general grant from the lawmakers. There being no spiritual courts in the American colonies, the legislatures possessed the only power that could at first be invoked to dissolve a marriage, and divorce by special act was the original rule in most, if not all the states. And it is still under authority derived from the legislature by general act that the courts obtain the power to dissolve a marriage regularly formed. A legislative divorce is not unconstitutional as impairing the obligation of a contract (Cooley on Const. Lim. 280), nor as retrospective. (Bishop on Marriage and Divorce, §§ 665–679.) The objection that it is in its nature an exercise of judicial power, and therefore forbidden to legislatures, is well answered by Bishop, sections 680–686. Its plausibility depends on the theory of divorce adopted, to be discussed hereafter.

To define *divorce* properly we must determine first, whether distinction is to be made between suits for nullity of marriage and divorce, as is done in some

*culo matrimonii* (from the bond of matrimony), the other merely *a mensa et thoro* (from bed and board). The total divorce, *a vinculo matrimonii*, must be for some of the canonical causes of impediment before mentioned; and those existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbe-

states. (E. g., Iowa Code of 1873, § 2231 et seq.) Suits for nullity imply marriages void from the beginning, though even in such cases the statute may provide that the children be deemed legitimate. (Iowa Code of 1873, § 2234; and n. 2, *post*, p. \*446.) The distinction has an important bearing on the question of jurisdiction also. In this country the power to dissolve the marriage tie must depend on positive statute; but jurisdiction to declare a pretended marriage null might be sustained on general principles, in a court of equity, without statutory grant. On the other hand, the distinction is encumbered with all the difficulties attaching to void and voidable marriages, and most statutes disregard it, treating all cases where the interposition of the court is requisite as cases of divorce.

When *divorce* and *nullity* are kept distinct, the logical consequence is that the former is only admissible where there has been a valid marriage, or a marriage at least capable of validation, though at first voidable. And in the latter case, if neither party averred that the marriage was void, the decree of divorce between them must be held to confirm its prior existence, so that it never could be avoided afterward. (Bishop on Marriage and Divorce, 116; Guest v. Shipley, 2 Hagg. Const. 321; Williams v. Dormer, 16 Jur. 366; 9 Eng. L. & Eq. 598.) American courts have followed this reasoning so far as to hold that a divorce suit cannot be maintained without proof of a valid marriage. (See Collins v. Collins, 71 N. Y. 269, 80 N. Y. 1.) But this seems to be arbitrary when severed from its logical basis, as it is in most American states where divorce and nullity are confounded, and the former granted in every case of void as well as voidable marriage. The only logical ground here is to abandon the distinction altogether, and grant divorce in all cases where a marriage in fact has existed. Another distinction is that no alimony can properly be allowed in suits for nullity; it is properly incident to divorce suits only, which presuppose a marriage, at least *de facto*, with its consequent disabilities and want of independent means (Chase v. Chase, 55 Me. 21; North v. North, 1 Barb. Ch. 241; Bartlett v. Bartlett, Clarke (N. Y.), 460); except *pendente lite*, when the wife defends, or has been misled by a formal marriage. (Cooper v. Mayhew, 40 Mich. 528; Cray v. Cray, 32 N. J. Eq. 25, 28.) In the latter case some courts will grant her compensation. (Griffin v. Griffin, 47 N. Y. 134, 142.)

Wherever there has been the form of marriage, a divorce suit may be maintained, and a decree of divorce (or nullity) obtained. The only question is whether the party may safely dispense with it and act as free. But even the courts that have gone furthest in recognizing marriage by cohabitation, etc.,



cility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio* (from the beginning); and the parties are therefore separated *pro salute animarum* (for the welfare of their souls): for which reason, as was before observed, no divorce can be obtained, but during the life of the parties. The issue of such marriage as is thus entirely dissolved are bastards.<sup>d</sup> [But see note 2, p. \*446, and note 12, p. \*457.]

<sup>d</sup> Co. Litt. 235.

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without form, require a formal marriage as a condition of a decree of divorce. (Collins v. Collins, *supra*.) Is this consistent with the other position? If so, what is the legal situation of parties who have fully committed themselves by their conduct to the position of husband and wife without a formal marriage? They seem to be the only American (and Protestant) citizens to whom the alienable right of free divorce is denied.

The theories of divorce found in our books are irreconcilable, and must be reduced to three principal forms: (1) That which regards divorce as essentially the rescission or dissolution of the marriage contract, granted to one party as a relief against the other. The jurisdiction upon this theory depends on the same principles as in other cases of contract, and especially on jurisdiction over the defendant. But this may result in two different rules: (a) That which holds the place of marriage or *lex loci contractus* to be the only proper *forum*. This is the English rule, forbidding the recognition of any foreign divorce of an English marriage (see Chief Justice Gibson's criticisms on it, 32 Am. Dec. 769, 770). (b) That which holds the domicile of defendant at the time of suit to be the proper one, as in the Scotch and many American cases, on the general principles of jurisdiction *in personam*. (2) That which regards divorce as the consequence of a delict or wrong committed by one party, inconsistent with the duties of marriage, the jurisdiction depending on the place where the wrong was committed. (Dorsey v. Dorsey, 7 Watts, 349, 32 Am. Dec. 767, and cases cited. Read remark of Gibson, C. J., on p. 770.) (3) That which regards divorce as the consequence of the state's power to determine the status of its citizens; therefore, as in the nature of a suit *in rem*, the jurisdiction depending on the domicile of the plaintiff, the wronged and petitioning party.

"It is plain that every state has the right to determine the *status*, or domestic and social condition of persons domiciled within its territory. (Ditson v. Ditson, 4 R. I. 87; Strader v. Graham, 10 How. 82, 13 L. Ed. 337; Cheever v. Wilson, 9 Wall. 108, 19 L. Ed. 604; Barber v. Root, 10 Mass. 260; Kinnier v. Kinnier, 45 N. Y. 535, 6 Am. Rep. 132.) So it is that every state may determine for itself, for what causes that *status* may be changed or affected, and hence upon what grounds, based upon what acts or omissions of persons holding the relation to each other of marriage, they may be separated, and that relation dissolved; and it may prescribe what legal proceedings shall be had to

§ 595. (b) **Divorce a mensa et thoro.**—Divorce *a mensa et thoro* is when the marriage is just and lawful *ab initio*, and therefore the law is tender of dissolving [441] it; but, for some supervenient cause, it becomes improper or impossible for the parties to live together: as in the case of intolerable ill temper, or adultery, in either of the parties. For the canon law, which the common law follows in this case, deems so highly and with such mysterious reverence of the nuptial tie, that it will not allow it to be unloosed for any cause whatsoever, that arises after the union is made. And this is said to be built on the divine revealed law; though that expressly assigns incontinence as a cause, and indeed the only cause,

that end, and what courts of its sovereignty shall have jurisdiction of the matrimonial *status* and power to adjudge a dissolution of that relation. All citizens of that state, domiciled within it and owing to it allegiance, are bound by the laws and regulations which it prescribes in that respect. When, without infringement of the constitution of the state, its statutes have conferred upon any of its courts the general power to act judicially upon the matrimonial *status* of its citizens, or of persons within its territorial limits, and to adjudge a dissolution of the relation of husband and wife, then, we take it, such court has jurisdiction of the subject matter of divorce.”—(FOLGER, J., in *Hunt v. Hunt*, 72 N. Y. 227, 28 Am. Rep. 129. And see *People v. Dawell*, 25 Mich. 247, 12 Am. Rep. 260; *Bishop on Marriage and Divorce*, § 720.)

The wife may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity for its exercise, and endures as long as the necessity continues. The proceedings for divorce may be instituted where the wife has her domicile. The place of the marriage, of the offense, and of the domicile of the husband are of no consequence. (Per Swayne, J., 9 Wall. 124, 19 L. Ed. 608, citing *Ditson v. Ditson*. Wife was plaintiff, husband was defendant in case.) The wife's separation of domicile is enough to give the federal courts jurisdiction (to enforce payment of alimony under a state decree, *Barber v. Barber*, 21 How. 582, 16 L. Ed. 226). But her husband's domicile governs her where she unjustifiably refuses to live with him. (*Cheely v. Clayton*, 110 U. S. 701, 28 L. Ed. 298, 4 Sup. Ct. Rep. 328.)

Where a divorce has been granted which prohibits the guilty party from marrying again during the lifetime of the other, it was formerly claimed that this prohibition was binding everywhere. (*Thompson v. Thompson*, 114 Mass. 566.) But the more common doctrine has been that other states would disregard the prohibition as a mere penalty of no extraterritorial effect, and hold a marriage elsewhere valid. (*Thompson v. Thompson*, 114 Mass. 566.) And now in New York it is held that the party under such a prohibition there may go abroad and marry, and return to the state where the prohibition exists, and the marriage will be held valid, at least so far as to sustain a divorce

why a man may put away his wife and marry another.<sup>e</sup> The civil law, which is partly of pagan original, allows many causes of absolute divorce; and some of them pretty severe ones (as if a wife goes to the theater or the public games, without the knowledge and consent of the husband<sup>f</sup>): but among them adultery is the principal, and with reason named the first.<sup>g</sup> But with us in England adultery is only a cause of separation from bed and board:<sup>h</sup> for which the best reason that can be given, is, that if divorces were allowed to depend upon a matter within the power of either the parties, they would probably be extremely frequent; as was the case when divorces were allowed for canonical disabilities, on the mere confession of the parties,<sup>i</sup> which is now prohibited by the canons.<sup>k</sup> However, divorces *a vinculo matrimonii*, for adultery, have of late years been frequently granted by act of parliament.<sup>13</sup>

<sup>e</sup> Matt. xix. 9.

<sup>f</sup> Nov. 117.

<sup>g</sup> Cod. 5. 17. 8.

<sup>h</sup> Moor. 683.

<sup>i</sup> 2 Mod. 314.

<sup>k</sup> Can. 1603. c. 105.

suit against the second spouse (Thorp v. Thorp, 90 N. Y. 602, 43 Am. Rep. 189), and to admit the children thereof to inherit as legitimate. (Moore v. Hegeman, 92 N. Y. 521, 44 Am. Rep. 408.) A fraudulent divorce is of no effect, not even to save a party from the penalty of bigamy. (People v. Dawell, 25 Mich. 247, 12 Am. Rep. 260.)

The requisites of a valid divorce are stated by Wharton on Conflict of Laws, sections 225-239, thus, in accordance with the doctrine last stated above: (1) One of the parties must be domiciled within the jurisdiction, and the wife may acquire an independent domicile for that purpose. The domicile must of course be *bona fide*. (2) The proceedings must be according to the rules of international law prescribed as to foreign judgments. (3) The defendant must be actually notified if he can be found. In Pennsylvania it is held that his *forum* must be sought. (Reel v. Elder, 62 Pa. St. 308, 315, 1 Am. Rep. 414; Colvin v. Reed, 55 Pa. St. 375; 2 West Jur. 229, with note. Dorsey v. Dorsey, 7 Watts (Pa.), 350, 32 Am. Dec. 767, is the leading case.) (4) The place of the marriage or its law is not material. Even in England the *lex loci contractus* no longer prevails. (5) It is immaterial where the offense was committed or the parties resided at that time. (*Aliter* in Pennsylvania, see above cases.) (6) There must be no collusion.—HAMMOND. [This subject is discussed in the light of recent decisions in the chapter on "Conflict of Laws," at the end of Book III.]

<sup>13</sup> **Legislative divorces.**—During all modern times in England to 1858, when the statute 20 & 21 Vict., c. 85, establishing the court for matrimonial causes, went into operation, no marriage could be dissolved by the sentence

§ 596. (i) **Alimony.**—In case of divorce *a mensa et thoro*, the law allows alimony to the wife: which is that allowance which is made to a woman for her support out of the husband's estate; being settled at the discretion of the ecclesiastical judge, on consideration of all the circumstances of the case. This is sometimes called her *estovers*; for which, if he refuses payment, there is (besides the ordinary process of excommunication) a writ at common law *de estoveriis habendis* (of recovering estovers), in order to recover it.<sup>1</sup> It is generally proportioned to the rank and quality of [442] the parties. But in case of elopement, and living with an adulterer, the law allows her no alimony.<sup>m</sup>

§ 597. f. **Legal consequences of marriage.**—Having thus shown how marriages may be made, or dissolved, I come now, lastly, to speak of the legal consequences of such making, or dissolution.

§ 598. (1) **Coverture of wife.**—By marriage, the husband and wife are one person in law:<sup>n</sup> that is, the very being or legal existence of the woman is suspended during the marriage,<sup>14</sup> or at least

<sup>1</sup> 1 Lev. 6.

<sup>n</sup> Co. Litt. 112.

<sup>m</sup> Cowel. tit. Alimony.

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of a court. Hence parliamentary divorces came into use. These divorces were regarded as valid, and the present statutes authorizing judicial dissolutions of marriage are in effect little else than a transferring of the jurisdiction to the courts. The Matrimonial Causes Act of 1857 did not apply to Ireland, and it is only by bill in parliament that divorces can be granted there. Westropp's Divorce Bill, 11 App. Cas. (Eng.) 294.

When this country was settled the legislative bodies were naturally the only authorities with jurisdiction to grant divorces. But this function has been given over to the courts, and in some of the states constitutional provisions prohibit the granting of divorces by the legislature. *Sparhawk v. Sparhawk*, 116 Mass. 315; *State v. Fry*, 4 Mo. 120. It has been held in the supreme court of the United States that a special act of a territorial legislature dissolving the marriage relation between a husband resident in the territory and a nonresident wife was a valid act, and was not rendered invalid by the fact either that there was no cause for divorce or that the defendant was not notified. *Maynard v. Hill*, 125 U. S. 190, 31 L. Ed. 654, 8 Sup. Ct. Rep. 723; 1 Bishop, Mar., Div. & Sep., § 1424 ff; Tiffany, Persons & Dom. Rel. 229.

<sup>14</sup> **Coverture of wife.**—The common law is often criticised for the complete absorption of the wife's legal existence in that of the husband, and the control given to the latter over the wife's property. These criticisms are

is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; and is therefore called in our law-French a *feme covert*, *fœmina viro co-operta*; is said to be *covert-baron*, or under the protection and influence of her husband, her *baron*, or *lord*; and her condition during her marriage is called her *coverture*.<sup>15</sup> Upon this prin-

perhaps just enough, if we compare its rules with our present notions of the true relations between the sexes. But when the critics reproach the English people with injustice toward the female sex according to the ideas of their own time, and assume that there law was peculiar in this respect, they err greatly. How completely its provisions reflected the general sentiment of Christendom at the time they were formed, may be seen by comparing Bodinus (*De Repub. lib. 1, cap. 3*, and especially the last paragraph, page 31), who states the husband's rights of property from civilian authors, almost exactly as the English law does, and even declares that settlements giving the wife control of her own property are contrary to all law, human and divine. (Cf. Kame's *Equity*, p. 151, to same effect in our law.)—HAMMOND.

<sup>15</sup> **Wife's separate domicile.**—"The question raised on the agreed statement of facts is whether a married woman, while the unity of the marriage relation exists undisturbed between them, can acquire a domicile other than that of her husband. In behalf of the plaintiff it is contended that she can. The contention rests on the argument that the common-law status of a married woman, by which her legal existence is suspended during the marriage, or merged in that of her husband (1 Bl. Comm. 442), has largely ceased to obtain in modern times, and especially in this state, where the law recognizes her as having a separate existence and separate rights as to her property, and consequently separate interests. After a careful examination of the authorities, however, we have come to the conclusion that, though a wife may acquire a domicile distinct from that of her husband, whenever it is necessary or proper for her to do so—as, for instance, where the husband and wife are living apart by mutual consent (*In re Florance*, 54 Hun, 328, 7 N. Y. Supp. 578), or where the wife has been abandoned by the husband (*Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282), or for purposes of divorce (*Ditson v. Ditson*, 4 R. I. 87), or, in short, whenever the wife has adversary interests to those of her husband—she cannot acquire such a domicile so long as the unity of the marriage relation continues, notwithstanding that from considerations of health, as in the present case, or of expediency, one of the parties, with the consent of the other, is actually living in a different place from the other. The question was apparently carefully considered in *McClellan v. Carroll* (Tenn. Ch.), 42 S. W. 185. In this case the husband of the defendant Clear, who had formerly resided in Tennessee, had removed to and become a domiciled resident of Missouri. She had remained in Tennessee with the view of retaining a homestead. They had not separated. There was no disagreement between them, and neither had deserted the other. It was held that she was not



ciple, of an union of person in husband and wife, depend almost all the legal rights, duties and disabilities, that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal*.

§ 599. (2) *Transactions between husband and wife.*—For this reason, a man cannot grant anything to his wife, or enter into covenant with her:<sup>o</sup> for the grant would be to suppose her separate existence; and to covenant with her, would be only to covenant with himself: and therefore it is also generally true, that all compacts made between husband and wife, when single, are voided by the intermarriage.<sup>p</sup> A woman, indeed, may be attorney for her husband;<sup>q</sup> for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath anything to his wife by will; for that cannot take effect till the coverture is determined by his death.<sup>r</sup>

§ 600. (3) *Liabilities of husband.*—The husband is bound to provide his wife with necessaries by law, as much as himself: and if she contracts debts for them, he is obliged to pay them;<sup>s</sup> but, for anything besides necessaries, he is not chargeable.<sup>t</sup> Also if a wife elopes, and lives with another man, the husband is [443] not

<sup>o</sup> *Ibid.*

<sup>p</sup> Cro. Car. 551.

<sup>q</sup> F. N. B. 27.

<sup>r</sup> Co. Litt. 112.

<sup>s</sup> Salk. 118.

<sup>t</sup> 1 Sid. 120.

a resident of Tennessee, and could not claim a homestead, for the reason that, where the relation of husband and wife exists, and the unity of the marriage state is maintained, the domicile of the husband is, in legal contemplation, that of the wife, even though the actual residence of the husband may be in one place and that of the wife in another. And see *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Harrison v. Harrison*, 20 Ala. 629, 56 Am. Dec. 227; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125; *Hairston v. Hairston*, 27 Miss. 704, 61 Am. Dec. 530; *Harding v. Alden*, 9 Greenl. (Me.) 140, 23 Am. Dec. 549; *Dougherty v. Snyder*, 15 Serg. & R. 84, 16 Am. Dec. 520. While the language of the court in *Shute v. Sargent*, 67 N. H. 305, 36 Atl. 282, is broad enough to support the plaintiff's contention as to the power of the wife to acquire a separate domicile for all purposes, the case shows that the wife had been abandoned by the husband, and the decision of the court seems to rest on that ground. Our opinion is that judgment should be rendered for the defendant for costs."—MATTESON, C. J., in *Howland v. Granger*, 22 R. I. 1, 45 Atl. 740.

chargeable even for necessities;<sup>u</sup> at least if the person, who furnishes them, is sufficiently apprised of her elopement.<sup>w 16</sup> If the wife be indebted before marriage, the husband is bound afterwards to pay the debt; for he has adopted her and her circumstances together.<sup>x</sup>

§ 601. (4) Suits by and against wife.—If the wife be injured in her person or her property, she can bring no action for redress

<sup>u</sup> Stra. 647.

<sup>x</sup> 3 Mod. 186.

<sup>w</sup> 1 Lev. 5.

16 **Liabilities of husband.**—The husband is bound to support the wife by common law, independent of any statute, at his own home. If she leave him of her own accord the duty ceases. If he drive her away or fail to support her there, he is liable to those who furnish her with necessities, either individuals or town authorities. This is true even where they live apart by agreement. (*Rumney v. Keyes*, 7 N. H. 576; *Charlestown v. Groodand*, 15 Gray (Mass.), 15.) If she willfully abandons him, she does not carry his credit with her or impose any liability on him. That liability depends entirely on his neglect or default (*People v. Pettit*, 74 N. Y. 320); unless she is insane, then she is incapable of abandoning him, and it is his duty to support her. (*Goodale v. Lawrence*, 88 N. Y. 513, 42 Am. Rep. 259.) For debts of the wife *during coverture* there can be no obligation at common law, except so far as she can be considered the husband's agent to charge *him*. While covert she cannot charge herself nor can he charge her. His liability to pay debts of her contracting will depend as a question of *fact* upon her agency, save in the rare cases where it becomes a question of law by his breach of the duty to provide for her. If he by his conduct render the home unsuitable for her to live in, or wrongfully send her away without any provision for her support, she has the right to buy necessities on his credit. (*Ross v. Ross*, 69 Ill. 569; *Billing v. Pilcher*, 7 B. Mon. (Ky.) 458, 46 Am. Dec. 523; *Allen v. Aldrich*, 29 N. H. 63; *Hultz v. Gibbs*, 66 Pa. St. 360.) If they separate by consent, and he furnish her no suitable support, his obligation for her necessities continues (*Rumney v. Keyes*, 7 N. H. 571; *Baker v. Barney*, 8 Johns. 72; 5 Am. Dec. 326); but if he make her an allowance sufficient to support her, or otherwise provide for her, he cannot be charged by her or others, for such necessities (*Mott v. Comstock*, 8 Wend. 544; *Nurse v. Craig*, 2 Bos. & P. 148, 127 Eng. Reprint, 511, reviewing English cases); and whether the provision be sufficient will be a question of fact for the jury. (*Pearsen v. Darrington*, 32 Ala. 227.) If the separation be her fault, no liability attaches to him. (*Allen v. Aldrich*, 29 N. H. 63; *Porter v. Bobb*, 25 Mo. 36; *McCutchen v. McGahay*, 11 Johns. 281, 6 Am. Dec. 373.) That the husband's liability for contracts made by the wife during coverture, and while both are discharging their marital duties, rests solely on agency, and that

without her husband's concurrence, and in his name, as well as her own:<sup>1</sup> neither can she be sued, without making the husband a defendant.<sup>2</sup> There is, indeed, one case where the wife shall sue and be sued as a *feme sole*, viz., where the husband has abjured

<sup>1</sup> Salk. 119. 1 Roll. Abr. 347.

<sup>2</sup> Bro. Error. 173. 1 Leon. 312. 1 Sid. 120. This was also the practice in the courts of Athens. (Pott. Antiqu. b. 1. c. 21.)

the agency is a matter of fact not law, is fully shown in *Benjamin v. Benjamin*, 15 Conn. 347, 39 Am. Dec. 384; *Sawyer v. Cutting*, 23 Vt. 486, 489; *Butts v. Newton*, 29 Wis. 632, 637; even when the contracts are for necessities. (*Tuttle v. Hoag*, 46 Mo. 38, 43, 2 Am. Rep. 481.)

Even for actual necessities furnished the wife, the vendor cannot recover without showing that the husband has *not* supplied her, the burden of proof of the negative being on him. (*Rea v. Durkee*, 25 Ill. 503; *Mitchell v. Treador*, 11 Ga. 324, 56 Am. Dec. 421; *Kimball v. Keyes*, 11 Wend. (N. Y.) 33; *Barr v. Armstrong*, 56 Mo. 577.) But if the husband is in default, a notice not to supply the wife on his credit will be of no avail. (*Church, C. J., in Daubney v. Hughes*, 60 N. Y. 187; *Black v. Bryan*, 18 Tex. 453, 467.) Upon his liability generally for support, cf. *Cunningham v. Irwin*, 7 Serg. & R. (Pa.) 247, 10 Am. Dec. 458, and note. Upon the connection *and distinction* between this and his right to earnings, *Norcross v. Rodgers*, 30 Vt. 588, 73 Am. Dec. 323. The husband's liability for necessities is made by some cases to be the counterpart of cohabitation, and the consequent right to her obedience and services. "The duties of the wife while cohabiting with the husband form the consideration of his liability for her necessities." (*McCutchen v. McGahay*, 11 Johns. (N. Y.) 281, 6 Am. Dec. 373; *Thornton, J., in Martin v. Robson*, 65 Ill. 129, 135, 16 Am. Rep. 578. From the legislator's or moralist's point of view this is no doubt true, but not from the lawyer's. It is much on a par with the statement that he is liable for her debts *because* he has her property. (65 Ill. 136, 16 Am. Rep. 578; 2 Bright's H. & W., p. 2; *Tyler on Coverture*, §§ 216, 233.) Both are consequences of a single cause but no causal connection exists between them. If it were so, his liability would cease with cohabitation, and some new reason must be found for it when he turns her out of doors. The true ground is still the unity of person. A married woman is as liable for *torts* as a single woman. There is nothing in her coverture to exempt her from the rights and duties imposed by the general law of the land on all alike, or from the consequences of their violation. Hence there is no such distinction between torts committed *dum sola* and during *coverture*, as there is between debts or contracts in the two cases. And "the distinction between the liability of the husband for the contracts of the wife before marriage, and for her torts during marriage [as well as before] is too dim to be easily seen." (*Thornton, J., in 65 Ill. 136, 16 Am. Rep. 578.*) But there are two important qualifications of her liability for these torts: (1) She is not liable when she is under coercion of her husband, actual or implied.

the realm, or is banished:<sup>a</sup> for then he is dead in law; and, the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defense at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately;<sup>b</sup> for the union is only a civil union.

<sup>a</sup> Co. Litt. 133.

<sup>b</sup> 1 Hawk. P. C. 3.

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(2) The liability can be enforced during coverture only on the *joint* person. If he dies it survives against her. If she dies it dies with her.

Frauds by the wife as well as her other torts come under this rule. "But where the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife. If this were allowed, it is obvious that the wife would lose the protection which the law gives her against contracts made by her during coverture." (Per Pollock, C. B., 9 Ex. 429; leading cases, *Cooper v. Witham*, 2 Keb. 399, 84 Eng. Reprint, 250; *Adelphi Loan Assn. v. Fairhurst and Wife*, 9 Ex. 422, 1854.) In other words, "where the husband is liable for the torts of his wife, the tort upon which such liability is founded must be a tort *simpliciter*, and not one which is either founded upon or connected with a contract. Where the wife makes a representation which is in fact false, and fraudulently made to her knowledge to a third party, who by giving credit to it is thereby induced to enter into a contract, the husband is not liable for that tort, but the party who believes a representation so made must bear the consequences of his own credulity." (*Arguendo*, 9 Ex. 428.) If the wife be damnified by a tort to her person or reputation, the right of recovery is in her—of action, in the joint person. He cannot sue without her (*Johnson v. Dicken*, 25 Mo. 580); nor she without him. But the action survives to her, not to him.

The husband's liability cannot be prevented from arising on marriage by any agreement between husband and wife, or any antenuptial settlement by which it was stipulated that each should have exclusive ownership and control of their own property, which should be exempt from liability for the antenuptial debts of the other. A note given by the wife before marriage is collectible from both during coverture in spite of such agreement. (*Obermayer v. Greenleaf*, 42 Mo. 304.) The same rule applies to torts. It is not affected by the fact that she has a separate estate. (*Callahan v. Patterson*, 4 Tex. 61, 51 Am. Dec. 712; *Neil v. Johnson*, 11 Ala. 615; *Strong v. Skinner*, 4 Barb. (N. Y.) 516; *Methodist E. Church v. Jaques*, 1 Johns. Ch. (N. Y.) 450.) But in most respects the above doctrine as to her immunity from obligations *in personam* is greatly changed by statute, which gives her the enjoyment of her own separate estate. The best account I know of the various married women's acts, in different states, allowing them to take, hold, convey, and devise separate

§ 602. (5) Incapacity as witnesses.—But, in trials of any sort, they are not allowed to be evidence for, or against, each other:° partly because it is impossible their testimony should be indifferent; but principally because of the union of person: and therefore, if they were admitted to be witnesses for each other, they would contradict one maxim of law, “*nemo in propria causa testis*

c 2 Hawk. P. C. 431.

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property, etc., is in 6 S. L. Rev. p. 633, by Henry Hitchcock, of the St. Louis bar. The acts themselves will be found collected in 76 Am. Dec. 367–401.

When the wife, even before these statutes, had a separate estate, and intended to charge it, the charge might be enforced in equity, subject to the question as to her power to charge, under the settlement or other instrument by which she held it. In such case there could be no judgment against her personally, no execution on which she could be taken, for that would violate her husband's rights (Reeve), and no remedy against general or after-acquired property. The only enforcement was by bill in equity against her (and her husband as a formal party) as on a right *in rem*. (2 Kent, Comm., 164; Reeve's Domestic Relations, 164; Adams' Equity, 45; 2 Story on Equity Jurisprudence, 1400; 1 Bright on H. & W. 254.) Hollis v. Francois, 5 Tex. 195, 51 Am. Dec. 760, note page 768, shows the general rule; but a different one in Texas.

It is now held, that under the statutes giving all married women a separate estate in property taken from others than their husbands, the charge need not be an express one. The execution of a bond, bill, or note is enough to presume such an intent. There need not be even a formal promise. (Dobbin v. Hubbard, 17 Ark. 189, 65 Am. Dec. 425; Coats v. Robinson, 10 Mo. 757, 760; Jarman v. Wilkerson, 7 B. Mon. (Ky.) 293; Leaycraft v. Hedden, 4 N. J. Eq. 512; Boarman v. Groves, 23 Miss. 280.) It may be created by buying on credit the property to be charged with the debt, she having no other personal estate (Cashman v. Henry, 75 N. Y. 103, 31 Am. Rep. 437), or by buying supplies for her family, including the husband (Tiemeyer v. Turnquist, 85 N. Y. 516, 39 Am. Rep. 674), though not by buying for her husband's sole use in business or otherwise. *Scd contra* many cases hold that the estate could not be made liable by implication. The charge must be express. In Dickson v. Miller, 11 Smedes & M. (Miss.) 594, 49 Am. Dec. 71, with note, a wife's debt for necessities furnished her while sole and an infant was sustained as such a charge, without noticing the difference between the husband's absolute liability for her debts in that case, as stated in the clearest terms by Blackstone, “for he has adopted her and her circumstances together” (p. \*443), and his liability by her agency in post-nuptial debts.

It has been held that a note constituting a valid charge on a separate estate may be sued in New York, and judgment rendered as if the wife were sole. It is unnecessary to allude to the coverture or separate estate. They can be set up in the answer, if a defense. “The judgment is properly the same in



*esse debet* (no one may be a witness in his own cause)"; and if against each other, they would contradict another maxim, "*nemo tenetur seipsum accusare* (no one is bound to accuse himself)." <sup>17</sup> But, where the offense is directly against the person of the wife, this rule has been usually dispensed with: <sup>a</sup> and therefore, by statute 3 Hen. VII, c. 2 (Abduction, 1487), in case a woman be forcibly taken away, and married, she may be a witness against such her husband, in order to convict him of felony. For in this case she can with no propriety be reckoned his wife; because a main ingredient, her consent, was wanting to the contract: and also there is another maxim of law, that no man shall take advantage of his own wrong; which the ravisher [<sup>444</sup>] here would do, if by forcibly

<sup>a</sup> State Trials, vol. 1. Lord Audley's Case, Stra. 633.

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form and effect as if she were unmarried." (Earl, C., in *Smith v. Dunning*, 61 N. Y. 249; *Corn Exch. Ins. Co. v. Babcock*, 42 N. Y. 613, 1 Am. Rep. 601; *Bodine v. Killeen*, 53 N. Y. 93; *Yale v. Dederer*, *ubi infra*; *Frecking v. Rolland*, 53 N. Y. 422.) This goes far beyond the doctrine of the separate estate in equity courts, and the rulings in most of the other states, even on the most liberal statutes in favor of married women. It places the wife's contract substantially on the same footing with her husband's. The cases where such a charge (not express) is implied have been summed up in New York thus, in *Manhattan B. & Mfg. Co. v. Thompson*, 58 N. Y. 80: (1) When created in a trade or business of the wife. (*Frecking v. Rolland*, 53 N. Y. 422.) (2) When the contract relates to or is made for the benefit of the separate estate. (*Owen v. Cawley*, 36 N. Y. 600; *Bollin v. Dillaye*, 37 N. Y. 35.) (3) Where the intention is expressed in the contract or instrument by which the liability is created. (*Yale v. Dederer*, 18 N. Y. 265, 72 Am. Dec. 503, 22 N. Y. 450, 78 Am. Dec. 216, 68 N. Y. 329, 332.) The last is a leading case on the subject, and was before the court of appeals three times.—HAMMOND.

<sup>17</sup> In modern times the rules of the earlier law have been relaxed, and by the Evidence Amendment Act, 1853, and the further act of 1869, husbands and wives of the parties to civil proceedings (including proceedings instituted in consequence of adultery) were made competent and compellable to give evidence. In criminal proceedings, the incompetence of husband and wife to give evidence has even now been only partially removed. 2 Stephen's Comm. 407.

In the United States the common-law rule prevails where not changed by statute. *Barron v. City of Anniston*, 157 Ala. 399, 48 South. 58; *Lucas v. State*, 23 Conn. 18; *Blain v. Patterson*, 47 N. H. 523. But statutes have been passed making husbands and wives witnesses against each other even in criminal cases. See, generally, 4 Jones, Comm. Ev., §§ 733 ff.

marrying a woman, he could prevent her from being a witness, who is perhaps the only witness, to that very fact.

§ 603. (6) *In ecclesiastical courts.*—In the civil law the husband and the wife are considered as two distinct persons; and may have separate estates, contracts, debts, and injuries:<sup>e</sup> and therefore, in our ecclesiastical courts, a woman may sue and be sued without her husband.<sup>f</sup>

§ 604. (7) *Separate acts of wife.*—But, though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion. And therefore all deeds executed, and acts done, by her, during her coverture, are void; except it be a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary.<sup>g</sup> She cannot by will devise lands to her husband, unless under special circumstances; for at the time of making it she is supposed to be under his coercion.<sup>h</sup> And in some felonies, and other inferior crimes, committed by her, through constraint of her husband, the law excuses her:<sup>i</sup> but this extends not to treason or murder.

§ 605. (8) *Husband's right of correction.*—The husband also (by the old law) might give his wife moderate correction.<sup>k</sup> For, as he is to answer for her misbehavior, the law thought it reasonable to entrust him with this power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children; for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds,<sup>l</sup> and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis uxoris suæ, licite et rationabiliter pertinet* (otherwise than lawfully and reasonably belongs to the husband for the due government and correction of his wife).<sup>m</sup> The civil law gave the husband the [<sup>445</sup>] same, or a larger, authority

<sup>e</sup> Cod. 4. 12. 1.

<sup>f</sup> 2 Roll. Abr. 298.

<sup>g</sup> Litt. § 669, 670.

<sup>h</sup> Co. Litt. 112.

<sup>i</sup> 1 Hawk. P. C. 2.

<sup>k</sup> *Ibid.* 130.

<sup>l</sup> Moor. 874.

<sup>m</sup> F. N. B. 80.

over his wife: allowing him, for some misdemeanors, *flagellis et fustibus acriter verberare uxorem* (to beat his wife severely with scourges and sticks); for others, only *modicam castigationem adhibere* (to use moderate chastisement).<sup>a</sup> But, with us, in the politer reign of Charles the Second, this power of correction began to be doubted:<sup>o</sup> and a wife may now have security of the peace against her husband;<sup>p</sup> or, in return, a husband against his wife.<sup>q</sup> Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege: and the courts of law will still permit a husband to restrain a wife of her liberty, in case of any gross misbehavior.<sup>r 18</sup>

These are the chief legal effects of marriage during the coverture; upon which we may observe, that even the disabilities, which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England.

▪ Nov. 117. c. 14. & Van Leeuwen. in loc.

q Stra. 1207.

o 1 Sid. 113. 3 Keb. 433.

r Stra. 478. 875.

p 2 Lev. 128.

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<sup>18</sup> This touching attachment to their old common law still survives among "the lower rank of people" in the form of wife-beating. But among the politer classes the right to restrain a consort's liberty (except under very special circumstances) may be deemed to have become exploded since the case of *Reg. v. Jackson* in 1891 (1 Q. B., p. 671, in the court of appeal). The judgments are instructive. The master of the rolls goes so far as to doubt whether the husband ever had a legal power of correction, a curious instance of the way in which the sentiment of a later time sometimes tries to force upon the language of an older time a non-natural meaning, the new sentiment being one which the older time would have failed to understand. It would have been simpler to admit that what may well have been law in the seventeenth century is not to be taken to be law now, manners and ideas having so completely changed as to render the old rules obsolete. So that now the English wife, like the Roman, may quit her husband's house when she pleases, and the suit for restitution of conjugal rights, whereby either could compel the other to live in the common household, is falling into disuse, if indeed it can still be described as in any sense effective since the act, passed in 1884, which took away the remedy by attachment.—BRYCE, *Studies in Hist. & Juris.*, 823.

## CHAPTER THE SIXTEENTH. [446]

### OF PARENT AND CHILD.

§ 606. **Parent and child.**—The next, and the most universal relation in nature, is immediately derived from the preceding, being that between parent and child.

§ 607. **Children.**—Children are of two sorts; legitimate and spurious, or bastards:<sup>1</sup> each of which we shall consider in their order; and first of legitimate children.

§ 608. 1. **Legitimate children.**—A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards. "*Pater est quem nuptiæ demonstrant* (the nuptials show who is the father)," is the rule of the civil law;<sup>a</sup> and this holds with the civilians, whether the nuptials happen before, or after, the birth of the child. With us in England the rule is narrowed, for the nuptials must be precedent to the birth;<sup>2</sup> of which more will be

<sup>a</sup> Ff. 2. 4. 5.

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<sup>1</sup> **Adoption.**—Adoption of children is now by statute the law of the majority of states, though only of late years, none of the statutes being earlier than 1850. Upon the interpretation of those statutes see note in 14 Am. Law Reg. 682, annexed to *Barnhizel v. Ferrell*, 47 Ind. 335, 1875, and article on *The Law of Adoption* (reviewing *Sewall v. Roberts*, 115 Mass. 262), in 9 Am. Law Rev. 74, 336. Adoption was unknown to the common law. (Coke, 2 Inst. 97.) Even the passage of Bracton referred to by Coke has an entirely different sense. (Lib. 2, c. 29, fol. 636; also in Coxe's trans. of Guterbock's Bracton, p. 83, n. g.—HAMMOND.)

<sup>2</sup> **Legitimation by subsequent marriage.**—Many American states adhere to the strict common-law rule, by which the only legitimate children are those born in wedlock, or within such a period after it as to justify the presumption that they were conceived within it. But Virginia set the example, soon after the revolution, of adopting the civil and canon law principle of legitimacy by the subsequent marriage of the parents: and added a rule which is found also in Code Napoleon, legitimizing the issue of null and void marriages. Many of the newer states have followed that example, and enacted both rules, or at least the former. (Virginia Code of 1873, c. 119, §§ 6, 7; *Ash v. Way's Admr.*, 2 Gratt. (Va.) 203; *Stone v. Keeling*, 5 Call (Va.), 143.)

Difficult questions must arise in the interpretation of both rules, for which no answer can be found in common-law precedents. Some of them have already

said when we come to consider the case of bastardy. At present let us inquire into, 1. The legal duties of parents to their legitimate children. 2. Their power over them. 3. The duties of such children to their parents.

§ 609. a. **Duties of parents.**—And, first, the duties of parents, to legitimate children: which principally consist in three particulars; their maintenance, their protection, and their education.

§ 610. (1) **Duty to support children.**—[<sup>447</sup>] The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation, says Puffendorf,<sup>b</sup> laid on them

<sup>b</sup> L. of N. l. 4. c. 11.

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been resolved by the *consensus* of civilians, and these will no doubt be decided in the same way, upon the familiar principle that when a state adopts a foreign law it is presumed to adopt with it the interpretation given in the state of its origin. Perhaps the most important question, arising as to *legitimatio per subsequens matrimonium*, is whether that effect is to be given in cases where the parents could not have lawfully intermarried before the child's birth, as in cases of adulterine bastardy, etc., or whether no such limitations are to be applied, none being found in the statutes themselves. The Roman law restricted such legitimization to cases of comparatively venial though irregular concubinage.

Another question which must inevitably arise, and upon which the foreign law throws no light, is whether children may be made legitimate by what is now commonly termed a "common-law" marriage, without any public ceremony. Our courts have lately gone very far in presuming such a marriage from cohabitation and repute, without the possibility of fixing any certain date for its commencement. It would be hard to deny to some children of such cohabitation the legitimacy thus assured to others; yet such may be the effect, if it is not held retroactive. At the same time there can be no doubt that the rule in its original sense was confined to actually solemnized marriages. So, also, was the French rule from which we derive the other statutory change, that "the issue of marriages deemed null in law or dissolved by a court shall nevertheless be legitimate"; but in this case it is difficult to give any definite meaning to the rule, or prevent it from legitimizing all bastards indiscriminately, unless we confine the word "marriages" to actually solemnized unions. If the restriction put upon the jurisdiction in divorce by such cases as *Collins v. Collins*, 80 N. Y. 1, that the courts have no power to grant divorce where there has not been a regular and duly celebrated marriage, should prevail, it would give rise to two singular anomalies, that these informal "common-law" marriages, hardly distinguishable from concubinage, would be the only marriages indissoluble by law, and the only ones of which the innocent offspring could



not only by nature itself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life, that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation, to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have a perfect *right* of receiving maintenance from their parents.<sup>3</sup> And the President Montesquieu<sup>c</sup> has a very just observation upon this head: that the establishment of marriage in all civilized states is

<sup>c</sup> Sp. L. b. 23. c. 2.

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invoke no legal protection of their *status*, if their unnatural parents saw fit to bastardize them. Even the remote possibility of such results is a disgrace to our laws, and calls loudly for a wise and uniform revision of them.

The Roman law made a distinction that seems never to have been recognized in our own, dating the life and status of a child born in legitimate wedlock from the time of conception, that of others from the time of birth (Ulpian, *Fragm.* v. 10; Gaius, i. 89; Gaius, *Vis.* i. 4, § 9; and see the note of Schulting, 41); but in spite of this they allow a child to be free-born whose mother was free at any moment while bearing him. (Paulus, *R. S.* ii. 24; *L.* 5, 2, *Dig. de Stat. Hom.*)—HAMMOND.

<sup>3</sup> **Rights and liabilities of father.**—There is a fallacy in the term "perfect right," used here, very unusual with Blackstone. By a perfect right of receiving maintenance, we can only understand that it is morally right for the child to receive whatever the parent, in the fulfillment of his duty, may provide. But a perfect right in legal language imports much more: it imports the right to demand the maintenance, or, at least, to have a remedy for the parent's neglect to provide it, and this neither common nor statute law has ever given. The only *legal* duty imposed on the parent is to so provide for his children that they shall not become a burden to the community; and, for a breach of this duty, it is the state only that can punish him. Upon the amount and manner of the maintenance to be given, and upon the education and protection to be furnished, the parent must act in his own discretion, over which the child has no control. Harsh as this doctrine may seem when thus stated, it is only a just expression of the principle that the law deals only with enforceable rights and duties, and not with ethical ones. Experience has not shown that English and American fathers have been less careful or less generous in maintaining and educating their children than those living under a system of government which enforced these parental duties, and many other ethical ones, by the oversight of the state.

When it is claimed that a father has promised to pay for things not necessary, furnished to his child, that is, when the father as such is to be holden

built on this natural obligation of the father to provide for his children; for that ascertains and makes known the person who is bound to fulfill this obligation; whereas, in promiscuous and illicit conjunctions, the father is unknown; and the mother finds a thousand obstacles in her way—shame, remorse, the constraint of her sex, and the rigor of laws;—that stifle her inclinations to perform this duty: and besides, she generally wants ability.

The municipal laws of all well-regulated states have taken care to enforce this duty: though Providence has done it more effectually than any laws, by implanting in the breast of every parent

for the contract made by his child, the plaintiff must show that the contract binds him as it would any stranger; that it is made for a good consideration (*Freeman v. Robinson*, 38 N. J. L. 383, 20 Am. Rep. 399), and that it is in writing, so as to satisfy the statute of frauds. (*Dexter v. Blanchard*, 11 Allen (Mass.), 365.)

By common law (*a*) neither the father is legally bound to support the child (*Mortimore v. Wright*, 6 Mees. & W. 482; *Sheldon v. Springer*, 20 Eng. L. & Eq. 281; *Hunt v. Thompson*, 3 Seam. (Ill.) 180, 36 Am. Dec. 538), nor (*b*) the child to support the father (*Rex v. Munden*, 1 Strange, 190; *Edwards v. Davis*, 16 Johns. (N. Y.) 821); and it is now held (*c*) that the moral duty is not sufficient to sustain an express promise. (*Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79.) Upon the implied promise to repay a stranger who has furnished necessities to a child or parent, the cases conflict. (*Pro*, *Van Valkenburg v. Watson*, 13 Johns. 480, 7 Am. Dec. 395. *Con*, *Hunt v. Thompson*, *supra*, followed in 78 Ill. 230, 445, 84 Ill. 40, 25 Am. Rep. 424, 88 Ill. 75, 89 Ill. 456.) Where a child is sent into the world to look out for himself, even without emancipation, he cannot claim his earnings (*Stiles v. Granville*, 6 Cush. (Mass.) 458), nor can the father's creditors. (*McCloshey v. Cyphert*, 27 Pa. St. 220, *Cloud v. Hamilton*, 11 Humph. (Tenn.) 104, 53 Am. Dec. 778.)

Against another employer, the father cannot recover the value of minor's services to him. (*Williams v. Williams*, 132 Mass. 304.) The father is liable for support of infant children, not of adults (*Hawkins v. Hyde*, 55 Vt. 55); but if they live with him not as boarders, he cannot collect board even from their estates. (*Beardsley v. Hotchkins*, 96 N. Y. 201.) He is not entitled to an allowance for support from the infant's estate except under special circumstances (*Beardsley v. Hotchkins*, 96 N. Y. 201; *Re Walling*, 35 N. J. Eq. 105); nor liable for services (*Cooper v. Cooper*, 12 Ill. App. 478); but the mother is, during the husband's life. (*Gladding v. Follett*, 95 N. Y. 652.) But when an express contract is shown, child may recover *quantum meruit*. (*Byrnes v. Clarke*, 57 Wis. 13, 14 N. W. 815.) Stepchildren once received into the family, the father cannot recover from their estates. (*Norton v. Ailor*, 11 Lea (Tenn.), 563.)

The father's consent for the son to receive his own earnings is put on the same footing with a gift delivered. It is valid against the father (2 Mass

that natural *σοφγη*, or insuperable degree of affection, which not even the deformity of person or mind, not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.

§ 611. (a) **Duty of support under the civil law.**—The civil law<sup>d</sup> obliges the parent to provide maintenance for his child; and, if he refuses, “*judex de ea re cognoscet* (the judge shall take cognizance of that matter).” Nay, it carries this matter so far, that it will not suffer a parent at his death totally to disinherit his child, without expressly giving [448] his reason for so doing; and there are fourteen such reasons reckoned up,<sup>e</sup> which may justify such disinherison. If the parent alleged no reason, or a bad, or a false

<sup>d</sup> Ff. 25. 3. 5.

<sup>e</sup> Nov. 115.

113, 115; 12 Mass. 275, 378; 3 Pick. 201, 15 Am. Dec. 207), even if not against creditors (6 Conn. 547); but it is held not liable for father's debts (49 N. H. 543), and the consent may be implied. (7 Cow. 92, 49 N. H. 544.) That it does not withdraw from the creditors any fund to which they are justly entitled, see *Lord v. Poor*, 23 Me. 569; *Wolcott v. Rickey*, 22 Iowa, 171 (homestead bought by son's earnings). But such a consent is not necessarily permanent; if by parol and without consideration it is revocable. (*Abbott v. Converse*, 4 Allen (Mass.), 530; *Ream v. Watkins*, 27 Mo. 516, 72 Am. Dec. 283; *Everett v. Sherfey*, 1 Iowa, 356.) The child's own desertion does not emancipate him without the father's consent. (*Bangor v. Readfield*, 32 Me. 60.) As to driving from home the cases differ. For emancipation, *Nightingale v. Withington*, 15 Mass. 272, 8 Am. Dec. 101; against, *Sumner v. Sebec*, 3 Me. 223; *Clinton v. York*, 26 Me. 167. But some cases call this emancipation. (*Lyon v. Bolling*, 9 Ala. 463, 44 Am. Dec. 444. See, also, *Lyon v. Bolling*, 14 Ala. 753, 48 Am. Dec. 122.)

The father may emancipate the minor, and thus surrender his own rights; but cannot thereby make him competent to obligate himself. (Note to *Burlingame v. Burlingame*, 7 Cow. 92.) The father's creditors cannot touch the earnings of the son so emancipated, or property acquired by him; and such emancipation may be inferred from circumstances (*Dierker v. Hess*, 54 Mo. 246); but in some states, the emancipation may be followed by an order of the district court, giving all the powers of full age. Upon emancipation by permanent departure from home with consent of the father, see *Lowell v. Newport*, 66 Me. 78; *West Gardiner v. Manchester*, 72 Me. 509. That the departure of a minor from home, to obtain employment, does not constitute emancipation, even in regard to settlement laws, is shown by *Parsonsfeld v. Kennebunkport*, 4 Me. 47; *Searsmont v. Thorndike*, 77 Me. 504, 1 Atl. 448. No public notice is necessary. (*Wood v. Corcoran*, 1 Allen (Mass.), 405.)

one, the child might set the will aside, *tanquam testamentum inofficiosum* (as an undutiful will), a testament contrary to the natural duty of the parent. And it is remarkable under what color the children were to move for relief in such a case: by suggesting that the parent had lost the use of his reason, when he made the *inofficious* testament. And this, as Puffendorf observes,<sup>f</sup> was not to bring into dispute the testator's power of disinheriting his own offspring; but to examine the motives upon which he did it: and, if they were found defective in reason, then to set them aside. But perhaps this is going rather too far: every man has, or ought to have, by the laws of society, a power over his own property: and, as Grotius very well distinguishes,<sup>g</sup> natural right obliges to give a *necessary* maintenance to children; but what is more than that

<sup>f</sup> l. 4. c. 11. § 7.

<sup>g</sup> De j. b. & p. l. 2. c. 7. n. 3.

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A minor's liability for necessities implies that he has not been otherwise furnished by his father; but he must show it as defense. (*Parsons v. Keys*, 43 Tex. 557.) But the mere fact that the father is poor and unable to pay (for medical services furnished the child) will not make the minor liable. (*Hoyt v. Casey*, 114 Mass. 397, 19 Am. Rep. 371.) The father is entitled to the services of the child till majority; and may recover against anyone who seduces him or her away, or by a tort deprives him of services, with allowance for expenses incurred, labor of nursing, etc. (*Frick v. St. L. K. C. etc. R. Co.*, 75 Mo. 542; *Connell v. Putnam*, 58 N. H. 534), although the child has his own action, (*Evansich v. G. C. & S. F. B. Co.*, 57 Tex. 123.) Upon the distinction between the two cases, see *Durkee v. Central Pacific R. R. Co.*, 56 Cal. 388, 38 Am. Rep. 59.

It was indeed formerly held that the moral duty of a parent to support the child was a sufficient consideration for an express promise to repay money laid out by another person in such support. But this ruling was due, not to any misconception of the nature of this relation, but to a temporary extension of the doctrine of consideration beyond its just bounds. Now, it is well settled that, at common law, neither the child nor a third person who has supported the child has any action against the parent for such support, or for damage due to the failure of support. In like manner, the child, even when of full age and abundant means, is not legally liable, at common law, for the support of the parent. Either one may, of course, be liable upon a contract for the support of the other to third persons, with whom the contract may have been made. Such a contract need not be expressed, but may be inferred from facts and circumstances. But it must be actually inferred as a fact; it will not be implied as of law from the relation between them. (Schouler on Domestic

they have no other right to, than as it is given them by the favor of their parents, or the positive constitutions of the municipal law.

§ 612. (b) **Duty of support under English law.**—Let us next see what provision our own laws have made for this natural duty. It is a principle of law,<sup>h</sup> that there is an obligation on every man to provide for those descended from his loins; and the manner, in which this obligation shall be performed, is thus pointed out.<sup>i</sup> The father, and mother, grandfather, and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability, according as the quarter sessions shall direct: and<sup>k</sup> if a parent runs away, and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and dispose of them toward their relief. By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain [449] it:<sup>l</sup> for this being a debt of hers, when single, shall like others extend to charge the husband. But at her death, the relation being dissolved, the husband is under no further obligation.<sup>4</sup>

<sup>h</sup> Raym. 500.

<sup>i</sup> Stat. 43 Eliz. c. 2 (Poor Relief, 1601).

<sup>k</sup> Stat. 5 Geo. I. c. 8 (Poor Relief, 1718).

<sup>l</sup> Styles. 283. 2 Bulstr. 346.

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Relations, § 241, and cases; *Allen v. Jacobi*, 14 Ill. App. 277; *Tyler v. Arnold*, 47 Mich. 564, 11 N. W. 387.)

A parent is not liable for the debts or torts of his child as such. The law makes no difference in this respect between the minor child and one of full age. In order to charge the parent, the debt or wrong must be shown to have been his, either as that of a joint wrongdoer or of a master who has given the child, as a servant, power to incur it. The cases in which a father is held liable for maintenance furnished a child, not provided for at home, are better explained upon this principle than from any duty arising from the status. The strongest case is that where a parent, having the means to support a child, turns it out of doors without reason and without means. He is then liable for maintenance furnished, as a husband would be for a wife under like circumstances.—HAMMOND.

<sup>4</sup> **Duty to support children.**—The statutes mentioned by Blackstone have been supplemented by later statutes, both in England and in America. In



No person is bound to provide a maintenance for his issue, unless where the children are impotent and unable to work, either through infancy, disease, or accident; and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20s. a month. For the policy of our laws, which are ever watchful to promote industry, did not mean to compel a father to maintain his idle and lazy children in ease and indolence: but thought it unjust to oblige the parent, against his will, to provide them with superfluities, and other indulgences of fortune; imagining they might trust to the impulse of nature, if the children were deserving of such favors. Yet, as nothing is so apt to stifle the calls of nature as religious bigotry, it is enacted,<sup>m</sup> that if any popish parent shall

<sup>m</sup> Stat. 11 & 12 W. III. c. 4 (Popery, 1700).

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Great Britain the various acts relating to the relief of the poor make it compulsory upon all parents, able to do so, to provide for the maintenance of their offspring when in poverty, of whatever age they may be, and whenever in fact, through infancy, disease, or accident, they are unable to support themselves. A mother, too, under the Married Women's Property Act of 1882, who has separate property, has to provide for the maintenance of her children and grandchildren. Under the provisions of the Children Act, 1908, any person over the age of sixteen years, who, having the custody of any child under the age of sixteen years, willfully assaults, ill-treats, neglects, abandons, or exposes such child, so as to cause it suffering or to injure its health, is guilty of a misdemeanor.

The obligation of a father to provide for the maintenance which is said to exist at common law is not a legal obligation, but only a moral one. Thus the father is not obliged to pay for necessaries supplied for the child's use. *Mortimore v. Wright*, 6 Mees. & W. 481. "Courts have not generally undertaken to enforce the obligation of parents to maintain their infant children. Indeed, in England, under the common law, the maintenance of minor children was considered merely a moral obligation not enforceable at law. It was generally there held that an action against the parent for necessaries furnished the child could not be maintained. This view has also been taken in some American decisions; although in others the other, and we think the better, rule has been declared that an action for necessaries against a parent is maintainable. See *Tiffany on Persons and Domestic Relations*, pp. 230, 234. It is probable that these later decisions rest on the proposition that the obligation is only a moral one, but that this moral obligation is a good consideration for the furnishing of necessaries, and a sufficient foundation for an action to recover for necessaries which have been *actually furnished*, although no sufficient foundation for a decree for future maintenance." *Paxton v. Paxton*, 150 Cal. 667, 671, 89 Pac. 1083.

refuse to allow his Protestant child a fitting maintenance, with a view to compel him to change his religion, the lord chancellor shall by order of court constrain him to do what is just and reasonable.<sup>5</sup> But this did not extend to persons of another religion, of no less bitterness and bigotry than the popish: and therefore in the very next year we find an instance of a Jew of immense riches, whose only daughter having embraced Christianity, he turned her out of doors: and on her application for relief, it was held she was entitled to none.<sup>n</sup> But this gave occasion<sup>o</sup> to another statute,<sup>p</sup> which ordains, that if Jewish parents refuse to allow their Protestant children a fitting maintenance suitable to the fortune of the parent,

<sup>n</sup> Lord Raym. 699.

<sup>o</sup> Com. Journ. 18 Feb. 12 Mar. 1701.

<sup>p</sup> 1 Ann. st. 1. c. 30 (Protestant Children of Jews, 1702).

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<sup>5</sup> **Religious instruction in American public schools.**—The constitutions and laws of the states of the American Union prohibit, either in letter or in spirit, sectarian teaching in the public schools. The questions then arise whether religious instruction is necessarily sectarian, and, if that be answered in the affirmative, whether reading the Bible is religious instruction. The latter question is the one that has provoked the most controversy. In a considerable number of jurisdictions it is held that exercises in the public schools, consisting of reading from the Bible, singing hymns, or reciting prayers, do not infringe any constitutional provision. *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Billard v. Board of Education*, 69 Kan. 53, 105 Am. St. Rep. 148, 2 Ann. Cas. 521, 66 L. R. A. 166, 76 Pac. 422; *Hackett v. Brooksville Graded School Dist.*, 120 Ky. 608, 117 Am. St. Rep. 599, 9 Ann. Cas. 36, 69 L. R. A. 592, 87 S. W. 792; *Spiller v. Woburn*, 12 Allen (Mass.), 127; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L. R. A. 536, 77 N. W. 250; *Church v. Bullock*, 104 Tex. 1, 16 L. R. A. (N. S.) 860, 109 S. W. 115; *Moore v. Monroe*, 64 Iowa, 367, 20 N. W. 475, 52 Am. Rep. 444.

On the other hand, some courts take the view that such exercises are necessarily sectarian in character. "The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion. It is not adapted for use as a text-book for the teaching alone of reading, of history, or of literature without regard to its religious character." *People v. Board of Education*, 245 Ill. 334, 19 Ann. Cas. 220, 29 L. R. A. (N. S.) 442, 92 N. E. 251; *State v. Scheve*, 65 Neb. 853, 59 L. R. A. 927, 91 N. W. 846, 93 N. W. 169; *State v. District Board*, 76 Wis. 177, 20 Am. St. Rep. 41, 7 L. R. A. 330, 44 N. W. 967. See articles by Henry Schofield in 6 *Illinois Law Rev.* 17, 91; and Willis A. Estrich in 20 *Case and Comment*, 249.

the lord chancellor on complaint may make such order therein as he shall see proper.<sup>5a</sup>

§ 613. (c) **Disinheriting of children.**—[450] Our law has made no provision to prevent the disinheriting of children by will: leaving every man's property in his own disposal, upon a principle of liberty in this, as well as every other, action: though perhaps it had not been amiss, if the parent had been bound to leave them at the least a necessary subsistence. Indeed, among persons of any rank or fortune, a competence is generally provided for younger children, and the bulk of the estate settled upon the eldest, by the marriage articles. Heirs also, and children, are favorites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words; there being required the utmost certainty of the testator's intentions to take away the right of an heir.<sup>a</sup>

§ 614. (2) **Duty to protect children.**—From the duty of maintenance we may easily pass to that of *protection*; which is also a natural duty, but rather permitted than enjoined by any municipal laws: nature, in this respect, working so strongly as to need rather a check than a spur. A parent may, by our laws, maintain and uphold his children in their lawsuits, without being guilty of the legal crime of maintaining quarrels.<sup>r</sup> A parent may also justify an assault and battery in defense of the persons of his children:<sup>s</sup> nay, where a man's son was beaten by another boy, and the father went near a mile to find him, and there revenged his son's quarrel by beating the other boy, of which beating he afterwards unfortunately died; it was not held to be murder, but manslaughter merely.<sup>t</sup> Such indulgence does the law show to the frailty of human nature, and the workings of parental affection.<sup>6</sup>

a 1 Lev. 130.

s 1 Hawk. P. C. 131.

r 2 Inst. 564.

t Cro. Jac. 296. 1 Hawk. P. C. 83.

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<sup>5a</sup> Cited, 45 N. H. 561, 49 N. H. 189, 6 Am. Rep. 499, 53 N. H. 115, 59 Pa. St. 285. The liability of a child to support its parents, who are infirm, or destitute, or aged, is wholly created by statute. (Spencer, J., 16 Johns. 281; 45 N. H. 561; 2 Kent, Comm., 208.)—HAMMOND.

<sup>6</sup> **Battery in defense of kin.**—As one may justify a battery in defense of himself, so may he justify a battery in defense of persons closely allied to him.

§ 615. (3) **Duty to educate children.**—The last duty of parents to their children is that of giving them an *education* suitable to their station in life: a duty pointed out by reason, and of far the greatest importance of any. For, as Puffendorf very well observes,<sup>u</sup> it is not [451] easy to imagine or allow, that a parent has conferred any considerable benefit upon his child, by bringing him into the world; if he afterwards entirely neglects his culture and education, and suffers him to grow up like a mere beast, to lead a life useless to others, and shameful to himself. Yet the municipal laws of most countries seem to be defective in this point, by not constraining the parent to bestow a proper education upon his children. Perhaps they thought it punishment enough to leave the parent, who neglects the instruction of his family, to labor under those griefs and inconveniences, which his family, so uninstructed, will be sure to bring upon him. Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes of apprenticing poor children;<sup>w</sup> and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth. The rich, indeed, are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family. Yet in one case, that of religion, they are under peculiar restrictions: for<sup>x</sup> it is provided, that if any person sends any child under his

<sup>u</sup> L. of N. b. 6. c. 2. § 12.

<sup>w</sup> See pag. 426.

<sup>x</sup> Stat. 1 Jac. I. c. 4 (Jesuits, 1603). & 3 Jac. I. c. 5 (Popish Recusants, 1605).

Thus, a person is justified in using sufficient force to protect his wife, children or other members of his family, provided the circumstances be such as to induce one having reasonable judgment to intervene to prevent the infliction of injury. "His whole defense was based on whether or not he in good faith believed that one of his sons was then and there in danger of bodily harm about to be inflicted upon him by the plaintiff, and that he used no more force than was necessary, or appeared to him in the exercise of a reasonable judgment to be necessary, to protect his son from injury at the hands of the plaintiff." *Downs v. Jackson* (Ky.), 128 S. W. 339. This principle extends to all family relations (*Leward v. Basely*, 1 Ld. Raym. 62), and a child may interfere to protect his parent (*Drinkhorn v. Bubel*, 85 Mich. 532, 48 N. W. 710), and a brother to protect his brother (*Mellen v. Thompson*, 32 Vt. 407).

government beyond the seas, either to prevent its good education in England, or in order to enter into or reside in any popish college, or to be instructed, persuaded, or strengthened in the popish religion; in such case, besides the disabilities incurred by the child so sent, the parent or person sending shall forfeit 100*l.*, which<sup>7</sup> shall go to the sole use and benefit of him that shall discover the offense. And<sup>8</sup> if any parent, or other, shall send or convey any person beyond sea, to enter into, or be resident in, or trained up in, any priory, abbey, nunnery, popish university, college, or school, or house of jesuits, or priests, or in any private popish family, in order to be instructed, persuaded, or confirmed in the [452] popish religion; or shall contribute anything towards their maintenance when abroad by any pretext whatever, the person both sending and sent shall be disabled to sue in law or equity, or to be executor or administrator to any person, or to enjoy any legacy or deed of gift, or to bear any office in the realm, and shall forfeit all his goods and chattels, and likewise all his real estate for life.<sup>7</sup>

§ 616. **b. Parental authority—**(1) **Parental authority under Roman law.**—The *power* of parents over their children is derived from the former consideration, their duty: this authority being given them, partly to enable the parent more effectually to perform his duty, and partly as a recompense for his care and trouble in the faithful discharge of it. And upon this score the municipal laws of some nations have given a much larger authority to the parents, than others. The ancient Roman laws gave the father a power of life and death over his children; upon this principle, that he who gave had also the power of taking away.<sup>a</sup> But the rigor of these laws was softened by subsequent constitutions; so that<sup>b</sup> we find a father banished by the Emperor Hadrian for kill-

<sup>7</sup> Stat. 11 & 12 W. III. c. 4 (Popery, 1700).

<sup>8</sup> Stat. 3 Car. I. c. 2 (1627).

<sup>a</sup> Ff. 28. 2. 11. Cod. 8. 47. 10.

<sup>b</sup> Ff. 48. 9. 5.

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<sup>7</sup> Great improvements have been made in the matter of popular education in England. The most important provisions in recent years have been the Elementary Education Acts of 1870 and 1876, and the acts amendatory thereof. On this subject consult 3 Stephen's Comm. (16th ed.), pp. 53-75.



ing his son, though he had committed a very heinous crime, upon this maxim, that "*patria potestas in pietate debet, non in atrocitate, consistere* (paternal power should consist in kindness, not in cruelty)." But still they maintained to the last a very large and absolute authority: for a son could not acquire any property of his own during the life of his father; but all his acquisitions belonged to the father, or at least the profits of them for his life.<sup>c</sup>

§ 617. (2) Parental authority under English law.—The power of a parent by our English laws is much more moderate; but still sufficient to keep the child in order and obedience. He may lawfully correct his child, being under age, in a reasonable manner;<sup>d</sup> for this is for the benefit of his education.<sup>8</sup> The consent or concurrence of the parent to the marriage of his child under age, was also *directed* by our ancient law to be obtained: but now it is absolutely *necessary*; for without it the contract is void.<sup>e</sup> And this also is another means, which the law has put into the parent's hands, in order [453] the better to discharge his duty; first, of protecting his children from the snares of artful and designing persons; and, next, of settling them properly in life, by preventing the ill consequences of too early and precipitate marriages. A father has no other power over his son's *estate*, than as his trustee or guardian; for, though he may receive the profits during the child's minority, yet he must account for them when he comes of age. He may indeed have the benefit of his children's labor while

<sup>c</sup> Inst. 2. 9. 1.

<sup>d</sup> 1 Hawk. P. C. 130.

<sup>e</sup> Stat. 26 Geo. II. 33 (Clandestine Marriages, 1753).

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<sup>8</sup> A parent, or one authorized by a parent to take control or charge of a minor child, is not liable for the use of a reasonable force to secure the child's obedience. *Rowe v. Rugg*, 117 Iowa, 606, 94 Am. St. Rep. 318, 91 N. W. 903. On grounds of supposed expediency, a child is not allowed in some courts to sue his parent for excessive punishment. *McKelvey v. McKelvey*, 111 Tenn. 388, 102 Am. St. Rep. 787, 1 Ann. Cas. 130, 64 L. R. A. 991, 77 S. W. 664. In other jurisdictions recovery may be allowed. *Clasen v. Pruhs*, 69 Neb. 278, 5 Ann. Cas. 112, 95 N. W. 640. But a parent will be liable criminally, being guilty, according to circumstances, of assault and battery: *State v. Bitman*, 13 Iowa, 485; or murder or manslaughter: *Grey's Case*, J. Kel. 64; *Rex v. Hazel*, 1 Leach, 368, 1 East P. C. 236; 2 Bishop, New Cr. Law, § 683.

they live with him, and are maintained by him: but this is no more than he is entitled to from his apprentices or servants. The legal power of a father (for a mother, as such, is entitled to no power,<sup>9</sup> but only to reverence and respect), the power of a father, I say, over the persons of his children ceases at the age of twenty-one: for they are then enfranchised by arriving at years of discretion, or that point which the law has established (as some must necessarily be established) when the empire of the father, or other guardian, gives place to the empire of reason. Yet, till that age arrives, this empire of the father continues even after his death; for he may by his will appoint a guardian to his children. He may also delegate part of his parental authority, during his life, to the tutor or schoolmaster, of his child; who is then *in loco parentis* (in the place of a parent), and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.

§ 618. c. Duties of children.—The *duties* of children to their parents arise from a principle of natural justice and retribution. For to those, who gave us existence, we naturally owe subjection and obedience during our minority, and honor and reverence ever after: they, who protected the weakness of our infancy, are en-

<sup>9</sup> Rights of mother.—At common law the father's rights were paramount; the mother had none during his life, and few after his death. (*Mercein v. People*, 25 Wend. (N. Y.) 64, 35 Am. Dec. 653; *People v. Mercein*, 3 Hill (N. Y.), 399, 38 Am. Dec. 644.) But in this country, even at common law, the courts will give custody to the mother as against the father in a proper case (*McShan v. McShan*, 56 Miss. 413; *English v. English*, 32 N. J. Eq. 738. Cf. 31 N. J. Eq. 543); and in some states the law puts them on an equality, e. g., Iowa, where both have equal power. In case of great neglect a guardian may be appointed in his lifetime, and custody taken from him. (*Heinemann's Appeal*, 96 Pa. St. 112, 42 Am. Rep. 532.) Neither has an absolute right, even against third persons, though a *prima facie* one. (*McGlennan v. Margowski*, 90 Ind. 150.) Grandparents, to whom the child has been given as an infant to bring up, can retain it against the mother (*Bonnett v. Bonnett*, 61 Iowa, 199, 47 Am. Rep. 810, 16 N. W. 91), the father (*Sturtevant v. State*, 15 Neb. 459, 48 Am. Rep. 349, 19 N. W. 617; *Verser v. Ford*, 37 Ark. 27. *Contra*, *Re Scarritt*, 76 Mo. 565, 43 Am. Rep. 768, Henry, J., dissenting). The aunt may retain it against the father in some cases. (*Chapsky v. Wood*, 26 Kan. 650, 40 Am. Rep. 321.)  
—HAMMOND.

titled to our protection in the infirmity of their age; they who by sustenance and education have enabled their offspring to prosper, ought in return to be supported by that offspring, in case they stand in need of assistance. Upon this principle proceed all the duties of children to their parents which are enjoined by positive laws. And the Athenian laws<sup>f</sup> carried [454] this principle into practice with a scrupulous kind of nicety: obliging all children to provide for their father, when fallen into poverty; with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a livelihood. The legislature, says Baron Montesquieu,<sup>g</sup> considered, that in the first case the father, being uncertain, had rendered the natural obligation precarious; that, in the second case, he had sullied the life he had given, and done his children the greatest of injuries, in depriving them of their reputation; and that, in the third case, he had rendered their life (so far as in him lay) an insupportable burden, by furnishing them with no means of subsistence.

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehavior of the parent; and therefore a child is equally justifiable in defending the person, or maintaining the cause or suit, of a bad parent, as a good one; and is equally compellable,<sup>h</sup> if of sufficient ability, to maintain and provide for a wicked and unnatural progenitor, as for one who has shown the greatest tenderness and parental piety.

§ 619. 2. **Illegitimate children, or bastards.**—We are next to consider the case of illegitimate children, or bastards; with regard to whom let us inquire, 1. Who are bastards. 2. The legal duties of the parents towards a bastard child. 3. The rights and incapacities attending such bastard children.

§ 620. a. **Who are bastards: legitimation.**—Who are bastards. A bastard, by our English laws, is one that is not only begotten,

<sup>f</sup> Potter's Antiqu. b. 4. c. 15.

<sup>g</sup> Sp. L. b. 26. c. 5.

<sup>h</sup> Stat. 43 Eliz. c. 2 (Poor Relief, 1601).

but born, out of lawful matrimony. The civil and canon laws do not allow a child to remain a bastard, if the parents afterwards intermarry:<sup>4</sup> and herein they differ most materially from our law; which, though not so strict as to require that the child shall be *begotten*, [455] yet makes it an indispensable condition that it shall be *born*, after lawful wedlock. And the reason of our English law is surely much superior to that of the Roman, if we consider the principal end and design of establishing the contract of marriage, taken in a civil light; abstractedly from any religious view, which has nothing to do with the legitimacy or illegitimacy of the children. The main end and design of marriage, therefore, being to ascertain and fix upon some certain person, to whom the care, the protection, the maintenance, and the education of the children should belong; this end is undoubtedly better answered by legitimating all issue born after wedlock, than by legitimating all issue of the same parties, even born before wedlock, so as wedlock afterwards ensues: 1. Because of the very great uncertainty there will generally be, in the proof that the issue was really begotten by the same man; whereas, by confining the proof to the birth, and not to the begetting, our law has rendered it perfectly certain, what child is legitimate, and who is to take care of the child. 2. Because by the Roman law a child may be continued a bastard, or made legitimate, at the option of the father and mother, by a marriage *ex post facto*, thereby opening a door to many frauds and partialities, which by our law are prevented. 3. Because by those laws a man may remain a bastard till forty years of age, and then become legitimate, by the subsequent marriage of his parents; whereby the main end of marriage, the protection of infants, is totally frustrated. 4. Because this rule of the Roman law admits of no limitations as to the time, or number of bastards so to be legitimated; but a dozen of them may, twenty years after their birth, by the subsequent marriage of their parents, be admitted to all the privileges of legitimate children. This is plainly a great discouragement to the matrimonial state; to which one main inducement is usually not only the desire of having *children*, but also the desire of procreating lawful *heirs*. Whereas our constitutions guard against this indecency, and at the same time give

<sup>4</sup> Inst. l. 10. 13. Decret. l. 4. t. 17. c. 1.

sufficient allowance to the frailties of human nature. For, if a child be begotten while the parents are single, and they will endeavor to make [456] an early reparation for the offense, by marrying within a few months after, our law is so indulgent as not to bastardize the child, if it be born, though not begotten, in lawful wedlock, for this is an incident that can happen but once; since all future children will be begotten, as well as born, within the rules of honor and civil society. Upon reasons like these we may suppose the peers to have acted at the parliament of Merton, when they refused to enact that children born before marriage should be esteemed legitimate.<sup>k</sup>

§ 621. (1) Children of dubious parentage.—From what has been said it appears, that all children born before matrimony are bastards by our law: and so it is of all children born so long after the death of the husband, that, by the usual course of gestation, they could not be begotten by him. But, this being a matter of some uncertainty, the law is not exact as to a few days.<sup>l</sup> And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child, in order to produce a supposititious heir to the estate: an attempt which the rigor of the Gothic constitutions esteemed equivalent to the most atrocious theft, and therefore punished with death.<sup>m</sup> In this case with us the heir presumptive may have a writ *de ventre inspiciendo* (for inspecting whether a woman be pregnant),<sup>10</sup> to examine whether she be with

<sup>k</sup> *Rogaverunt omnes episcopi magnates, ut consentirent quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt, quod nolunt leges Angliæ mutare, quæ hucusque usitatæ sunt et approbatæ* (All the bishops requested the peers to consent that children born before marriage should be legitimate, as those which are born after marriage, because the church esteems them so. But all the earls and barons answered unanimously, that they would not change the laws of England which were hitherto used and approved). Stat. 20 Hen. III. c. 9. See the introduction to the great charter, edit. Oxon. 1759. sub anno 1253.

<sup>l</sup> Cro. Jac. 541.

<sup>m</sup> Stiernhook de Jure Gothor. l. 3. c. 5.

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<sup>10</sup> "The writ *de ventre inspiciendo*, to ascertain whether a woman convicted of a capital crime was quick with child, was allowed by the common law, in



child, or not;<sup>n</sup> and, if she be. to keep her under proper restraint, till delivered; which is entirely conformable to the practice of the civil law:<sup>o</sup> but, if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again, on the birth of a child within forty weeks from the death of the husband.<sup>p</sup> But if a man dies, and his widow soon after marries again, and a child is born within such a time, as that by the course of nature it might have been the child of either [<sup>457</sup>] husband; in this case he is said to be more than ordinarily legitimate; for he may, when he arrives to years of discretion, choose which of the fathers he pleases.<sup>q</sup> To prevent this, among other inconveniences, the civil law ordained that no widow should marry *infra annum luctus* (within the year of mourning),<sup>r</sup> a rule which obtained so early as the reign of Augustus,<sup>s</sup> if not of Romulus: and the same constitution was probably handed down to our early ancestors from the Romans, during

<sup>n</sup> Co. Litt. 8. Bract. l. 2. c. 32.

<sup>o</sup> Ff. 25. tit. 4. per tot.

<sup>p</sup> Britton, c. 66. pag. 166.

<sup>q</sup> Co. Litt. 8.

<sup>r</sup> Cod. 5. 9. 2.

<sup>s</sup> But the year was then only *ten* months. Ovid. Fast. I. 27.

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order to guard against the taking of the life of an unborn child for the crime of the mother. The only purpose, we believe, for which the like writ was allowed by the common law, in a matter of civil right, was to protect the rightful succession to the property of a deceased person against fraudulent claims of bastards, when a widow was suspected to feign herself with child in order to produce a supposititious heir to the estate, in which case the heir or devisee might have this writ to examine whether she was with child or not, and, if she was, to keep her under proper restraint till delivered. 1 Bl. Comm. 456; Bac. Ab., Bastard, A. In cases of that class, the writ has been issued in England in quite recent times. In re Blakemore, 14 Law Journal (N. S.) Ch. 336. But the learning and research of the counsel for the plaintiff in error have failed to produce an instance of its ever having been considered, in any part of the United States, as suited to the habits and condition of the people. So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history." Union Pac. Ry. Co. v. Botsford, 141 U. S. 250, 253, 35 L. Ed. 734, 11 Sup. Ct. Rep. 1000.

their stay in this island; for we find it established under the Saxon and Danish governments.<sup>t 11</sup>

§ 622. (2) Bastards born during wedlock.—As bastards may be born before the coverture or marriage state is begun, or after it is determined, so also children born during wedlock may in some circumstances be bastards. As if the husband be out of the kingdom of England (or, as the law somewhat loosely phrases it, *extra quatuor maria*—beyond the four seas), for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards.<sup>u</sup> But, generally, during the coverture access of the husband shall be presumed, unless the contrary can be shown;<sup>v</sup> which is such a negative as can only be proved by showing him to be elsewhere: for the general rule is, *præsumitur pro legitimatione* (the presumption is in favor of legitimacy).<sup>w</sup> In a divorce, *a mensa et thoro* (from bed and board), if the wife breeds children, they are bastards; for the law will presume the husband and wife conformable to the sentence of separation, unless access be proved: but in a voluntary separation by agreement, the law

<sup>t</sup> *Sit omnis vidua sine marito duodecim menses.* (Let every widow remain unmarried twelve months.) LL. Ethelr. A. D. 1008. LL. Canut. c. 71.

<sup>u</sup> Co. Litt. 244.

<sup>v</sup> Salk. 123. 3 P. W. 276. Stra. 925.

<sup>w</sup> 5 Rep. 98.

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<sup>11</sup> Savigny has discussed this point in his history of the Roman law during the Middle Ages (vol. 2, ch. 10, § 58); but the civilian does not share Blackstone's belief that the law of Canute was a survival of the Roman dominion. After referring not only to this (LL. Canute, § 71, *Ancient Laws*, Thorpe's ed. vol. 1, p. 74), of which he says that it is clearly taken from the Theodosian Code, lib. 3, tit. 8, section 1, *brev. de sec. nuptiis*, its penalties differing entirely from those of the code of Justinian *de sec. nuptiis*, but also the other proofs of the knowledge, or use of the Roman law in the Anglo-Saxon period given by different writers, he concludes that all taken together prove some acquaintance with the Roman law among the clergy, but not the preservation of any such law from the period of Roman rule in the island. When it is considered that the law of marriage was in the hands of the clergy, whose councils and synods preserved an almost unbroken line of descent from those of Christian Rome, the wonder must be, not that we find an occasional trace of Roman law here, but that these are so very few and slight.—HAMMOND.

will suppose access, unless the negative be shown.<sup>x</sup> So, also, if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastard.<sup>y</sup> Likewise, in case of divorce in the spiritual court *a vinculo matrimonii* (from the bond of matrimony), all the issue born during the coverture are bastards;<sup>z</sup><sup>12</sup> because such divorce is always upon [458] some cause, that rendered the marriage unlawful and null from the beginning.

§ 623. **b. Support of bastards.**—Let us next see the duty of parents to their bastard children, by our law; which is principally that of maintenance. For, though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved: and they hold indeed as to many other intentions; as, particularly, that a man shall not marry his bastard sister or daughter.<sup>a</sup> The civil law, therefore, when it denied maintenance to bastards begotten under certain atrocious circumstances,<sup>b</sup> was neither consonant to nature, nor reason; however profligate and wicked the parents might justly be esteemed.

<sup>x</sup> Salk. 123.

<sup>a</sup> Lord Raym. 63. Comb. 356.

<sup>y</sup> Co. Litt. 244.

<sup>b</sup> Nov. 89. c. 15.

<sup>z</sup> *Ibid.* 235.

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<sup>12</sup> **Effect of divorce on legitimacy.**—The influence of the canon law in introducing the consideration given to good faith, knowledge, etc., is clearly shown in the case of divorce, and its effect upon the legitimacy of the issue. By the common law a divorce bastardized all the issue, as Croke says, in Hil. 18 Edw. IV, pl. 28, fol. 29, 30; but the spiritual law distinguished in cases of divorce for consanguinity between a conscious and unconscious incest, and bastardized only the issue of the former. (Brian, *ubi supra*, and Catesby, arg. fol. 296.) There the question is treated as an open one, and the difference of common and canon law is clearly recognized; but at a later date the same point is stated without qualification in our law, as Blackstone has stated it here (Roll. Rep. 212; 14 Vin. 250; Heir, F. 1); and it is doubtless from the influence of the canon law that the French law took the rule mentioned in a former note (p. \*453), legitimizing children born of a void marriage, which has been copied by the statute law of Virginia and other states.—HAMMOND.

The method in which the English law provides maintenance for them is as follows:° When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or miscarries, or proves not to have been with child, the person shall be discharged: otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father, or lewd mother, run away from the parish, the overseers by direction of two justices may seize their rents, goods, and chattels, in order to bring up the said bastard child. Yet such is the humanity of our laws, that no woman can be compulsively questioned concerning the father of her child, till one month after her delivery: which indulgence is, however, very frequently a hardship upon parishes, by giving the parents opportunity to escape.

§ 624. c. Rights and incapacities of bastards.—[459] I proceed next to the rights and incapacities which appertain to a bastard. The rights are very few, being only such as he can *acquire*; for he can *inherit* nothing, being looked upon as the son of nobody, and sometimes called *filius nullius* (the son of no one), sometimes *filius populi* (the son of the people).<sup>d</sup> Yet he may gain a surname by reputation,<sup>e</sup> though he has none by inheritance. All other children have their primary settlement in their father's parish; but a bastard in the parish where born, for he hath no father.<sup>f</sup> However, in case of fraud, as if a woman be sent either by order of justices,

° Stat. 18 Eliz. c. 3 (Poor, 1575). 7 Jac. I. c. 4 (Vagabonds, 1609). 3 Car. I. c. 4 (1627). 13 & 14 Car. II. c. 12 (Poor Relief, 1662). 6 Geo. II. c. 31 (Bastard Children, 1732).

<sup>d</sup> Fort. d. L. L. c. 40.

<sup>e</sup> Co. Litt. 3.

<sup>f</sup> Salk. 427.

or comes to beg as a vagrant, to a parish which she does not belong to, and drops her bastard there; the bastard shall, in the first case, be settled in the parish from whence she was illegally removed;<sup>g</sup> or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy.<sup>h</sup> Bastards also, born in any licensed hospital for pregnant women, are settled in the parishes to which the mothers belong.<sup>i</sup> The incapacity of a bastard consists principally in this, that he cannot be heir to anyone, neither can he have heirs, but of his own body; for, being *nullius filius*, he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived. A bastard was also, in strictness, incapable of holy orders; and, though that were dispensed with, yet he was utterly disqualified from holding any dignity in the church:<sup>k</sup> but this doctrine seems now obsolete; and in all other respects, there is no distinction between a bastard and another man. And really any other distinction, but that of not inheriting, which civil policy renders necessary, would, with regard to the innocent offspring of his parents' crimes, be odious, unjust, and cruel to the last degree, and yet the civil law, so boasted of for its equitable decisions, made bastards in some cases incapable even of a gift from their parents.<sup>l</sup> A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise,<sup>m</sup> as was done in the case of John of Gant's bastard children, by a statute of Richard the Second.

<sup>g</sup> *Ibid.* 121.

<sup>h</sup> Stat. 17 Geo. II. c. 5 (1743).

<sup>i</sup> Stat. 13 Geo. III. c. 82 (*Lying-in Hospitals, 1772*).

<sup>k</sup> Fortesc. c. 40. 5 Rep. 58.

<sup>l</sup> Cod. 6. 57. 5.

<sup>m</sup> 4 Inst. 36.



## CHAPTER THE SEVENTEENTH. [460]

### OF GUARDIAN AND WARD.

§ 625. **Guardian and ward.**—The only general private relation, now remaining to be discussed, is that of guardian and ward;<sup>1</sup> which bears a very near resemblance to the last, and is plainly derived out of it: the guardian being only a temporary parent; that is, for so long time as the ward is an infant, or under age. In examining this species of relationship, I shall first consider the different kinds of guardians, how they are appointed, and their power and duty; next, the different ages of persons, as defined by the law: and, lastly, the privileges and disabilities of an infant, or one under age and subject to guardianship.

1 **The law of guardianship.**—The common-law distinctions as to different kinds of guardian have almost entirely disappeared, though in the guardian *ad litem* we have still a reminiscence of the *prochein amy* who was guardian in socage; and the parent is still guardian by nature of his child's person, but not of his estate. The guardian is now testamentary or statutory; the latter being appointed by the proper court under the state laws regulating the subject. After the age of fourteen the infant has usually by these statutes the right to select his guardian, subject to the court's approval. Either is now known as a general guardian, unless his power is expressly limited by the act appointing him.

The court of the father's last domicile is the proper court to appoint. (Wells v. Andrews, 60 Miss. 373.) The guardian cannot change it by removing the ward. (Marheineke v. Grothaus, 72 Mo. 204.) The appointment has no extraterritorial force, e. g., out of state. (Taney's Appeal, 97 Pa. St. 74, peculiar facts, guardian appointed where father was killed—aunt's choice of domicile.) Ancillary guardian may be appointed in another jurisdiction. Guardianship of "unknown heirs of A" is a mere nullity. (State v. McLaughlin, 77 Ind. 335.) He may expend the income, but not the principal without leave of court. *Semble*, under strong and sudden urgency, as for maintenance, medical expenses, and burial, he may do so. (Hobbs v. Harlan, 10 Lea (Tenn.), 268, 43 Am. Rep. 309.) The court can afterward sanction this as to personalty, but not as to realty. Rinker v. Streit, 33 Gratt. (Va.) 663.) He may under circumstances anticipate future resources. (Gott v. Culp, 45 Mich. 265, 7 N. W. 767.) The ward cannot in any case extend his authority. His consent even in a criminal case is a nullity. (State v. Willoughby, 76 Mo. 215.) The apparent exception of consent given by female ward after marriage not real. (Bickerstaff v. Marlin, 60 Miss. 509, 45 Am. Rep. 418.) A guardian's contract even for necessities for the ward will not bind the estate (Reading v. Wilson, 38 N. J. Eq.

§ 626. 1. **Guardians.**—1. The guardian with us performs the office both of the *tutor* and *curator* of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune; or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law;<sup>a</sup> as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

§ 627. a. **Kinds of guardians.**—(1) **Guardians by nature;** (2) **Guardians for nurture;** (3) **Guardians in socage;** (4) **Guardians by statute or by testament;** (5) **Guardians by custom.**—<sup>[461]</sup> Of the several species of guardians, the first are guardians *by nature*: viz., the father and (in some cases) the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits.<sup>b</sup> And, with regard to daughters, it seems by construction of the statute 4 & 5 Ph. & Mar., c. 8 (Abduction, 1558), that the father might by deed or will assign a guardian to any woman child under the age of sixteen; and, if none be so assigned, the mother shall in

<sup>a</sup> Ff. 26. 4. 1.

<sup>b</sup> Co. Litt. 88.

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446); but he may be held personally on a contract so made. (*McKinney v. Jones*, 55 Wis. 39, 11 N. W. 606, 12 N. W. 381.) He cannot advance money from his own means, and hold the ward personally liable after coming of age. (*Preble v. Longfellow*, 48 Me. 279, 77 Am. Dec. 227.) The guardian is a trustee, and held to all the duties of a trustee, except those belonging to the legal title, which he has not (in land at least, though he may have in personalty). It is a breach of trust if he takes title in his own name, and the title is void. (*Robinson v. Peabworth*, 71 Ala. 240; *Coffey v. Greenfield*, 62 Cal. 602.) Upon his responsibility for the ward's money deposited in his own name, see *Parsley v. Martin*, 77 Va. 376, 46 Am. Rep. 733. Like other trustees, he cannot purchase. (*Jeffries v. Dowdle*, 61 Miss. 504.) It is his duty to collect debts by suit (*Bemiss v. Bemiss*, 110 U. S. 42, 28 L. Ed. 64, 3 Sup. Ct. Rep. 441); and he may compound them. (*Ordinary v. Dean*, 44 N. J. L. 64.) The guardian should settle his accounts in court at the termination of the minority. It will then be *res adjudicata*. (*State v. Slaughter*, 80 Ind. 597.) He may settle with the infant personally after the latter is of age, but in case of doubt will have the burden of proving the fairness of the settlement, especially if made soon or hastily. A delay of four years in questioning such a settlement is fatal, at least as to claims on his sureties. (*Aaron v. Mendel*, 78 Ky. 427, 39 Am. Rep. 248.)—HAMMOND.

this case be guardian.<sup>c</sup> There are also guardians *for nurture*;<sup>d</sup> which are, of course, the father or mother, till the infant attains the age of fourteen years:<sup>e</sup> and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.<sup>f</sup> Next are guardians *in socage* (an appellation which will be fully explained in the second book of these Commentaries), who are also called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin, to whom the inheritance cannot possibly descend; as, where the estate descended from his father, in this case his uncle by the mother's side cannot possibly inherit this estate, and therefore shall be the guardian.<sup>g</sup> For the law judges it improper to trust the person of an infant in his hands, who may by possibility become heir to him; that there may be no temptation, nor even suspicion of temptation, for him to abuse his trust.<sup>h</sup> The Roman laws proceed on a quite contrary principle, committing the care of the minor to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate, to which he has a prospect of succeeding: and this they boast to be "*summa providentia* (the greatest prudence)."<sup>i</sup> But in the meantime they seem to have forgotten how much it is the [462] guardian's interest to remove the encumbrance of his pupil's life from that estate for which he is supposed to have so great a regard.<sup>k</sup>

<sup>c</sup> 3 Rep. 39.

<sup>d</sup> Co. Litt. 88.

<sup>e</sup> Moor. 738. 3 Rep. 38.

<sup>f</sup> 2 Jones 90. 2 Lev. 163.

<sup>g</sup> Litt. § 123.

<sup>h</sup> *Nunquam custodia alicujus de jure alicui remanet, de quo habeatur suspicio, quod possit vel velit aliquod jus in ipsa hæreditate clamare.* (The guardianship of no person shall of right continue in him, of whom a suspicion may be entertained that he can or will claim any right in the inheritance.) Glanv. l. 7. c. 11.

<sup>i</sup> Ff. 26. 4. 1.

<sup>k</sup> The Roman satirist was fully aware of this danger, when he puts this private prayer into the mouth of a selfish guardian:

—*pupillum o utinam, quem proximus hæres*

*Impello, expungam.* (O, were my pupil fairly knock'd o' th' head! I should possess th' estate if he were dead.) Pers. l. 12.

And this affords Fortescue,<sup>l</sup> and Sir Edward Coke,<sup>m</sup> an ample opportunity for triumph; they affirming, that to commit the custody of an infant to him that is next in succession is “*quasi agnum committere lupo, ad devorandum* (like committing the lamb to the wolf to be devoured).”<sup>n</sup> These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion, so far as to choose his own guardian. This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II, c. 24 (Military Tenures, 1660), which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter) enacts, that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one and twenty years. These are called guardians *by statute*, or *testamentary* guardians. There are also special guardians *by custom* of London, and other places;<sup>o</sup> but they are particular exceptions, and do not fall under the general law.

§ 628. b. Reciprocal rights and duties.—The power and reciprocal duty of a guardian and ward are the same, *pro tempore* (for the time being), as that of a father and child; and therefore I shall not repeat them: but shall only add, that the guardian, when the ward comes of age, is bound to give [<sup>463</sup>] him an account of all that has been transacted on his behalf, and must answer for all losses by his willful default or negligence. In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially,

<sup>l</sup> C. 44.

<sup>m</sup> 1 Inst. 88.

<sup>n</sup> See Stat. Hibern. 14 Hen. III (1229). This policy of our English law is warranted by the wise institutions of Solon, who provided that no one should be another's guardian, who was to enjoy the estate after his death. (Potter's Antiqu. b. 1. c. 26.) And Charondas, another of the Grecian legislators, directed that the inheritance should go to the father's relations, but the education of the child to the mother's; that the guardianship and right of succession might always be kept distinct. (Petit. Leg. Att. 1. 6. t. 7.)

<sup>o</sup> Co. Litt. 88.

to indemnify themselves by applying to the court of chancery, acting under its direction, and accounting annually before the officers of that court. For the lord chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics; that is, of all such persons as have not discretion enough to manage their own concerns. In case, therefore, any guardian abuses his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.<sup>p</sup>

§ 629. 2. Wards; infancy.—Let us next consider the ward or person within age, for whose assistance and support these guardians are constituted by law; or who it is, that is said to be within age. The ages of male and female are different for different purposes. A male at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods, and chattels. A female also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian: at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that full age in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth;<sup>q</sup> who till that time is an infant, and so styled in law. Among the ancient Greeks and Romans *women* were never [<sup>464</sup>] of age but subject to perpetual guardianship,<sup>r</sup> unless when married, "*nisi convenissent in manum viri* (unless they should come under the care of a husband)": and, when that perpetual tutelage wore away in process of time, we find

<sup>p</sup> 1 Sid. 424. 1 P. Will. 703.

<sup>q</sup> Salk. 44. 615. Lord Raym. 480, 1096. *Toder v. Sansam*, Dom. Proc. 27 Febr. 1775.

<sup>r</sup> Pott. Antiq. b. 4. c. 11. Cic. pro Muren. 12.



that, in females as well as males, full age was not till twenty-five years.<sup>s</sup> Thus by the constitution of different kingdoms, this period, which is merely arbitrary, and *juris positivi* (positive law), is fixed at different times. Scotland agrees with England in this point (both probably copying from the old Saxon constitutions on the Continent, which extended the age of minority "*ad annum vigesimum primum, et eo usque juvenes sub tutelam reponunt*"—to the twenty-first year; and they place their youths under guardianship till that period);<sup>t</sup> but in Naples they are of full age at *eighteen*; in France, with regard to marriage, not till *thirty*; and in Holland at *twenty-five*.

§ 630. a. **Privileges and disabilities of infants.**—Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves<sup>2</sup> by their own improvident acts. An infant cannot be sued

<sup>s</sup> Inst. 1. 22. 1.

<sup>t</sup> Stiernhook de Jure Sueonum. 1. 2. c. 2. This is also the period when the king as well as the subject arrives at full age in modern Sweden. Mod. Un. Hist. xxxiii. 220.

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2 **Privileges and disabilities of infancy.**—An infant's disabilities extend only to the disposal of property. In holding it he has the same rights with any other person, and a gift, devise, or conveyance to him vests a complete title, with which the parent has no right as parent to interfere, and as guardian can only deal with it as any other guardian would, subject to account, and under the direction of a court of probate or chancery. Acceptance by the infant is presumed. (*Jackson v. Bodle*, 20 Johns. (N. Y.) 184.) Guardian's promise does not bind. (*Burnham v. Porter*, 24 N. H. 570.) A conveyance from the father to the child is no exception to this rule; only such a conveyance is subject to be avoided by creditors if voluntary, as the like conveyance to a stranger would be, and the relationship of the parties is a suspicious fact that would strengthen other evidence of fraud. Such a conveyance to a stranger would be valid between the parties, and there seems to be no reason why it should not be valid between parent and child, as any other voluntary conveyance would be, against subsequent purchasers under the American rule, though not under the English. (*Spencer v. Carr*, 45 N. Y. 406, 6 Am. Rep. 112.) An absolute gift of personalty by father to child, e. g., of a watch, cannot be reclaimed without the child's consent. (*Smith v. Smith*, 7 Car. & P. 401.)

Upon the distinction between different acts by the infant himself, the fundamental principle may be stated thus: An infant or minor is incapable of obligating himself by any promise he may make, or other expression of his will;

but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise:" but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian. In criminal cases, an infant of the age of *fourteen* years may be capitally punished for any capital offense:<sup>w</sup> but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty: for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax* (capable of deceit), and could

<sup>u</sup> Co. Litt. 135.

<sup>w</sup> 1 Hal. P. C. 25.

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but he is subject to all the laws of the state, and responsible for transgressions against them, equally with adults. In consequence, he is liable for torts, but not upon contracts: or more accurately, he is subject to duties *in rem*, but not to obligations *in personam*. But even this limited responsibility does not attach to him upon birth, or before he can be deemed a rational being; mischief done by a young infant not capable of foreseeing the results of his acts, must be regarded as accidents. At what age this capacity begins is a question of fact in each case. So, too, in cases where a greater degree of care, skill, prudence, or knowledge is required, or where actual malice must be shown, it will always be a question of fact, and his age at the time will be one of the evidential factors, of which the answer to that question must be constructed. Infancy may always be taken into consideration with other circumstances in determining whether a wrong has been committed. It is here not an ultimate but an evidential fact, and the effect of it will vary according to the nature of the tort. This is very clearly stated by C. J. Marshall in *Vasse v. Smith*. After holding that infancy is not a complete bar in trover, even when the goods were in his possession by virtue of a contract, he says: "Yet it may be given in evidence, for it may have some influence on the question whether the act complained of be really a conversion or not," and therefore overrules an exception taken to its admission.

The exceptional cases in which the minor is said to bind himself by his contracts will be found always to contain some external act or course of conduct, upon which the law fixes the consequence wrongly attributed to his obligation. Thus his feoffments actually passed the seisin, but his grants were inoperative; his contract to serve was called binding, to give him a settlement (*King v. Dutton*, 15 East, 352); but it was really the residence that was the result in fact of the service. The clearest instance, however, is the purchase of necessaries; the law implies liability to pay the reasonable worth of what he

discern between good and evil at the time of the offense committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty [465] or discretion.\* And Sir Matthew Hale gives us two instances, one of a girl of thirteen, who was burned for killing her mistress; another of a boy still younger, that had killed his companion, and hid himself, who was hanged; for it appeared by his hiding that he knew he had done wrong, and could discern between good and evil: and in such cases the maxim of law is, that *malitia supplet aetatem* (malice, or the intention to do a wrongful act, makes up for the want of mature years). [Broom's Legal Maxims (8th ed.), 264]. So, also, in much more modern times, a boy of ten years old, who

\* 1 Hal. P. C. 26.

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has in fact received, but his express promise to pay any particular sum is of no force.

In these cases the obligation is to be separated from the act done; the latter can only be annulled upon equitable terms; the former is simply unenforceable against the minor, while no question can arise upon it otherwise. *Per contra*, the acts done by either party may have legal consequences, which only the minor can avoid—under what conditions?

In all executed contracts there is something done, the practical consequences of which are the same when an infant does them as when they are done by a person of full age. It is absurd to speak of such acts as void or voidable. Being actually done, the only question is what legal consequences follow; and we must distinguish land, chattels, money. Where the infant has conveyed land, the grantee has a title good as to all third persons (*Irvine v. Irvine*, 9 Wall. 628, 19 L. Ed. 804), and is bound by his purchase, although the infant may avoid it by re-entry, without returning the price (*Green v. Green*, 69 N. Y. 553, 25 Am. Rep. 233), or by deed to another person, after he is of age, except where the grantee is in actual possession, and the law avoids deeds of land in adverse possession, when he must *re-enter* (*Riggs v. Fisk*, 64 Ind. 100; *Mustard v. Wohlford*, 15 Gratt. (Va.) 329, 76 Am. Dec. 209). The privilege is not lost by mere acquiescence even after he comes of age, until the statute of limitations runs (*Wallace v. Latham*, 52 Miss. 291); but the sale may be confirmed by his conduct, amounting to an equitable estoppel (*Irvine v. Irvine*, 9 Wall. 627, 628, 19 L. Ed. 803, 804; *Davis v. Dudley*, 70 Me. 236, 35 Am. Rep. 318; *Ferguson v. Bobo*, 54 Miss. 121; *Allen v. Poole*, 54 Miss. 323), and of course by his express grant, or recital, and confirmation in another grant. (*Phillips v. Green*, 5 T. B. Mon. (21 Ky.) 344.)

The distinction between what the infant has actually done, and what he has promised or directed to be done, lost sight of entirely in the common maxims as to the effect of his contracts (because executed and executory contracts alike

was guilty of a heinous murder, was held a proper subject for capital punishment, by the opinion of all the judges.<sup>7</sup>

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters: but this may be said in general, that an infant shall lose nothing by nonclaim, or neglect of demanding his right: nor shall any other *laches* or negligence be imputed to an infant, except in some very particular cases.

§ 631. (1) **Contracts and conveyances of infants.**—It is generally true, that an infant can neither alien his lands, nor do any legal act, nor make a deed, nor, indeed, any manner of contract, that will bind him. But still to all these rules there are some ex-

7 Foster. 72.

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are included in that term), was at the basis of the old distinction between feoffment and grant. The *former*, an actual livery of seisin, is voidable only, because something has actually been done which requires to be undone before the parties are *in statu quo*; the latter, a mere declaration or written instrument, making no change in the subject matter of itself, can be entirely disregarded, or held void, and will thus leave the parties *in statu quo*. (Thompson v. Leach, Carth. 435; Comb. 469; 3 Salk. 300; 2 Vent. 198; Yates v. Boen, 2 Strange, 1104; Ball v. Mannin, 1 Dow & C. 380; Dexter v. Hall, 15 Wall. 9, 21 L. Ed. 73, criticising 2 Bl. Comm. 291.)

The passage of Perkins, quoted by Lord Mansfield, 3 Burr. 1804, and so many others, which makes an infant's grant void if it does not take effect *by delivery of his hand*, is often understood as if it referred to the delivery of the deed itself (see Lord Mansfield's reasoning, etc., and comments by Judge Story, Tucker v. Moreland, 10 Pet. 67-70, 9 L. Ed. 349, 350); but there seems no doubt that he meant livery of seisin, or of the land itself; i. e., that he had in mind the primitive distinction between feoffments and other conveyances. In section 14 soon after he says: "If an infant give a horse, and do not deliver *him with his hand*, and the donee take the horse by the force of the gift, the infant shall have trespass. But if he do deliver with his own hand *not*." (1 Mod. 137.) It is plain that nothing here depends on delivery of a deed, but on delivery of the thing itself. By a feoffment, or wherever there is livery of seisin, the infant actually transfers the land, and it cannot be treated as a nullity, though he have a right to take it again. But all other deeds by which an estate passes are void, and do not transfer the land (see Perk. § 15); but Lord Mansfield held a lease and release voidable only in *Z. v. P.*, and thus destroyed the ancient distinction. (See statement by Bronson, J., in *Fonda v. Van Horne*, 15 Wend. (N. Y.) 631, 30 Am. Dec. 77, 80.) The same phrase is used in *Whittingham's Case*, 8 Coke, 84, "if

ceptions: part of which were just now mentioned in reckoning up the different capacities which they assume at different ages; and there are others, a few of which it may not be improper to recite, as a general specimen of the whole. And, first, it is true that infants cannot alien their estates: but infant trustees, or mortgagees, are enabled to convey, under the direction of the court of chancery or exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint.<sup>z</sup> Also it is generally true, that an infant can do no legal act: yet, an infant, who has an advowson, may present to the benefice when it becomes void.<sup>a</sup> For the law in this case dispenses with one rule, in order to maintain others of far [466] greater consequence: it

<sup>z</sup> Stat. 7 Ann. c. 19 (Trust or Mortgage Estates, 1708). 4 Geo. III. c. 16 (Infant Trustees and Mortgagees, 1763).

<sup>a</sup> Co. Litt. 172.

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the infant makes a feoffment in fee, and executes it by livery of seisin *by his own hands*"; and this case illustrates Perkins, for it holds an infant's feoffment valid, if made so, but void if made by letter of attorney. (Whittingham's Case, 8 Coke, 89.) R. W. devised to his bastard daughter and her heirs. She enfeoffed S. and died without issue before her majority. The question was whether the land escheated to the queen; i. e., whether the infant's feoffment was a valid transfer of the fee. On the assumption that it was made *by livery of seisin by her own hands*, the two chief justices held that it was valid (p. 84). But it afterward appeared that it was executed by letter of attorney made by the infant, wherefore it was resolved that it was void, and the land did escheat (p. 89).

The old doctrine is well stated in Viner, Lunatic, C. 3, 3, and Infant, D. E.; though it seems from D. 33, vol. 9, fol. 387, that it was repudiated in Thompson v. Leach, by Chief Justice Holt, at least as to infants. In D. 29 it is said that if an infant makes feoffment, and dies without heir, the feoffment is unavoidable, citing Y. B. etc.

The rule as to infant's contracts is generally stated as follows: When the court can pronounce the contract to be for the infant's prejudice, it is void; when to his benefit, as for necessities, it is good; when the contract is of an uncertain nature as to benefit or prejudice, it is voidable only at the election of the infant. (Per Eyre, C. J., in Keane v. Boycott, 2 H. Black. 511; Mansfield, C. J., in Zouch v. Parsons, 3 Burr. 1794; 1 W. Black. 575. See Williams v. Moore, 11 Mees. & W. 256, for criticism on *voidable* and *void*, with remark of Wooddesson, I. 239, and note 2, pointing out the objection, and in favor of holding all *voidable*.) The objections to the distinction of *void* and *voidable* are strongly stated in Clark v. Goddard, 39 Ala. 164, 84 Am. Dec. 777; followed in Langham v. State, 55 Ala. 114. Compare authorities in 34 Am.



permits an infant to present a clerk (who, if unfit, may be rejected by the bishop) rather than either suffer the church to be unserved till he comes of age, or permit the infant to be debarred of his right by lapse to the bishop. An infant may also purchase lands, but his purchase is incomplete: for, when he comes to age, he may either agree or disagree to it, as he thinks prudent or proper, without alleging any reason; and so may his heirs after him, if he dies without having completed his agreement.<sup>b</sup> It is, further, generally true, that an infant, under twenty-one, can make no deed but what is afterwards voidable: yet in some cases<sup>c</sup> he may bind him-

<sup>b</sup> Co. Litt. 2.

<sup>c</sup> Stat. 5 Eliz. c. 4 (Artificers and Apprentices, 1562). 43 Eliz. c. 2 (Poor Relief, 1601). Cro. Car. 179.

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Dec. 538, as to binding force of apprenticeship. But *Woodruff v. Logan*, 6 Ark. 276, 42 Am. Dec. 695, holds such a contract made by infant alone binding because beneficial.

The first mention of the infant's advantage as a *ratio decidendi* is in an odd *dictum* of Tankerville, 39 Ass. 1, who says: "If novel disseisin be brought by a guardian for the infant, though the infant in proper person disavows it, still *nonsuit* or *retrahit* shall not be adjudged, because the suit is presumed to be for his advantage; but if percase matter arises in the suit, whereby percase a disadvantage should be adjudged to the infant, then percase it would be good to surcease." The very terms, and especially the humorous repetition of "percase," intimate the discretion which the court reserves to itself, even in making an order which it can see to be for the benefit of the infant or against it. But this is a very different thing from judging whether a contract is for his benefit or not, and giving or taking away his rights in the exercise of such a discretion. If instead of saying that contracts prejudicial to infants are absolutely void, the books said merely that the courts would not enforce them, the modern rule would be better expressed. Thus trading contracts were formerly said to be "absolutely void as against public policy." (Bayley, J., in *Thornton v. Illingworth*, 2 Barn. & C. 824. But see comments on this in Benjamin on Sales, § 26, and Bennett's note, p. 37.) If the act is prejudicial only to an individual, then it is to be considered as voidable only by that individual. (Wilde, J., in *Commonwealth v. Weiher*, 3 Met. (Mass.) 445; *Allis v. Billings*, 6 Met. (Mass.) 415, 39 Am. Dec. 744; Parke, B., in *Williams v. More*, 11 Mees. & W. 256.) The cases holding infant's contracts void are collected and doubted in *Parsons on Partnership*, p. 18, n. e.

At common law the infant's ratification is needed to make an executory contract binding; and this of course implied that he had come of age. No obligation would be now judicially enforced against him, without such ratification (except in the states where by statute his contracts are presumptively valid,

self apprentice by deed indented or indentures, for seven years; and<sup>a</sup> he may by deed or will appoint a guardian to his children, if he has any. Lastly, it is generally true, that an infant can make no other contract that will bind him: yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other

<sup>a</sup> Stat. 12 Car. II. c. 24 (Military Tenures, 1660).

and need disaffirmance to discharge him, e. g., Iowa). But when the contract has been executed, and he seeks to get back money or property actually parted with, the case is quite different. He is allowed to repudiate his acts even during minority; and now the important question is, on what terms? We must distinguish here whether he is plaintiff or defendant. In the former case, at law, he could demand back all he had parted with by his voidable deed or act; but equity made him return the consideration, if he still had it, though it did not refuse relief if he had spent it.

Many conflicts may be solved by the distinction between rights *in rem* and *in personam* properly applied. When an infant repudiates his sale or purchase of chattels, he thereby restores the chattel to its original owner, so that a vendor to him may bring an action of replevin or of trover (not of trespass), not on any contract, express or implied, but on the original right of property and its breach, and he may bring a like action against his vendee. The repudiation likewise destroys all obligation to pay money on the contract. But as to the money *paid* on such contract before repudiation, the case is different. There is no right *in rem* remaining or revived to a sum of money. It must be sued for, if at all, on an implied promise to repay it. Such a promise cannot be implied from any act of an infant. Can it from his act after reaching majority? Not without in effect affirming the original contract. Yet some courts have held it can be done if he was in possession of the money after he had reached majority, some without that qualification, and some have gone so far as to make it a defense—a condition of any repudiation. If one who has sold and conveyed land during infancy were required to return the purchase money before revoking the deed and recovering the land, this would merely convert the sale into a mortgage, and would in effect make a valid and binding mortgage by an infant, as was said in *Manning v. Johnson*, 26 Ala. 446, 62 Am. Dec. 732, with long note, pp. 734–738, citing many *dicta*, which holds that infant may recover the land at law without returning the consideration, but with these important qualifications: (a) If the infant after he arrives at full age is shown to have been possessed of the consideration, and to have retained it an unreasonable time, or disposed of it, this will affirm his contract; (b) and the revocation of the contract by the infant at full age will allow the other party to sue for and recover at law the consideration paid him. *a* is in clear conflict with the cases that allow him to revoke until the statute runs; *b* is equivalent to enforcing the infant's contract to repay money lent; for if the other party wishes to provide an infant of means with spending money, he has

necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards.\* And thus much, at present, for the privileges and disabilities of infants.

\* Co. Litt. 172.

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only to buy property of him at a low rate, and he will hold it virtually as mortgaged for the money paid on it. He will only take the risk of the infant's entire insolvency before revocation, in which case he will still get a judgment for the amount paid him, and hold it over his head as in the case of any other insolvent debtor. Technically, too, this action can only be sustained upon an implied contract of the infant to repay money received in infancy, which the law has always refused to allow. The right of the other party to recover *chattels* given the infant in exchange or payment, after the infant's revocation of the transaction, rests on a different footing. (*Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105.)

An infant's contract will not be validated by fraudulent representations inducing the vendor to sell (*Studwell v. Shapter*, 54 N. Y. 249); nor fraud in representing himself of age. (*Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87.) But this may constitute a cause of action for the tort, though it will not estop him from repudiating the contract (*Brown v. Hartford Fire Ins. Co.*, 117 Mass. 479); nor will he be estopped from repudiating a note and mortgage given for borrowed money to one who he knew believed him to be of full age (*Baker v. Stone*, 136 Mass. 405); but when the possession itself of the goods is obtained by fraud in the contract, e. g., by giving a fraudulent check, he will be liable (as an adult would be) in case of trover. (*Mathews v. Cowan*, 59 Ill. 341.) As a rule the rights and duties of third parties dealing with infants depend on the actual age of the infant, not on their knowledge of it. They cannot meet the plea of infancy by showing that they supposed the party to be of full age; nor does their knowledge of his infancy diminish rights they otherwise would possess. (*Cassier v. Fales*, 139 Mass. 461, 1 N. E. 922, 20 The Reporter, 208.) Even the infant's misrepresentation and fraud as to his age will not make him liable. (*Aliter*, by statute in some states, e. g., Iowa.) In *Knapp v. Crosby*, 1 Mass. 479, where the costs on a writ of error were in the power of the court, and a judgment was set aside on the ground of defendant's infancy, costs were refused him because plaintiff did not know of his infancy. Infant's domicile is that of parents—father, if living (Cf. *Wharton on Conflict of Laws*, § 41; *Wheeler v. Burrow*, 18 Ind. 14; *Davis v. Davis*, 30 Ill. 180), mother, if in charge of it (*Jenness v. Jenness*, 24 Ind. 355, 87 Am. Dec. 335); and that of father remains after his death till legally changed. (*Pennsylvania v. Ravenel*, 21 How. 103, 16 L. Ed. 33.) Bastard has mother's domicile. (*Eggleston v. Battles*, 26 Vt. 548.) *Quære*, as to effect of legitimating statute as in Missouri with regard to null marriage?—HAMMOND.

[467]      CHAPTER THE EIGHTEENTH.  
OF CORPORATIONS.

§ 632. **Corporations: artificial persons.**—We have hitherto considered persons in their natural capacities, and have treated of their rights and duties. But, as all personal rights die with the person, and, as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient, if not impracticable; it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute artificial persons,<sup>1</sup> who may maintain a perpetual succession, and enjoy a kind of legal immortality.

These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations of which there is a great

1 **Are corporations real or fictitious persons.**—The question whether these artificial persons are to be considered as real or fictitious persons in law has been a topic for much discussion during recent years. Chief Justice Marshall in *Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 4 L. Ed. 629, defined a corporation as ‘an artificial being, invisible, intangible, and existing only in contemplation of law.’ Professor Maitland has advocated the German theory that a corporation is a real person, and this idea has been elaborated by Professor Geldart in his lecture on ‘Legal Personality,’ delivered upon the occasion of his inauguration as Vinerian Professor of English Law at Oxford.

“Some ten years have passed since the late Professor Maitland in his masterly introduction to his translation of Gierke’s *Political Theories of the Middle Age* introduced us to that writer’s theory of the *Genossenschaft*. That theory was a part of the nineteenth century revolt of German legal thought against the Romanism which since the era of the Reception had, if not crushed, at least overlaid and driven below the surface the native conceptions of Germanic law. Already classical Roman law had faced, while it sought to discourage, the existence of *corpora*, *collegia*, *universitates personarum*, groups of persons acting as units; it had admitted, perhaps, not that they are persons, at least that they act as, have the functions of persons; words which, if they do not express, yet contain the germ of a fiction theory. The looser and richer structure of mediæval society presented an abundance of such groups, cities, villages, guilds, ecclesiastical bodies, universities, and within them faculties and colleges. A theory was called for to meet the facts, and a theory was found by Pope Innocent IV, which taught that the basis of the facts was a fiction. The corporate body is not in reality a person, but is made a person by fiction of the law. The fiction theory led by an easy transition to the concession theory, which allows

variety subsisting, for the advancement of religion, of learning, and of commerce; in order to preserve entire and forever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations, let us consider the case of a college in either of our universities, founded *ad studendum et orandum* (for study and prayer), for the encouragement and support of religion and learning. If this was a mere voluntary assembly, the individuals which compose it might indeed read, pray, study, and perform scholastic exercises together, so long as they could agree to do so: but they [468] could neither frame, nor receive any laws or rules of their conduct; none at least, which would have any binding force, for want of a coercive power to create a sufficient obligation. Neither could they be capable of retaining any privileges or immunities: for, if such privileges be attacked, which of all this unconnected assembly has the right, or ability, to defend them? And,

the creation of such fictitious bodies only to the state. Then in the nineteenth century Savigny developed and defined this fiction theory. The question might well be asked, How can that which is a mere fiction act so as to acquire rights and incur liabilities? For the fictitious person will hardly serve a useful purpose if it cannot at least acquire property and make contracts. The answer was found in an analogy between the artificial person and the natural person who is under disability, such as one of tender years. Just as the *pupillus* of Roman law who cannot act has a tutor who acts for him and whose acts are deemed to be his acts, so the artificial person who cannot act must be represented by natural persons whose acts are attributed to it.

"Against this fiction theory and its developments, as against other doctrines which Romanism had forced upon the native law, renascent Germanism replied with the *Genossenschaftstheorie*. 'Our German Fellowship,' so Maitland sums up the essence of that theory, 'is no fiction, no symbol, no piece of the state's machinery, no collective name for individuals, but a living organism and a real person with a body and members and a will of its own. Itself can will, itself can act; it wills and acts by the men who are its organs, as a man wills and acts by brain, mouth and hand. It is not a fictitious person; it is a *Gesammperson*, and its will is a *Gesammtwille*; it is a group-person and its will is a group-will.'"—GELDART, *Legal Personality* (1911), 27 *Law Quarterly Review*, 90, 92.

"Has the common law received the fiction theory of corporations?" This question is answered by Sir Frederick Pollock, 27 *Law Quarterly Review*, 219, 232: "We may now try to sum up the doctrine as it appears to have been understood at the time, say about 1600, when the common law was settled in



when they are dispersed by death or otherwise, how shall they transfer these advantages to another set of students, equally unconnected as themselves? So, also, with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other, as often as the hands are changed. But when they are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic; or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws: the privileges and immunities, the estates and possessions, of the corporation, when once vested in them, will be forever vested, without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, a person that never dies:

its classical form and became accessible in print. A body of men claiming corporate personality may rely either on express royal authority (much more on the authority of an act of parliament in which the king and the estates of the realm concur), or on ancient and continuous usage. When the existence of a corporation is established in either way, it is a person in law having such capacities and disposing powers as are compatible with an incorporeal subject of rights and duties. These capacities are attributed to it by the general law, and an express grant is not needed to confer them. On the contrary, they can be diminished only by express restriction. The king, or the founder with his assent, can prescribe internal regulations, but the prevalent opinion is that without parliament he cannot substantially derogate from the corporation's right to do, by means of its common seal, all such acts in the law as a natural man may by deed, nor yet confer on it immunity from an ordinary man's responsibility; the law will allow the limits imposed in both directions by the nature of things, and it knows of no others. How far exactly these conditions operate, to what kinds of actions and legal process, for example, a corporation is amenable, has to be worked out as particular cases arise. As to what the nature of corporate personality may be in itself, no positive rule at all is laid down. Most of the points could probably be supported at need by a good show of civilian though hardly of canonist authors. Nevertheless the whole does not look to me very like the work of men imbued with the fiction theory."

in like manner as the River Thames is still the same river, though the parts which compose it are changing every instant.

§ 633. 1. History of corporations: Roman law.—The honor of originally inventing these political constitutions entirely belongs to the Romans. They were introduced, as Plutarch says, by Numa; who finding upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by [469] instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law,<sup>a</sup> in which they were called *universitates* (corporations), as forming one whole out of many individuals; or *collegia* (corporations), from being gathered together: they were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from them our spiritual corporations are derived. But our laws have considerably refined and improved upon the invention, according to the usual genius of the English nation: particularly with regard to sole corporations, consisting of one person only, of which the Roman lawyers had no notion; their maxim being that “*tres faciunt collegium* (three make a corporation).”<sup>b</sup> Though they held, that if a corporation, originally consisting of three persons, be reduced to one, “*si universitas ad unum redit*,” it may still subsist as a corporation, “*et stet nomen universitatis*.”<sup>c</sup>

§ 634. 2. Classes of corporations.—Before we proceed to treat of the several incidents of corporations, as regarded by the laws of England, let us first take a view of the several sorts of them;<sup>2</sup>

<sup>a</sup> Ff. 1. 3 t. 4. per tot.

<sup>c</sup> Ff. 3. 4. 7.

<sup>b</sup> Ff. 50. 16. 8.

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2 Public and municipal corporations.—It will be seen that Blackstone nowhere mentions what is now the most important division of corporations—that into public and private. It was quite unknown when he wrote. Indeed, the chief kind of public corporations, the municipal, were hardly distinguishable in their legal aspect from private corporations. They lacked all the features which now make so broad a difference in the rules of law applicable to them, that the latest writers find it impossible to treat of the two together. The great work of Judge Dillon on Municipal Corporations, and the still newer ones of Morawetz and Taylor on Private Corporations, describe systems far more

and then we shall be better enabled to apprehend their respective qualities.

§ 635. a. **Corporations aggregate**—b. **Corporations sole**.—The first division of corporations is into *aggregate* and *sole*. Corporations aggregate consist of many persons united together into one society, and are kept up by a perpetual succession of members, so as to continue forever: of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations sole consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation:<sup>a</sup> so is a bishop: so are some deans, and pre-

<sup>a</sup> Co. Litt. 43.

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unlike and disparate, to use Mr. Austin's favorite word, than were the ecclesiastical and lay corporations, or the aggregate and sole of Blackstone. On the other hand, these divisions have almost disappeared from American law within the last century. Ecclesiastical corporations were known only to a few of our older states at any time; and even in these they have lost all distinctive features. Even our churches, which preserve a corporate organization, are not recognized by the law as such, and could not well be under the constitutional provisions forbidding religious establishments. They are formed in the same manner and under the same rules with lay corporations for literary, educational, and charitable purposes: and under the statutes of many states form with these a class by themselves, separate from the corporations formed for pecuniary profit. As for sole corporations, they have disappeared almost entirely from our law: not so much by any change in the law itself, as by the obsolescence of the ecclesiastical dignitaries who furnish most of Blackstone's instances. Single persons, holding some office or trust, can take property, or obligations to them and their respective successors, by properly worded instruments; many public officers, treasurers, sheriffs, etc., are specially authorized by statutes to do the same: the law applicable to these cases is almost precisely that which a century ago would have been deemed peculiar to sole corporations; and yet the word is hardly ever applied to them. In the reports and digests and treatises it is found under the rubric of office, officer, or some more specific term, and rarely found under that of corporations.

Municipal corporations, as now known, may be said to be a development of common-law principles on this side of the Atlantic. Until half a century ago, even the cities, boroughs, and other like bodies of England were organized on

bendaries, distinct from their several chapters: and so is every parson and vicar. And the necessity, or at least use, of this institution will be very apparent, if we consider the case of [470] a parson of a church. At the original endowment of parish churches, the freehold of the church, the churchyard, the parsonage house, the glebe, and the tithes of the parish, were vested in the then parson by the bounty of the donor, as a temporal recompense to him for his spiritual care of the inhabitants, and with intent that the same emoluments should ever afterwards continue as a recompense for the same care. But how was this to be effected? The freehold was vested in the parson; and, if we suppose it vested in his natural capacity, on his death it might descend to his heir, and

the same model with those for private purposes. Membership or "freedom" was transmitted like private property, or given by co-optation, and rarely required even a residence within the corporate bounds. Much oftener it went with the title to land in these. The rights and duties of the corporation itself were measured by no general rule. Even the most necessary powers of administration were shared with parishes, manor courts, and artificial districts of various kinds. The famous History of Boroughs, prepared for a political purpose, and one of the first weapons of the long agitation which led to the reform bill of 1832, is full of curious details as to the composition of each parliamentary borough in England. The state of things it describes lasted down to 1835, when the Municipal Corporations' Reform Act, 5 & 6 Wm. IV, c. 76, worked a great reform, and remodeled the most important places with a few exceptions on a general plan, not unlike that which had grown up in the United States. Its distinctive features may be stated briefly thus: The municipal corporation is a subordinate branch of the government of the land, not an embodiment of individuals for their own ends, although the ancient principle of corporate unity—that the entire body is one *person* in law—is the means employed in both. But membership in this joint personality is gained in different ways. The municipal corporation has no control over the enjoyment of its own privileges. Residence within the corporate bounds is the chief prerequisite, and all others are fixed by the legislature, or by general law. The corporation itself has no voice in the matter.

"When a man moves into a town he becomes a citizen thereof (if possessed of the requisite qualifications as to age, etc., and if he remains the requisite length of time) whatever may be the desire of himself or the town." (Morton, J., *Oakes v. Hill*, 10 Pick. 333, 346. Cf. *Overseers of Poor v. Sears*, 22 Pick. 122, 130; *Hill v. Boston*, 122 Mass. 344, 356, 23 Am. Rep. 332; *People v. Canaday*, 73 N. C. 198, 21 Am. Rep. 465.) Nor has it any choice as to the objects of its existence or the methods of obtaining them. These are fixed for it, either by special charter or by general legislation, and they are invariably of a public nature. It must, of course, exercise a wide discretion as to the

would be liable to his debts and encumbrances: or, at best, the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* (as) parson, shall never die, any more than the king; by making him and his successors a corporation. By which means all the original rights of the parsonage are preserved entire to the successor: for the present incumbent, and his predecessor who lived seven centuries ago, are in law one and the same person; and what was given to the one was given to the other also.<sup>3</sup>

means to be employed in each case, but even in selecting these it cannot work for the private interest of members. The fact that it is composed of all who come within it, and that it loses all interest in those who depart from it, furnishes a sufficient test of what are private as distinct from public interests. (Dillon on Municipal Corporations, §§ 9, 52 et seq., 195; Cooley's Constitutional Limitations, c. 8; United States v. B. & O. R. R. Co., 17 Wall. 332, 21 L. Ed. 601; Philadelphia v. Fox, 64 Pa. St. 169; People v. Draper, 15 N. Y. 532; People v. Albertson, 55 N. Y. 50; State v. Leffingwell, 54 Mo. 458.) Again, it results from the foregoing that the public or municipal corporation, unlike the private, has no vested rights except in the property which it holds in trust for municipal purposes in the interest of its constantly fluctuating membership. The sovereign (represented as to the municipal corporation by the legislature) may modify its charter at pleasure, increase or diminish its powers, or wipe it out altogether.

The distinction between the two forms of corporation may be curiously illustrated in this respect by the ancient difference of customary and prescriptive rights. Whatever could be claimed by custom at common law is of such nature that a fluctuating body like the inhabitants of a particular territory may claim it. Whatever can be claimed only by prescription is property, which they as a body cannot claim, but must leave to those who can deduce each a several title to it. (Compare 2 Comm. 263.) Yet a municipal corporation can claim the same by prescription now.—HAMMOND.

<sup>3</sup> **Corporations sole.**—"The suggestion in Maine's text regarding the Roman ancestor in his representative character as a kind of corporation sole may be helpful to English students, but we can hardly trust it to throw light on the actual formation of Roman legal ideas. For our English category of corporations sole is not only, as Maine calls it, a fiction, but modern, anomalous, and of no practical use. When a parson or other solely corporate office-holder dies, there is no one to act for the corporation until a successor is appointed, and, when appointed, that successor can do nothing which he could not do without being called a corporation sole. In the case of the parson even the continuity of the freehold is not saved, and it is said to be in abeyance in the interval. As for the king, or 'the crown,' being a corporation sole, the language of our books appears to be nothing but a clumsy and, after all, ineffective de-



§ 636. **c. Ecclesiastical corporations.**—Another division of corporations, either sole or aggregate, is into *ecclesiastical* and *lay*. Ecclesiastical corporations are where the members that compose it are entirely spiritual persons; such as bishops; certain deans, and prebendaries; all archdeacons, parsons, and vicars; which are sole corporations: deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate. These are erected for the furtherance of religion, and perpetuating the rights of the church.

§ 637. **d. Lay corporations**—(1) **Civil corporations;** (2) **Eleemosynary corporations.**—Lay corporations are of two sorts, *civil* and *eleemosynary*. The civil are such as are erected for a variety of temporal purposes. The king, for instance, is made a corpora-

vice to avoid openly personifying the state. The problems of federal politics in Canada and Australia threaten to make the fiction complex. Is 'the crown' a trustee for Dominion and Province, for commonwealth and state, with possibly conflicting interests? Or is there one indivisible crown being or having several persons for different purposes? (F. W. Maitland, L. Q. R. xvi. 335, xvii. 131; W. Harrison Moore, L. Q. R. xx, 351; Markby, 'Elements of Law,' § 145). The whole thing seems to have arisen from the technical difficulty of making grants to a parson and his successors after the practice of making them to God and the patron saint had been discontinued, as tending to bring the saints into the unseemly position of litigants before secular courts. All this we may now think makes for historical curiosity rather than philosophical edification."—POLLOCK, *Maine's Ancient Law*, with notes by Sir Frederick Pollock, 226.

"A sole corporation is generally said to be a corporation composed of a single member. The definition is inaccurate and misleading. The capital stock of any corporation might by transfer become invested in one person, but this would not constitute it a corporation sole, it would still retain its original character." Thompson on Corporations, § 15.

The existence of the corporation sole in English law as a juristic person has been doubted by Professor Maitland. The Corporation Sole, 16 *Law Quarterly Review*, 335. The Crown as Corporation, 17 *Law Quarterly Review*, 131. "Then following in the steps of Sir William Markby, I ventured to say that this corporation sole has shown itself to be no 'juristic person' but is either a natural man or a juristic abstraction."

Corporations sole have practically passed out of the law of the United States. They have been recognized, however, in several states. *Weston v. Hunt*, 2 Mass. 500; *Archbishop of San Francisco v. Shipman*, 79 Cal. 288, 21 Pac. 830; *McCloskey v. Doherty*, 97 Ky. 300, 30 S. W. 649; *Governor v. Allen*, 8 Humph. (Tenn.) 176.

tion to prevent in general the possibility of an *interregnum* or vacancy of the throne, and to preserve the possessions of the crown entire; for, immediately upon the demise of one king, his successor is, as we have formerly seen, in full possession of the regal rights and dignity. Other lay corporations are erected for the good government of [471] a town or particular district, as a mayor and commonalty, bailiff and burgesses, or the like: some for the advancement and regulation of manufactures and commerce; as the trading companies of London, and other towns: and some for the better carrying on of divers special purposes; as churchwardens, for conservation of the goods of the parish; the college of physicians and company of surgeons in London, for the improvement of the medical science; the royal society for the advancement of natural knowledge; and the society of antiquaries for promoting the study of antiquities. And among these I am inclined to think the general corporate bodies of the universities of Oxford and Cambridge must be ranked:<sup>4</sup> for it is clear they are not spiritual or ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends are annexed to particular magistrates and professors, any more than other corporations where the acting officers have standing salaries; for these are rewards *pro opera et labore* (for work and labor), not charitable donations only, since every stipend is preceded by service and duty: they seem, therefore, to be merely civil corporations. The eleemosynary sort are such as are constituted for the perpetual distribution of the free alms, or bounty, of the founder of them to such persons as he has directed. Of this kind

<sup>4</sup> R. v. Chancellor of Cambridge (1723), 1 Stra. 557; Rex v. Cambridge (Vice-chancellor) (1765), 3 Burr. 1656. Under the Oxford University Act, 1854, the government of the university of Oxford is mainly vested in the Hebdomadal Council, a body consisting of twenty-two persons, of whom four are ex-officio members (the chancellor, vice-chancellor, and the two proctors), and the other eighteen are elected, viz., six by the heads of houses, six by the professors, and six by masters of arts of not less than five years' standing. Under the Cambridge University Act, 1856, the government of the university of Cambridge is vested in the Council of the Senate, consisting of eighteen persons, of whom two are ex-officio members (the chancellor and the vice-chancellor), and the other sixteen are elected, viz., four by heads of colleges, four by professors, and eight by other members of the senate.—STEPHEN, 3 Comm. (16th ed.), 3 n.

are all hospitals for the maintenance of the poor, sick, and impotent; and all colleges, both *in* our universities and *out* of them: which colleges, are founded for two purposes; 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons,<sup>4</sup> and although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.

[472] Having thus marshaled the several species of corporations, let us next proceed to consider, 1. How corporations, in general, may be created. 2. What are their powers, capacities, and incapacities. 3. How corporations are visited. And 4. How they may be dissolved.

§ 638. 3. Creation of corporations—a. Civil law.—Corporations, by the civil law, seem to have been created by the mere act, and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium* (an unlawful corporation).<sup>5</sup> It does not appear that the prince's consent was necessary to be actually given to the foundation of them; but merely that the original founders of these voluntary and friendly societies (for they were little more than such) should not establish any meetings in opposition to the laws of the state.<sup>5</sup>

\* Such as at Manchester, Eton, Winchester, etc.

† 1 Lord Raym. 6.

§ Ff. 47. 22. 1. *Neque societas, neque collegium, neque hujusmodi corpus passim omnibus habere conceditur; nam et legibus, et senatus consultis, et principalibus constitutionibus ea res cæretur.* (Neither to all and everywhere is it allowed to have a society, college, or body of this kind; for the permission is controlled by the laws, by the decrees of the senate, and by the constitutions of the prince.) Ff. 3. 4. 1.

<sup>5</sup> No doubt the authorization of the supreme power of the state was needed to constitute corporations as legal persons under the Roman law, and the assent of the sovereign was necessary for their dissolution; and Professor Williston is right in his observation that "Blackstone is in error in saying that by the civil law the voluntary association of the members was sufficient unless con-

§ 639. b. English law—(1) Corporations by common law; (2) Corporations by prescription.—But, with us in England, the king's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given.<sup>b</sup> The king's implied consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence; <sup>5a</sup> common law being nothing else but custom, arising from the universal agreement of the whole community. Of this sort are the king himself, all bishops, parsons, vicars, churchwardens, and some others; who by common law have ever been held (as far as our books can show us) to have been corporations, *virtute officii*: and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must also have an idea

<sup>b</sup> Cities and towns were first erected into corporate communities on the Continent, and endowed with many valuable privileges, about the eleventh century (Roberts Cha. V. i. 30.): to which the consent of the feudal sovereign was absolutely necessary, as many of his prerogatives and revenues were thereby considerably diminished.

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trary to law—an error probably caused by the fact that penalties were imposed on certain forbidden associations in the nature of clubs for acting without the authorization of the state, and only on these.” “The History of the Law of Business Corporations before 1800,” by Samuel Williston, in 3 Select Essays in Anglo-American Legal History, pp. 195, 197. The reader will find much of interest in this essay.

<sup>5a</sup> “We find Blackstone laying it down that the sovereign's consent is absolutely necessary to the erection of any corporation. Such consent, he explains, is implied with respect to corporations at the common law. In the United States the courts have taken a position similar to that of Blackstone. (Corporations at the common law have been but rarely mentioned in American corporate law. The validity, however, of a corporation aggregate at the common law was recognized by the United States supreme court, speaking by Mr. Justice Story, in *Terrett v. Taylor*, 9 Cranch, 43, 46 (churchwardens), and in *Pawlet v. Clark*, 9 Cranch, 292, 328 (same). The validity of a corporation sole at the common law was recognized in the cases just cited (parson), and in *Governor v. Allen*, 8 Humph. (Tenn.) 176 (governor of a state). As to a corporation sole by virtue of a statute, see *Weston v. Hunt*, 2 Mass. 500 (parson); *Brunswick v. Dunning*, 7 Mass. 445 (parson); *Jansen v. Ostrander*, 1 Cow. (N. Y.) 670, 679 (a town officer was a corporation ‘by implication from the act creating the office’).” Edward H. Warren, “Collateral Attack on Incorporation,” 21 Harv. Law Rev. 303, 311.

of a corporation, capable to transmit [<sup>473</sup>] his rights to his successors, at the same time. Another method of implication, whereby the king's consent is presumed, is as to all corporations by *prescription*, such as the city of London, and many others,<sup>1</sup> which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one; and that by the variety of accidents, which a length of time may produce, the charter is lost or destroyed.

§ 640. (3) Consent of king, how given—(a) By parliament.—The methods, by which the king's consent is expressly given, are either by act of parliament or charter. By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created;<sup>1</sup> but it is observable, that most of those statutes, which are usually cited as having created corporations, do either confirm such as have been before created by the king; as in the case of the college of physicians, erected by charter 10 Hen. VIII (1518),<sup>2</sup> which charter was afterwards confirmed in parliament;<sup>3</sup> or, they permit the king to erect a corporation *in futuro* with such and such powers; as is the case of the bank of England,<sup>m</sup> and the society of the British fishery.<sup>n</sup> So that the immediate creative act is usually performed by the king alone, in virtue of his royal prerogative.<sup>o</sup> <sup>6</sup>

<sup>1</sup> 2 Inst. 330.

<sup>2</sup> 10 Rep. 29. 1 Roll. Abr. 512.

<sup>3</sup> 8 Rep. 114.

<sup>4</sup> 14 & 15 Hen. VIII, c. 5 (Physicians, 1523).

<sup>m</sup> Stat. 5 & 6 W. & M. c. 20 (Bank of England, 1694).

<sup>n</sup> Stat. 23 Geo. II, c. 4 (1750).

<sup>o</sup> See pag. 272.

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<sup>6</sup> Cited, 65 N. Y. 151; 3 Brev. 172, 173; 1 Murph. 58, 85; 3 Am. Dec. 675; 5 Kan. 676. Few corporations by *prescription* exist in the United States, but the principle applies here, and is expressly recognized in the case of a church using corporate powers from a period fifty years before the revolution. (*Reformed Church v. Schoolcraft*, 65 N. Y. 134.)—HAMMOND.



§ 641. (b) **By charter.**—All the other methods, therefore, whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of the king's letters patent, or charter of incorporation. The king's creation may be performed by the words "*creamus, erigimus, fundamus, incorporamus* (we create, we erect, we found, we incorporate)," or the like. Nay, it is held, that if the king grants to a set of men to have *gildam mercatoriam*, a [474] mercantile meeting or assembly,<sup>p</sup> this is alone sufficient to incorporate and establish them forever.<sup>q</sup>

§ 642. (4) **Power of parliament to create corporations.**—The parliament, we observe, by its absolute and transcendent authority, may perform this, or any other act whatsoever: and actually did perform it to a great extent, by statute 39 Eliz., c. 5 (Workhouses, 1597), which incorporated all hospitals and houses of correction founded by charitable persons, without further trouble: and the same has been done in other cases of charitable foundations. But otherwise it has not formerly been usual thus to intrench upon the prerogative of the crown, and the king may prevent it when he pleases. And, in the particular instance before mentioned, it was done, as Sir Edward Coke observes,<sup>r</sup> to avoid the charges of incorporation and licenses of mortmain in small benefactions; which in his days were grown so great, that they discouraged many men from undertaking these pious and charitable works.

§ 643. (5) **Creation of corporations by patent.**—The king (it is said) may grant to a subject the power of erecting corporations,<sup>s</sup> though the contrary was formerly held: <sup>t</sup> that is, he may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the king that erects, and the subject is but the instrument: for though none but the king can make a cor-

<sup>p</sup> *Gild* signified among the Saxons a fraternity, derived from the verb *gildan* to pay, because every man paid his share towards the expenses of the community. And hence their place of meeting is frequently called the *Guild hall*.

<sup>q</sup> 10 Rep. 30. 1 Roll. Abr. 513.

<sup>r</sup> 2 Inst. 722.

<sup>s</sup> Bro. Abr. tit. Prerog. 53. Viner. Prerog. 88. pl.

<sup>t</sup> Year-Book, 2 Hen. VII, 13 (1486).

poration, yet *qui facit per alium, facit per se* (he who does a thing by the agency of another, does it himself).<sup>u</sup> In this manner the chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it, in the erection of several matriculated companies, now subsisting, of tradesmen subservient to the students.

§ 644. (6) **Corporate name.**—When a corporation is erected, a name must be given to it; and by that name alone it must sue, and be sued, and do all [475] legal acts; though a very minute variation therein is not material.<sup>v</sup> Such name is the very being of its constitution; and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions.<sup>w</sup> The name of incorporation, says Sir Edward Coke, is as a proper name, or name of baptism; and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by the same name the king baptizes the incorporation.<sup>x 7</sup>

<sup>u</sup> 10 Rep. 33.

<sup>w</sup> Gilb. Hist. C. P. 182.

<sup>v</sup> *Ibid.* 122.

<sup>x</sup> 10 Rep. 28.

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7 **Authority to create corporations.**—The crown has at all times exercised the prerogative of creating corporations by charter or letters patent, and may still do so upon the advice of a responsible minister. Thus, in 1889, the British South Africa Company was “constituted, erected, and incorporated . . . by our prerogative royal and of our especial grace.” But trading corporations are now usually incorporated either by special acts of parliament, as most of our railway companies have been, or under the powers contained in general acts of parliament, of which the most important is the Companies (Consolidation) Act, 1908. That act, which repeals and re-enacts in the form of a Consolidating Act, the Companies Act, 1862, and many other acts on the same subject, empowers any seven or more persons to form themselves into an incorporated company for any lawful purpose, by subscribing to a memorandum of association and otherwise complying with the requirements of the act. A vast number of trading companies have been formed under that act, or the earlier Companies Acts, whose place it has taken.—STEPHEN, 3 Comm. (16th ed.), 6.

In the United States, where written constitutions define the powers of the several branches of government, the power of chartering corporations belongs to the legislature only. The power of granting corporate franchises is not given to Congress in express terms by the constitution, but it belongs to Congress as an incident to the powers expressly granted. *McCullough v. Maryland*, 4

§ 645. 4. Powers of a corporation—a. To have perpetual succession; b. To sue and be sued; c. To purchase and hold lands; d. To have a common seal; e. To make by-laws.—After a corporation is so formed and named, it acquires many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation; which incidents, as soon as a corporation is duly erected, are tacitly annexed of course.<sup>1</sup> As, 1. To have perpetual succession. This is the very end of its incorporation: for there cannot be a succession forever without an incorporation;<sup>2</sup> and therefore all aggregate corporations have a power necessarily implied of electing

<sup>1</sup> *Ibid.* 30. Hob. 211.

<sup>2</sup> 10 Rep. 26.

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Wheat. 316. Whether Congress can charter a corporation in any particular case, therefore, depends wholly upon the constitutionality of the object to be attained, and the fact that the formation of a corporation is really adapted to effect this object. Morawetz on Private Corporations, § 9.

In many of the states the legislature is prohibited by constitutional provision from granting corporate franchises except within certain prescribed rules. Thus, it is provided, in many instances, that no charter of incorporation shall be granted by special act, and that corporations shall be formed only in accordance with general laws. Morawetz on Private Corporations, § 10.

The rule that corporations may exist by prescription has been frequently asserted in the United States with regard to municipal corporations. "But the acquiescence of the public cannot upon the same principle be held to legalize a private corporation; for the public are ordinarily not concerned in the existence of a private corporation, and acquiescence can have no weight where there is no cause for objecting.

"Long-continued uses of corporate franchises may undoubtedly be presumptive evidence that a charter was granted, in the United States as well as in England, but in the United States all franchises must be derived from an act of the legislature, and it is generally possible to ascertain with certainty whether or not a corporation was chartered, by reference to the statute books or to the records of the articles of incorporation." Morawetz on Private Corporations, § 37.

**De facto corporations.**—The corporation at the common law and the corporation by prescription were recognized by the courts as legal units though unchartered. The courts have been called upon to recognize the acts of *de facto* corporations as corporate acts, although such corporations have not been sanctioned by the state because they have failed to conform to statutory provisions regarding the formation and regulation of corporations. Professor Warren has discussed this subject thoroughly in two articles in the Harvard Law Review. "There is therefore nothing in the nature of things which prevents a court from

members in the room of such as go off.<sup>a</sup> 2. To sue or be sued, implead or be impleaded, grant or receive, by its corporate name, and do all other acts as natural persons may. 3. To purchase lands, and hold them, for the benefit of themselves and their successors: which two are consequential to the former. 4. To have a common seal. For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse: it therefore acts and speaks only by its common seal.<sup>8</sup> For, though

<sup>a</sup> 1 Roll. Abr. 514.

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recognizing as a legal unit a body of persons unauthorized by the sovereign to act as a unit, but in fact acting as a unit.

"Are there sufficient reasons of policy to prevent the courts from recognizing such body as a unit?"

"It has been accepted as clear and long settled law, that, without the consent of the state, corporate action is unauthorized.

"It follows that if the state complains in a '*quo warranto*' or similar proceeding, of unauthorized corporate action, the courts will grant the state appropriate relief. This is clear law.

"But suppose that the state does not complain. Ought the courts to allow the question of legal incorporation to be raised collaterally?" 21 Harv. Law Rev. 305; 20 Harv. Law Rev. 456.

The courts have recognized the acts of *de facto* corporations as corporate acts and have denied collateral attack. They have based their decisions on the broad ground of estoppel. Four requisites to the existence of such corporations have been recognized; (1) the existence of a charter, or some law under which a corporation with the powers assumed might lawfully be created; and (2) a *bona fide* attempt to organize a corporation under such a charter or statute; (3) a colorable compliance with such a charter or statute; (4) an actual user of the corporate powers or some of them which might have been rightfully used by such an organization. *Methodist etc. Church v. Pickett*, 19 N. Y. 482; *Newcomb-Endicott Co. v. Fee*, 167 Mich. 574, 133 N. W. 540. The courts have, however, denied collateral attack in cases where all the technical requisites were not present and have allowed recovery by or against the *de facto* corporation on the ground of fairness between the parties. Professor Warren concludes his review of the subject by saying, "Viewing the subject as a whole, it is seen that whether or not collateral attack is to be permitted depends not so much on logical deductions as on the exercise of a sound judgment."

Questions of collateral attack upon incorporation usually have arisen in the United States, but not in England, where the statute provides that the certificate of incorporation is conclusive evidence that the provisions of the Companies Acts have been complied with.

<sup>8</sup> "This reason, besides bearing on its face indications of having been invented after the fact, goes altogether too far. A corporation has no hand

the particular members may express their private consents to any act, by words, or signing their names, yet this does not bind the corporation; it is the fixing of the seal, and that only, which unites the several assents of the individuals, who compose the community, and makes one joint assent of the whole.<sup>b 9</sup> 5. To make by-laws

<sup>b</sup> Dav. 44. 48.

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with which to affix its seal, and if it may perform that act by an agent, there is no reason in the nature of things why it should not do anything else by the same instrumentality. (1 Blackst. Comm., Sharswood's ed., 475, n. 7.)" Williston, *Business Corporations Before 1800*, 3 *Select Essays in Anglo-American Legal History*, 195, 209.

<sup>9</sup> **Use of seal by corporations.**—This rule has, however, been considerably modified, both by the relaxations introduced by the decisions of the courts and by the legislature. On the one hand, the courts have long admitted the exception in favor of all corporations aggregate that they may without the use of the common seal do all acts of a trivial and frequently occurring kind and those which by their nature do not admit of delay, for, to require such acts to be done under seal, would defeat the objects for which the corporation is created. (Per Denman, C. J., in *Church v. Imperial Gas Light & Coke Co.* (1838), 6 Ad. & E. 846, 861.) And, in the case of corporations established for trading purposes, the rule is, that they may without the use of a seal do all things of ordinary occurrence in that trade; the seal of the company only being required for matters of an unusual and extraordinary kind. (*South of Ireland Colliery Co. v. Waddle* (1869), L. R. 4 C. P. 617.) In the case of companies incorporated under the Companies Acts, or by special act of parliament incorporating the Companies Clauses Act, 1845, the legislature has enacted that the company may make without the common seal all contracts which an individual may make orally or in writing without the use of a seal. The seal of the company is only required for contracts of a kind which if made by an individual would have to be under seal. (Companies (Consolidation) Act, 1908, § 76; Companies Clauses Act, 1845, § 97.)—STEPHEN, 3 Comm. (16th ed.), 7.

"In former times it was held that a corporation could not express its will or enter into a contract except through an instrument under seal, executed by a duly constituted agent. This doctrine certainly had no principle based upon reason to support it; on the contrary, it seems to have been a result of the ignorance of the art of writing during the dark ages. It was never rigorously applied in all cases, which shows that it did not result from the nature of a corporation; and in modern times the ancient rule has been wholly discarded. It is now a rule well settled throughout the United States that a corporation may make a contract without the use of a seal in all cases in which this may be done by an individual; and it is equally well settled that an agent of a corporation may be appointed without the use of a seal, whatever may be the purposes of the agency." Morawetz on Corporations, § 338; Thompson on Corporations, § 1920.



or private statutes for the better government [476] of the corporation; which are binding upon themselves, unless contrary to the laws of the land, and then they are void. This is also included by law in the very act of incorporation:<sup>c</sup> for, as natural reason is given to the natural body for the governing it, so by-laws or statutes are a sort of political reason to govern the body politic. And this right of making by-laws for their own government, not contrary to the law of the land, was allowed by the law of the twelve tables at Rome.<sup>d</sup> But no trading company is, with us, allowed to make by-laws, which may affect the king's prerogative, or the common profit of the people, under penalty of 40*l.* unless they be approved by the chancellor, treasurer, and chief justices, or the judges of assize in their circuits: and, even though they be so approved, still if contrary to law they are void.<sup>e</sup> These five powers are inseparably incident to every corporation, at least to every corporation aggregate: for two of them, though they may be practiced, yet are very unnecessary to a corporation sole; viz., to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

§ 646. 5. Privileges and disabilities.—There are also certain privileges and disabilities that attend an aggregate corporation,<sup>10</sup>

<sup>c</sup> Hob. 211.

<sup>d</sup> *Sodales legem quam volent, dum ne quid ex publica lege corrumpant, sibi ferunt.* (Let the societies prescribe for themselves any law they please, provided it infringe not the public law.)

<sup>e</sup> Stat. 19 Hen. VII, c. 7 (Corporations, 1503), 11 Rep. 54.

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<sup>10</sup> Characteristics of corporations.—The five distinctive characteristics or attributes of a modern private corporation are these: (1) to sue and be sued in the corporate name, (2) to take and hold the title to real property in its corporate name, (3) to conduct its business and affairs through a board of managers or directors, (4) to continue in existence during the period for which it is chartered irrespective of the death of its members or the transfer by them of their shares, (5) to be liable for all of the corporate debts and obligations to the exclusion of any liability upon its members for such debts or obligations. *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. (U. S.) 566, 19 L. Ed. 1029; *Thomas v. Dakin*, 22 Wend. (N. Y.) 9; *Andrews Bros. Co. v. Youngstown Coke Co.*, 86 Fed. 585, 30 C. C. A. 293, 58 U. S. App. 444. The last two attributes, succession and liability, are considered the most important, and are usually relied upon to determine whether an association of individuals

and are not applicable to such as are sole; the reason of them ceasing, and of course the law. It must always appear by attorney; for it cannot appear in person, being, as Sir Edward Coke says,<sup>f</sup> invisible, and existing only in intendment and consideration of law. It can neither maintain, nor be made defendant to, an action of battery or such like personal injuries: for a corporation can neither beat, nor be beaten, in its body politic.<sup>g</sup> <sup>11</sup> A corporation cannot commit treason, or felony, or other crime, in its corporate

<sup>f</sup> 10 Rep. 32.

<sup>g</sup> Bro. Abr. tit. Corporation. 63.

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is to be considered as a corporation, an entity distinct and separate from its members, or merely as an association of individuals which is the case of an ordinary partnership.

"Under the common law, the members of a corporation are not individually liable to any extent for its debts, unless there is an express provision in the company's charter creating a liability." Morawetz on Corporations, § 779. In England at the present time the liability of a shareholder is regulated by the form of the memorandum of association, and the provisions of the Companies Act, 1908. A statement that the liability of members is limited means "limited by shares," and no member can be called upon to pay more after his shares are fully paid up. In the United States the state constitutions and state statutes have regulated and enhanced the liability of stockholders. Thompson on Corporations, § 4759 et seq. The statutes may generally be classified under three heads, accordingly as they impose single, double or triple liability. Thompson on Corporations, §§ 4791-4794. In each of these three cases the liability is limited in amount and is in the first case the par value of the shares of the stockholder, and in the other two cases is the par value doubled and trebled respectively. There is a fourth class of constitutional and statutory regulations which impose a liability on shareholders which is not limited but is proportional. Thompson on Corporations, § 4797. There the stockholder is liable for such proportion of the corporate debts as the amount of stock owned by him bears to the whole amount of the subscribed capital stock.

<sup>11</sup> **Tort liability of corporations.**—Under the theory that a corporation could do only those things which it was authorized by the state to do, the conclusion naturally followed that a corporation could not commit a tort, and therefore could not be liable in a tort action. The modern rule is entirely opposed to that point of view and corporations have been held liable for the torts of their agents committed in the course of their employment to the same degree as individuals. *Chestnut Hill Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675. A malicious state of mind has also been imputed to the corporation so as to render it liable for "vexatiously and maliciously" driving omnibuses. *Green v. London Omnibus Co.*, 7 Com. B., N. S., 290. A corpora-

capacity:<sup>h</sup> though its members may, in their distinct individual capacities.<sup>i</sup> Neither is it capable of suffering [477] a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. It cannot be executor or administrator, or perform any personal duties; for it cannot take an oath for the due execution of the office. It cannot be seised of lands to the use of another;<sup>j</sup> for such kind of confidence is foreign to the end of its institution. Neither can it be committed to prison;<sup>k</sup> for its existence being ideal, no man can apprehend or arrest it. And therefore, also, it cannot be outlawed; for outlawry always supposes a precedent right of arresting, which

<sup>h</sup> 10 Rep. 32.

<sup>i</sup> The civil law also ordains that, for the misbehavior of a body corporate, the directors only shall be answerable in their personal capacities. *Ff.* 4. 3. 15.

<sup>j</sup> *Bro. Abr. tit. Feoffm. al Uses.* 40. *Bacon of Uses.* 347.

<sup>k</sup> *Plowd.* 538.

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tion may entertain malice and therefore be liable in an action for malicious prosecution. *Vance v. Erie Ry. Co.*, 32 N. J. L. 334, 90 Am. Dec. 665.

**Criminal liability of corporations.**—The modern law has gradually developed the rule that a corporation should be held liable for criminal acts. This development has been somewhat retarded by the difficulty of calculating the proper punishment for certain crimes. There is apparently no reason why the courts should not impute a guilty mind to the corporation in the case where it has directed a crime, in the same way that they impute a malicious mind in case of a tort.

In a case before the supreme court of the United States, it was contended that the provisions of the Elkins Act were unconstitutional because Congress has no authority to impute to a corporation the commission of criminal offenses, or to subject a corporation to a criminal prosecution by reason of the things charged. The Elkins Act, regulating interstate commerce (Feb. 19, 1903, 32 U. S. Stat. 847), provides: (1) That anything done or omitted to be done by a corporation common carrier subject to the act to regulate commerce, and the acts amendatory thereof, which, if done or omitted to be done by a director or officer thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by such corporation, would constitute a misdemeanor under said acts, or under this act, shall also be held to be a misdemeanor committed by such corporation, and upon conviction thereof it shall be subject to like penalties as are prescribed in said acts, or by this act, with reference to such persons, except as such penalties are herein changed.

In upholding the provisions of the act, the court said:

"Some of the earlier writers on common law held the law to be that a corporation could not commit a crime. It is said to have been held by Lord Chief

has been defeated by the parties absconding, and that also a corporation cannot do: for which reasons the proceedings to compel a corporation to appear to any suit by attorney are always by distress on their lands and goods.<sup>1</sup> Neither can a corporation be excommunicated; for it has no soul, as is gravely observed by Sir Edward Coke:<sup>m</sup> and therefore also it is not liable to be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ* (for the welfare of the soul), and their

<sup>1</sup> Bro. Abr. tit. Corporation. 11. Outlawry. 72.

<sup>m</sup> 10 Rep. 32.

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Justice Holt (Anonymous, 12 Mod. 559) that 'a corporation is not indictable, although the particular members of it are.' In Blackstone's Commentaries, chapter 18, section 12, we find it stated: 'A corporation cannot commit treason, or felony, or other crime in its corporate capacity, though its members may in their distinct individual capacities.' The modern authority, universally, so far as we know, is the other way. In considering the subject, Bishop's New Criminal Law, section 417, devotes a chapter to the capacity of corporations to commit crime, and states the law to be: 'Since a corporation acts by its officers and agents, their purposes, motives, and intent are just as much those of the corporation as are the things done. If, for example, the invisible, intangible essence of air which we term a corporation, can level mountains, fill up valleys, lay down iron tracks, and run railroad cars on them, it can intend to do it, and can act therein as well viciously as virtuously.'" New York C. R. v. United States, 212 U. S. 481, 492, 53 L. Ed. 613, 29 Sup. Ct. Rep. 304. See, also, United States v. Van Schaick, 134 Fed. 592, where a corporation was held liable as principal for manslaughter for violation of a statute regulating the supply of life-preservers on boats.

"In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act." United States v. John Kelso Co., 86 Fed. 304 (violating eight-hour law); State v. Baltimore Ry. Co., 120 Ind. 298, 22 N. E. 307 (obstructing highway); Southern Express Co. v. State, 1 Ga. App. 700, 58 S. E. 67 (sale of liquor to minors contrary to statute).

The English cases are clear that a corporation may be indicted for misdemeanors which do not depend on the mental condition of the person committing them (such as obstructing a highway); whether the misdemeanor consist of an act of omission or commission. 3 Stephen's Comm. (16th ed.), 9, and cases cited.

sentences can only be enforced by spiritual censures: a consideration, which, carried to its full extent, would alone demonstrate the impropriety of these courts interfering in any temporal rights whatsoever.

There are also other incidents and powers, which belong to some sort of corporations, and not to others. An aggregate corporation may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot:<sup>n</sup> for such movable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid.<sup>12</sup> In ecclesiastical and eleemosynary foundations, the king or the founder may give them rules, laws, statutes, and ordinances, which they are bound to observe: but corporations merely [478] lay, constituted for civil purposes, are subject to no particular statutes; but to the common law, and to their own by-laws, not contrary to the laws of the realm.<sup>o</sup> Aggregate corporations also, that have by their constitution a head, as a dean, warden, master, or the like, cannot do any acts during the vacancy of the headship, except only appointing another: neither are they then capable of receiving a grant; for such corporation is incomplete without a head.<sup>p</sup> But there may be a corporation aggregate constituted without a head:<sup>q</sup> as the collegiate church of Southwell in Nottinghamshire, which consists only of prebendaries; and the governors of the Charter-house, London, who have no president or superior, but are all of equal authority.

§ 647. 6. Corporations act by majority.—In aggregate corporations also, the act of the major part is esteemed the act of the whole.<sup>r</sup> By the civil law this major part must have consisted of two-thirds of the whole; else no act could be performed:<sup>s</sup> which, perhaps, may be one reason why they required three at least to

<sup>n</sup> Co. Litt. 46.

<sup>q</sup> 10 Rep. 30.

<sup>o</sup> Lord Raym. 8.

<sup>r</sup> Bro. Abr. tit. Corporation. 31. 34.

<sup>p</sup> Co. Litt. 263, 264.

<sup>s</sup> Ff. 3. 4. 3.

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<sup>12</sup> On the limited attributes of a corporation sole, see *Power v. Banks*, [1901] 2 Ch. 487. Prof. Maitland attributes the term to Lord Coke (Co. Litt. 250, a), perhaps suggested to him by Broke's *Grand Abridgment*. Maitland, 16 *Law Quart. Rev.* 335; 3 *Collected Essays*, 210. See note on p. \*470, *ante*.



make a corporation. But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations had made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act (which King Henry VIII found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations); it was therefore enacted by statute 33 Hen. VIII, c. 27 (Corporation, 1541), that all private statutes shall be utterly void, whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority: but this statute extends not to any negative or necessary voice, given by the founder to the head of any such society.

§ 648. 7. Power to purchase lands—a. Statutes of mortmain. We before observed that it was incident to every corporation, to have a capacity to purchase lands for themselves and [479] successors: and this is regularly true at the common law.<sup>t</sup> But they are excepted out of the statute of wills:<sup>u</sup> so that no devise of lands to a corporation by will is good: except for charitable uses, by statute 43 Eliz., c. 4 (Charitable Gifts, 1601):<sup>w</sup> which exception is again greatly narrowed by the statute 9 Geo. II, c. 36 (Charitable Uses, 1736). And also, by a great variety of statutes,<sup>x</sup> their privilege even of purchasing from any living grantor is much abridged; so that now a corporation, either ecclesiastical or lay, must have a license from the king to purchase,<sup>y</sup> before they can exert that capacity which is vested in them by the common law:<sup>13</sup> nor is even

<sup>t</sup> 10 Rep. 30.

<sup>u</sup> 34 Hen. VIII, c. 5 (Wills, 1542).

<sup>w</sup> Hob. 136.

<sup>x</sup> From *magna carta*, 9 Hen. III, c. 36 (1225), to 9 Geo. II, c. 36 (1736).

<sup>y</sup> By the civil law a corporation was incapable of taking lands, unless by special privilege from the emperor: *collegium, si nullo speciali privilegio subnixum sit, hereditatem capere non posse, dubium non est*. (There is no doubt that a corporation cannot take an inheritance unless by special privilege.) Cod. 6. 24. 8.

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<sup>13</sup> "A corporation has implied authority, in the absence of a prohibition in its charter, to acquire and hold any property, whether real or personal, which

this in all cases sufficient. These statutes are generally called the statutes of *mortmain*; all purchases made by corporate bodies being said to be purchases in *mortmain*, *in mortua manu* (in a dead-hand): for the reason of which appellation Sir Edward Coke<sup>\*</sup> offers many conjectures; but there is one which seems more probable than any that he has given us: viz., that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore, holden by them, might with great propriety be said to be held *in mortua manu*.

I shall defer the more particular exposition of these statutes of mortmain till the next book of these Commentaries,<sup>14</sup> when we shall consider the nature and tenures of estates; and also the exposition of those disabling statutes of Queen Elizabeth, which restrain spiritual and eleemosynary corporations from aliening such lands as they are at present in legal possession of: only mentioning them in this place, for the sake of regularity, as statutable incapacities incident and relative to corporations.

§ 649. 8. Duties of corporations.—The general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons, be <sup>[480]</sup> reduced to this single one; that of acting up to the end or design, whatever it be, for which they were created by their founder.<sup>15</sup>

\* 1 Inst. 2.

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may be required in carrying on the business for which the company was formed." "The implied right of corporations to acquire and hold property for authorized purposes has in many cases been restrained within definite limits, either by general statutes or by the acts under which the companies are formed." Morawetz on Corporations, §§ 327, 328. The same author points out that the English statutes of mortmain were never adopted in the United States, although some states have declared themselves in favor of a mortmain policy, and provisions similar to the mortmain acts are to be in their statutes and charters of incorporation. *Leazure v. Hillegass*, 7 Serg. & R. (Pa.) 313; *Matter of McGraw*, 111 N. Y. 66, 2 L. R. A. 387, 19 N. E. 233. Cf. *Hubbard v. Worcester Art Museum*, 194 Mass. 280, 10 Ann. Cas. 1025, 9 L. R. A. (N. S.) 689.

<sup>14</sup> See Book II, p. \*268.

<sup>15</sup> Implied powers of corporations.—Corporations organized under general laws derive their powers from those laws and the articles of association or

§ 650. 9. Visitation of corporations—a. Ecclesiastical corporations.—I proceed, therefore, next to inquire, how these corporations may be *visited*. For corporations being composed of individuals, subject to human frailties, are liable as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary.<sup>16</sup> With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from

franchises by which they are created and empowered to act. In England the objects of such companies are to be found in the Memorandum of Association as regulated by the Companies (Consolidated) Act, 1908, *Ashbury Ry. Carriage Co. v. Riche* (1875), L. R. 7 H. L. 672; Companies Act, 1913. In the United States the powers or objects of a corporation are to be determined from its Articles of Association and the constitution and statutes of the jurisdiction in which it is organized.

The chief problem that has arisen in this connection is in the proper determination of the implied powers of a corporation. "We take the general doctrine to be in this country that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of these powers implies the exclusion of all others." *Thomas v. West Jersey Ry. Co.*, 101 U. S. 71, 25 L. Ed. 950. The charter of a corporation is construed like other grants from the state strictly against the grantee, so that powers not clearly granted are impliedly withheld. *Whitaker v. Delaware & Hudson Canal Co.*, 87 Pa. St. 34; *Downing v. Mt. Washington Road Co.*, 40 N. H. 230; *Proprietors of Stonebridge Canal v. Wheeley*, 2 Barn. & Ad. 792. See, also, *Jacksonville Ry. & Nav. Co. v. Hooper*, 160 U. S. 514, 40 L. Ed. 515, 16 Sup. Ct. Rep. 379.

16 Right of visitation.—The duties of a visitor are, generally, to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes. (*Dr. Lee's Case* (1858), E. B. & E. 863.) The visitor's construction of statutes is binding on superior courts. (*A. G. v. Clare Hall* (1747), 3 Atk. 662, as reported in 2 Term Rep. 312.) In the exercise of these duties, he is to be guided by the intentions of the founder; so far as they can be collected from the statutes or from the design of the institution. But otherwise, and as regards the course of proceeding, he is restrained by no particular forms (*Re Dean of York* (1841), 2 Q. B. 1); and while he keeps within his jurisdiction, his determinations as visitor are final, and examinable in no other court whatsoever. (*R. v. Bishop of Ely* (1788), 2 Term

thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops; and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all persons and vicars, and of all other spiritual corporations.<sup>17</sup> With respect to all lay corporations, the founder, his heirs, or assigns, are the visitors, whether the foundation be civil or eleemosynary; for in a lay incorporation the ordinary neither can nor ought to visit.<sup>a</sup>

§ 651. b. Civil corporations—(1) Lay corporations.—I know it is generally said, that civil corporations are subject to no visitation, but merely to the common law of the land; and this shall be presently explained. But first, as I have laid it down as a rule that the founder, his heirs, or assigns, are the visitors of all lay corporations, let us inquire what is meant by the *founder*. The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society; and in civil incorporations, such as mayor and commonalty, etc., where there are no possessions or endowments given to the body, there is no other founder but the king: but in eleemosynary foundations, such as colleges and hospitals, where there is an endowment of lands, the law distinguishes, and makes two species of [481] foundation; the one *fundatio incipiens*, or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other

<sup>a</sup> 10 Rep. 31.

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Rep. 290; *R. v. Bishop of Worcester* (1815), 4 M. & S. 415).—STEPHEN, 3 Comm. (16th ed.), 13.

In the United States the right of visitation is vested in the state. In general, the legislature is the visitor of the corporations created by it. The legislature is aided by the courts and certain public officers or private visitors. The power of the state may be exercised by injunction, mandamus, forfeiture, and indictment. The attorney general may proceed by *quo warranto*. The right of visitation exercised by the legislatures or the states is not absolute but is limited by the provisions of the state and federal constitutions. The exercise of this power must not impair the obligation of contract nor take property without due process of law. *Trustees of Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518; *Thompson on Corporations*, § 475 et seq.

<sup>17</sup> *In re Dean of York*, 2 Q. B. 1; *Regina v. Dean of Rochester*, 17 Q. B. 1.

*fundatio perficiens*, or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder: and it is in this last sense that we generally call a man the founder of a college or hospital.<sup>b</sup> But here the king has his prerogative: for, if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And, in general, the king being the sole founder of all civil corporations, and the endower the perficient founder of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king; and of the latter to the patron or endower.

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place, wherein he shall exercise this jurisdiction: which is the court of king's bench; where and where only, all misbehaviors of this kind of corporations are inquired into and redressed, and all their controversies decided. And this is what I understand to be the meaning of our lawyers, when they say that these civil corporations are liable to no visitation; that is, that the law having by immemorial usage appointed them to be visited and inspected by the king their founder, in his majesty's court of king's bench, according to the rules of the common law, they ought not to be visited elsewhere, or by any other authority.<sup>c</sup> And this is so strictly true, that though the king by his letters patent had subjected the college of physicians to the visitation of four very respectable persons, the lord chancellor, the two chief justices, and the chief baron; though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for near a century; yet in 1753, the authority of this provision coming in dispute, on an appeal preferred to these supposed [482] visitors, they directed the legality of their own appointment to be argued: and as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days solemn debate, that they had no jurisdiction as

<sup>b</sup> 10 Rep 33.

<sup>c</sup> This notion is perhaps too refined. The court of king's bench, from its general superintendent authority where other jurisdictions are deficient, has power to regulate all corporations where no special visitor is appointed. But, as its judgments are liable to be reversed by writs of error, it may be thought to want one of the essential marks of visitatorial power.



visitors; and remitted the appellant (if aggrieved) to his regular remedy in his majesty's court of king's bench.

§ 652. (2) *Eleemosynary corporations.*—As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself: but, if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir. Eleemosynary corporations are chiefly hospitals, or colleges in the universities. These were all of them considered, by the popish clergy, as of mere ecclesiastical jurisdiction: however, the law of the land judged otherwise; and, with regard to hospitals, it has long been held,<sup>d</sup> that if the hospital be spiritual, the bishop shall visit; but if lay, the patron. This right of lay patrons was indeed abridged by statute 2 Hen. V, c. 1 (Hospitals, 1414), which ordained that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved, to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by statute 14 Eliz., c. 5 (Poor Relief, 1572), which directs the bishop to visit such hospitals only, where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz., c. 5 (Workhouses, 1597), are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit.\*

§ 653. (3) *Colleges.*—Colleges in the universities (whatever the common law may now, or might formerly, judge) were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or at least as *clerical corporations*; and therefore the right of visitation was claimed by the ordinary of the [483] diocese. This is evident, because in many of our most ancient colleges, where the founder had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull

<sup>d</sup> Year-Book, 8 Edw. III. 28 (1333). 8 Ass. 29.

• 2 Inst. 725.

to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of our colleges, where no special visitor is appointed, the bishop of that diocese, in which Oxford was formerly comprised, has immemorially exercised visitatorial authority which can be ascribed to nothing else, but his supposed title as ordinary to visit this, among other ecclesiastical foundations. And it is not impossible that the number of colleges in Cambridge, which are visited by the Bishop of Ely, may in part be derived from the same original.

But, whatever might be formerly the opinion of the clergy, it is now held as established common law that colleges are lay corporations, though sometimes totally composed of ecclesiastical persons; and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law.<sup>f</sup> And yet the power and jurisdiction of visitors in colleges was left so much in the dark at common law, that the whole doctrine was very unsettled till the famous case of *Philips and Bury*.<sup>g</sup> In this the main question was, whether the sentence of the Bishop of Exeter, who (as visitor) had deprived Doctor Bury, the rector of Exeter College, could be examined and redressed by the court of king's bench. And the three puisne judges were of opinion, that it might be reviewed, for that the visitor's jurisdiction could not exclude the common law; and accordingly judgment was given in that court. But the Lord Chief Justice Holt was of a contrary opinion; and held, that by the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course; and that from him, and him only, the party grieved ought to have redress; the founder having reposed in him so entire a confidence, that he [484] will administer justice impartially, that his determinations are final, and examinable in no other court whatsoever. And, upon this, a writ of error being brought into the house of lords, they concurred in Sir John Holt's opinion, and reversed the judgment of the court of king's bench. To which leading case

<sup>f</sup> Lord Raym. 8.

<sup>g</sup> Lord Raym. 5. 4 Mod. 106. Show. 35. Skinn. 407. Salk. 403. Carthew. 180.

all subsequent determinations have been conformable. But, where the visitor is under a temporary disability, there the court of king's bench will interpose, to prevent a defect of justice.<sup>b</sup> Also it is said,<sup>c</sup> that if a founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise, where he mistakes in a thing within his power.

§ 654. 10. Dissolution of corporations.—We come now, in the last place, to consider how corporations may be dissolved. Any particular member may be disfranchised, or lose his place in the corporation, by acting contrary to the laws of the society, or the laws of the land: or he may resign it by his own voluntary act.<sup>k</sup> But the body politic may also itself be dissolved in several ways; which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation: for the law doth annex a condition to every such grant, that if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth.<sup>l 18</sup> The grant is, indeed, only during the life of the corporation; which *may* endure forever: but, when that life is

<sup>b</sup> Stra. 797.

<sup>c</sup> 2 Lutw. 1566.

<sup>k</sup> 11 Rep. 98.

<sup>l</sup> Co. Litt. 13.

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<sup>18</sup> This rule that upon the dissolution of a corporation at common law its real property reverted to the grantor or his heirs has been doubted. Gray, *Rule Against Perpetuities* (2d ed.), §§ 44-48. As a common-law doctrine it was applied to ecclesiastical and municipal corporations, where there were usually no shareholders and no creditors. There the land went to the grantors or donors and the personalty to the king.

In the case of private corporations the shareholders are usually the grantors. In equity they are looked upon as the persons beneficially interested and therefore on dissolution, and after the payment of creditors, the assets of the corporation will be divided among them. Where the statutes do not expressly provide for the distribution of the property on dissolution, equity will administer the assets in favor of the beneficiaries. Morawetz on Corporations, §§ 1031, 1032. See *Late Corporation of Latter Day Saints v. United States*, 136 U. S. 1, 34 L. Ed. 481, 10 Sup. Ct. Rep. 792; *Greenwood v. Union Freight R. R. Co.*, 105 U. S. 13, 26 L. Ed. 961.

determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. The debts of a corporation, either to or from it, are totally extinguished by its dissolution; so that the members thereof cannot recover, or be charged with them, in their natural capacities:<sup>m 19</sup> agreeable to that maxim of the civil law,<sup>n</sup> “*si quid universitati debetur, singulis non debetur; nec, quod debet universitas, singuli debent*” (whatever be due to a corporation, is not due to each member singly; nor is each singly answerable for the debts due from the corporation).”

§ 655. a. Methods of dissolution—(1) By act of parliament; (2) By death of all members; (3) By surrender of franchise; (4) By forfeiture of charter.—<sup>[485]</sup> A corporation may be dissolved, 1. By act of parliament, which is boundless in its operations. 2. By the natural death of all its members, in cases of an aggregate corporation. 3. By surrender of its franchises into the hands of the king, which is a kind of suicide. 4. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition

<sup>m</sup> 1 Lev. 237.

<sup>n</sup> Ff. 3. 4. 7.

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<sup>19</sup> This remark has been repeated by later authors, and has led to some confusion. It was undoubtedly an error. The only authority cited to support it is *Edmunds v. Brown*, 1 Lev. 237. The Company of Woodmongers had been dissolved. It had given a bond to the plaintiff, which was signed by the defendants for the company. This action was debt on the bond against the individuals who signed it. The plaintiff failed, and rightly, for the bond was not executed by the defendants as individuals but for the company. The difficulty, however, was simply in the remedy which the plaintiff chose. This is evident from the case of *Naylor v. Brown*, Finch, 83—a suit in equity by the creditors of the Woodmongers’ Company, begun immediately after the failure of the action at law just referred to. On the dissolution of the company, the members had divided up its property. It was decreed that the property should be returned, “it being in equity still a part of the estate of the late company,” and that the debts due the plaintiffs should be discharged from the fund so formed. This important case, which seems to have been generally overlooked, clearly shows that the property of a dissolved corporation was liable in equity for the corporate debts, although they were unenforceable at law.—WILLISTON, *Business Corporations Before 1800*, in 3 *Select Essays in Anglo-American Legal History*, 195, 233.

upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an information in nature of a writ of *quo warranto* (by what warrant or authority), to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law, for the purposes of the state, in the reigns of King Charles and King James the Second, particularly by seizing the charter of the city of London, gave great and just offense; though perhaps, in strictness of law, the proceedings in most of them were sufficiently regular, but the judgment against that of London was reversed by act of parliament<sup>o</sup> after the revolution; and by the same statute it is enacted that the franchises of the city of London shall never more be forfeited for any cause whatsoever. And, because by the common law corporations were dissolved, in case the mayor or head officer was not duly elected on the day appointed in the charter or established by prescription, it is now provided,<sup>p</sup> that for the future no corporation shall be dissolved upon that account; and ample directions are given for appointing a new officer, in case there be no election, or a void one, made upon the charter or prescriptive day.<sup>20</sup>

• Stat. 2 W. & M. c. 8 (City of London, 1690).

▷ Stat. 11 Geo. I. c. 4 (Municipal Elections, 1724).

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<sup>20</sup> Special machinery is now provided in Great Britain for dissolving, or "winding up," as it is called, companies that are registered under the Companies (Consolidation) Act, 1908. On the important subject of "Limited Companies" in Great Britain under the above-mentioned act, the reader is referred to 3 Stephen's Comm. (16th ed.), pp. 249 ff.

In the United States the statutes of the various states provide methods of dissolution. These statutes are not uniform; some allow the stockholders to dissolve the corporation, others make it necessary that the directors or stockholders shall apply to a court which shall by its decree dissolve the corporation. The general methods of dissolution are still practically the same as those enumerated by Blackstone, except that the legislature cannot dissolve a corporation in violation of a right given by the state or federal constitution. Statutes concerning dissolution are usually passed for the purpose of expediting the procedure and protecting the persons interested in the affairs of the corporation.

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[NOTE.—The notes to this chapter have been prepared by Professor Matthew C. Lynch.]





COMMENTARIES  
ON THE  
LAWS OF ENGLAND.

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BOOK II.  
OF THE RIGHTS OF THINGS.  
(703)



## BOOK THE SECOND.

### OF THE RIGHTS OF THINGS.

#### CHAPTER THE FIRST.

##### OF PROPERTY, IN GENERAL.

§ 1. Right of property.—The former book of these Commentaries having treated at large of the *jura personarum*, or such rights and duties<sup>1</sup> as are annexed to the persons of men, the

1 Of the form in which rights and duties appear in the law.—Beginners sometimes do not see the extent to which rights and duties figure in the law, because they look only for the broad abstractions which are described under those names in the books. But most of the rights and duties known to the practical law appear either in the form of institutions and relations, each of which denotes complexes of many such rights and duties, or of the ultimate facts out of which rights spring, or by which a right is modified.

The systematic treatment of law is distinguished from that of other sciences by the fact that it does not consist merely in the proper arrangement of the single truths that compose it. In law, these truths change their nature as well as form in the process. The separate rules of law drop their form of rules, of injunctions and prohibitions, and become members of a legal institution. They become the ultimate facts that compose a transaction, or the elements out of which are formed such conceptions as person, thing, rights, obligations, etc. (Ihering, *Spirit of Roman Law*, 1, 37.)

It is needless to show that this is true of the various names of crimes, of torts and other wrongs, or of the terms of procedure, which belong to the category of remedies—both having definite relations to the conception of a right. But it is equally true of the words designating the different forms of property, e. g., tenement, estate, fee simple, freehold, remainder, reversion, coparcenary, joint tenancy, appurtenance, fixture, chattel, chose in action, bill of exchange, each of which denotes either a form of the right of property or the object of such a right.

So, also, of the words expressing legal relations, citizen, alien, magistrate, husband, wife, parent, child, ancestor, heir, master, servant, every one of which implies a considerable number of rights and duties toward the related or other persons. These differ in this respect from such terms as creditor, debtor, vendor, vendee, grantor, grantee, principal, agent, etc., because the latter designate the parties to a single transaction, while the former characters inhere in the persons to which they belong through a great variety of different transactions, all of which will be modified by the

objects of our inquiry in this second book will be the *jura rerum*, or those rights which a man may acquire in and to such external things as are unconnected with his person. These are what the

rights and duties peculiar to the persons so designated. In other words, the former terms denote a true *status*, the others only normal persons, engaged in a single transaction to which their relation is limited, and with which it ends; e. g., of the vendor and vendee no peculiar rules of law can be stated, except those which belong to the sale in question; principal and agent are properly such only with reference to a single contract of agency, no matter how wide its scope. On the other hand, master and servant implies a continuous control, affecting all acts done while it lasts, and in that capacity; and like parent and child may modify rights and duties of any kind, by general rules of law forming the *status*. In other words, each of the last-mentioned terms "denotes a lot of distinctive rights and duties, marked by a collective name and bound by that name into a complex aggregate." (Bentham, quoted by Austin, p. 723.)

To understand the force or contents of a legal term, the student must distinguish what logicians term its *extension*, or what it denotes or applies to, and its *comprehension* (sometimes called intension, but the word is a bad one because only a letter distinguishes it from a word of same sound, but very different meaning, intention), or what it connotes or implies.

The extension of a term denotes the objects to which it may be applied; its comprehension, the qualities which it implies in every one of those objects; e. g., a hereditament is applicable to all kinds of land or rights to land in fee, whether in possession or in expectancy, in severalty or in common, legal or equitable, absolute or conditional, and whether corporeal or incorporeal. This is the extension of the term "hereditament"; its comprehension implies that every such thing, however it may differ in other respects from the rest, will have the common qualities of passing to the legal heir on the death of the holder, of being exempt from the process of administration, of vesting in the heir by the mere process of law without act of the parties, etc. It will also imply all the qualities of a freehold, of which fee is merely a species if in possession.

Strictly speaking, hereditament and fee are distinguished as a thing, and right to a thing. But this may be overlooked here as belonging rather to the metaphysics of law than to its logic.

Again, crime in its *extension* denotes treason, felony, misdemeanor, and the subdivisions of each: in its *comprehension* it implies a wrongful act, a guilty intention or malice, imputability, and in some states an act forbidden by positive law. Misfeasance in its *extension* denotes acts of fraud, negligent breaches of duty (not of obligation), conversion, nuisance, and a great variety of other causes of action, while it comprehends in every case an indirect wrong, and damage proximately produced by it. Malfeasance in its *extension* denotes



writers on natural law style the rights of dominion, or property concerning the nature and original of which I shall first premise a few observations, before I proceed to distribute and consider its several objects.

§ 2. 1. Origin of property.—[2] There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or that sole and despotic domin-

trespasses of all kinds, slander *per se*, and all other direct wrongs; while it comprehends in every such action a direct infringement of an absolute right from which the law implies *damnum*. Although actual and even special *damnum* may be also proved in such actions, it is not an essential part of the cause of action, and therefore is not comprehended in the term.

By a familiar law of logic, as the extension of a term is increased its comprehension is diminished, and *vice versa*; i. e., the greater number of separate facts or species there may be included in a term, or the greater number of cases it will apply to, the fewer qualities will be comprehended in the term as common to and possessed by all of them, or the fewer qualities will be implied by it; e. g., the term "estate" is one of wide extension, and applies to every kind of interest held in land, whether freehold, leasehold, or copyhold. (It may be doubtful whether the copyholder had a *status* in the original sense of the term, but it would be an over-refinement to exclude him now.) But its comprehension is proportionately limited; it implies few qualities as always connoted by it, for the relation between the holder and the land may be of many different kinds.

A *freehold estate* is of less extension, excluding all the estates less than freehold (leasehold, copyhold, etc.); but it implies duration for life and much else. A *fee* is of still less extension, but comprehends other qualities, such as inheritability; and so we may go on with fee simple, fee simple in possession, fee simple in possession upon condition, fee simple in possession upon condition subsequent, etc. For other examples take (*a*) private wrong (3 Bl. Comm. 1), tort, trespass, false imprisonment; (*b*) private wrong, tort, case, malicious arrest; (*c*) private wrong, tort, conversion; (*d*) remedy, action, equitable action, suit for specific performance; (*e*) remedy, action, action of tort, replevin.

When we analyze a term like real property or crime into various things to which it applies, we proceed from the general to the particular. When we analyze the facts of a client's case until from the concrete fact we have reached the primary right which lies at the basis of the cause of action, we are proceeding from the particular to the general. Yet the term "analysis" is properly used in both cases. The former is analysis in extension; the latter, in comprehension. (Jevons, *Lessons in Logic*, p. 208.)

ion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. And yet there are very few that will give themselves the trouble to consider the original and foundation of this right.<sup>2</sup> Pleased as we are with the possession, we seem afraid to

The student who wishes to master the whole law easily and rapidly can find no better exercise than to take any large collection of legal terms, like the titles of the United States Digest or the index of Blackstone or Kent, and arrange them systematically under the following categories:

1. Denoting legal institutions, e. g., courts.
2. Denoting relations, guardianship.
3. Denoting parties to a single transaction of any kind, e. g., partner.
4. Denoting *status*, infant.
5. Denoting transactions, contract, gift.
6. Denoting things, easement, fixture, hereditament.
7. Denoting remedies, action, trover, *habeas corpus*.

And the scheme may be enlarged and subdivided to almost any extent, until it embraces every term of fixed legal meaning which is capable of being treated as an ultimate fact.—HAMMOND.

**2 Origin of property in land.**—Most recent writers on law take the right of property for granted without any attempt to investigate its origin. The theory of writers on natural law assumes that the conception of property existed in its present form from the earliest stage of human thought. Consequently it does not discriminate between the two very different questions, the ethical ground or basis of private property, and the mode in which the institution of property has actually been developed. In regard to the former question, it is enough here to say that the right to property is in the last analysis identical with the right to existence, since individual existence can only be maintained by constant appropriations from external nature, and by the occupancy of a place on the earth's surface. If, as Grotius and Puffendorf maintain, individual property must be derived to each person from the cession of his fellows of their original common rights, then the right of each to exist must depend upon joint consent. (For these theories the student may consult Grotius, *de Jure Belli et Pacis*, lib. 2, cap. 2, §§ 1, 2; Puffendorf, *de Jure Nat. et Gent.* lib. 4, cap. 4, with the notes of Barbeyrac; 2 Locke's Works, p. 181, etc.; Treatise on Government, book 1, c. 4; Rutherford's *Institutes of Natural Law*, c. 3; 3 Wilson's Works, pp. 179–198; Montesquieu, *Esprit des Lois*, liv. 26, cap. 15; Maine's *Ancient Law*, c. 8; Schouler on *Personal Property*, pp. 1–24; J. S. Mill's *Principles of Political Economy*, i. 240.)

Recent students of ancient Aryan law have tried to show that the notion of property in land was originally a religious one. In the earliest times, they say, it was not the law which guaranteed the right of property, but religion.

look back to the means by which it was acquired, as if fearful of some defect in our title; or at best we rest satisfied with the decision of the laws in our favor, without examining the reason or authority upon which those laws have been built. We think it enough that our title is derived by the grant of the former proprietor, by descent from our ancestors, or by the last will and testament of the dying owner; not caring to reflect that (accurately and strictly speaking) there is no foundation in nature or in natural law why a set of words upon parchment should convey the dominion of land; why the son should have a right to exclude his fellow-creatures from a determinate spot of ground, because his father

The proof depends chiefly upon the sacred character that undoubtedly in early Greek, Roman, Hindoo, as well as Hebrew law, attached to boundary marks, *termini*, etc. (See Laws of Manu, viii. 245; Varro, *De Lingua Latina*, v. 74; Pollux, ix. 9; Hesychius verbo *ᾠδός*; Plato, *de Legg.* viii. 842; Ovid *Fast.* ii. 677.) But when all law had a religious character, and the commonest rules of human intercourse were placed under the sanction of religious penalties, these facts prove very little as to the origin of any particular rule or notion. As well show that marriage was first introduced as a religious duty, because we find it almost always accompanied by religious rites. Indeed, the argument for marriage might be made much stronger, since we find it one of the chief points of early religion to perpetuate the race in order to keep up the worship of ancestors and the family rites. (*La Cité Antique, par F. de Coulunges*, translated by T. C. Barker under the title "Aryan Civilization," etc., London, 1871. See on this point, c. 6, 7.)

The growth of the conception of individual ownership in land among our own ancestors is not difficult to trace, and the principal stages of it can be distinctly marked, although much remains to be investigated in regard to details. It is safe to say that among the Germanic tribes described by Cæsar and Tacitus there was no abstract right of property in land such as we now possess. The territory controlled by the whole tribe or community was common property, so far as property could be predicated of it in any sense. Its enjoyment was parceled out among the families or members of the tribe from time to time, with a constant tendency to more definite and permanent several possession. This possession was recognized as a legal right under the title of *gewere*—the seisin of later times. This may be defined as the right to repel by force every attack on the objects in possession, guaranteed by the approval of the community, and if needful, by their joint force. It would, of course, be exercised by the family under the direction of their head, or *pater familias*, and thus gave rise to the conception of family ownership. It embraced the land in possession of each family with the persons and chattels found thereon. But as possession can never be altogether physical, there would be a natural extension of the *gewere* to that which had once been in possession and never

had done so before him: or why the occupier of a particular field or of a jewel, when lying on his death-bed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him. These inquiries, it must be owned, would be useless and even troublesome in common life. It is well if the mass of mankind will obey the laws when made, without scrutinizing too nicely into the reasons of making them. But, when law is to be considered not only as matter of practice, but also as a rational science, it cannot be improper or useless to examine more deeply the rudiments and grounds of these positive constitutions of society.

In the beginning of the world, we are informed by holy writ, the all-bountiful Creator gave to man "dominion over all the

formally abandoned, or abandoned only with the intent of resuming. Hence the conception of an ideal possession. We find this extension going on throughout the Anglo-Saxon period of our law. But it may be doubted whether the abstract idea of property as distinct from and opposed to possession was ever formed in our law down to the time when the whole doctrine of the title to land was modified by feudal and Roman notions.

It has been a fruitful theme of controversy how these changes were to be accounted for or expressed in the form of a principle; what new element has been added to possession, actual or ideal, to form our present notion of property (right over things external whether possessed or not) unknown to the early Germanic law. The principal theories by which these phenomena have been accounted for may be stated thus: (1) That rights *in rem* were unknown to the early Germanic law and only personal rights recognized; (2) that a peculiar kind of property right, known as the *gewere* or *seisin*, was then the only form of right to external things recognized, the distinction of possession and property being as yet unknown, and both confounded under the one term; (3) that possession was the only right to things recognized, and that the notion of property was yet unformed. (4) There remains possibly still a fourth hypothesis: that the only rights known to early English law, or to Germanic law generally, were rights to outward objects, possessory only, and that it was the later recognition of rights *in personam*, borrowed from the Roman law, directly or indirectly, that formed the new element of *proprietary* rights. Less obvious than either of the others, this seems to explain the historical facts more completely than any of them.

Blackstone has discussed none of these questions. They lay outside of his task, for they were no part of the existing law when he wrote. The distinction of rights *in rem* and *in personam* he has studiously ignored, no doubt because he thought it not acknowledged by English law, which was indeed the common opinion of English lawyers in the eighteenth century, and until Mr. Austin,

earth; and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth [3] upon the earth.”<sup>a</sup> This is the only true and solid foundation of man’s dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers upon this subject. The earth, therefore, and all things therein, are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose, that all was in common among them, and that everyone took from the public stock to his own use such things as his immediate necessities required.

§ 3. a. **Ownership in common.**—These general notions of property were then sufficient to answer all the purposes of human life; and might perhaps still have answered them had it been possible for mankind to have remained in a state of primeval simplicity: as may be collected from the manners of many American nations when first discovered by the Europeans; and from the ancient method of living among the first Europeans themselves, if we may

<sup>a</sup> Gen. i. 28.

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fresh from the German schools, introduced it again. (Lectures on Jurisprudence, I. 46–59, et seq.; App. Table II.) *Gewere* is a term unknown to the Anglo-Saxon law though familiar to the kindred systems on the Continent; and in the French and English form of seisin it had become appropriated to real property only, and its connection with property in general thus disguised. How completely the connection with chattels had been forgotten is shown by Mr. Maitland’s rediscovery of its use in that sense in his articles on the *Mystery of Seisin*, 2 L. Q. R. 481, October, 1886, and *Seisin of Chattels*, July, 1885. But it is worth noticing that in Blackstone’s analysis of a “complete title” (Book II, c. 13, pp. \*195–\*199) he has severed the right of property entirely from the right of possession, in a manner which the English law of his own time could never have suggested (as above mentioned), while in his two elements of “possession” and “right of possession” he has exactly accounted for all the phenomena that are found in the Anglo-Saxon law as distinct from that after the Conquest. He has not indeed expressed the distinction between the two rights in an exhaustive way, for he has taken no notice of the effect of contract between the parties in modifying either. But there is at least some reason to think that he saw correctly the nature of the change made at, or about, the Conquest, even if he could not explain the reasons for it or the causes that produced it historically.—HAMMOND.



credit either the memorials of them preserved in the golden age of the poets, or the uniform accounts given by historians of those times, wherein "*erant omnia communia et indivisa omnibus, veluti unum cunctis patrimonium esset* (all things were common and undivided, as if there were but one patrimony for them all)."<sup>b</sup> Not that this communion of goods seems ever to have been applicable, even in the earliest ages, to aught but the *substance* of the thing; nor could it be extended to the *use* of it. For, by the law of nature and reason, he who first began to use it acquired therein a kind of transient property, that lasted so long as he was using it, and no longer:<sup>c</sup> or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in common, and **no** part of it was the permanent property of any man in particular; yet whoever was in the occupation of any determinate spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust, and contrary to the law of nature, to have driven him by force; but the instant that he [4] quitted the use or occupation of it, another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit, which he had gathered for his own repast. A doctrine well illustrated by Cicero, who compares the world to a great theater, which is common to the public, and yet the place which any man has taken is for the time his own.<sup>d</sup>

§ 4. b. **Individual ownership.**—But when mankind increased in number, craft and ambition, it became necessary to entertain conceptions of more permanent dominion; and to appropriate to individuals not the immediate *use* only, but the very *substance* of the thing to be used.<sup>3</sup> Otherwise innumerable tumults must have

<sup>b</sup> Justin. l. 43. c. 1.

<sup>c</sup> Barbeyr. Puff. l. 4. c.

<sup>d</sup> *Quemadmodum theatrum, cum commune sit, recte tamen dici potest, ejus esse eum locum quem quisque occupavit.* De Fin. l. 3. c. 20.

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<sup>3</sup> "To all who pursue the inquiries which are the subject of this volume, occupancy is pre-eminently interesting on the score of the service it has been

arisen, and the good order of the world been continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable; as, habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession; if, as soon as he walked out of his tent, or pulled off his garment, the next stranger who came by would have a right to inhabit the one, and to wear the other. In the case of habitations in particular. it was natural to observe, that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young; that the birds of the air had nests, and the beasts of the field had caverns, the invasion of which

made to perform for speculative jurisprudence, in furnishing a supposed explanation of the origin of private property. It was once universally believed that the proceeding implied in occupancy was identical with the process by which the earth and its fruits, which were at first in common, became the allowed property of individuals. The course of thought which led to this assumption is not difficult to understand, if we seize the shade of difference which separates the ancient from the modern conception of natural law. The Roman lawyers had laid down that occupancy was one of the natural modes of acquiring property, and they undoubtedly believed that, were mankind living under the institutions of nature, occupancy would be one of their practices. How far they persuaded themselves that such a condition of the race had ever existed, is a point, as I have already stated, which their language leaves in much uncertainty; but they certainly do seem to have made the conjecture, which has at all times possessed much plausibility, that the institution of property was not so old as the existence of mankind. Modern jurisprudence, accepting all their dogmas without reservation, went far beyond them in the eager curiosity with which it dwelt on the supposed state of nature. Since then it had received the position that the earth and its fruits were once *res nullius*, and since its peculiar view of nature led it to assume without hesitation that the human race had actually practiced the occupancy of *res nullius* long before the organization of civil societies, the inference immediately suggested itself that occupancy was the process by which the 'no man's goods' of the primitive world became the private property of individuals in the world of history. It would be wearisome to enumerate the jurists who have subscribed to this theory in one shape or another, and it is the less necessary to

they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall; which seem to have been originally mere <sup>[5]</sup> temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. And there can be no doubt but that movables of every kind became sooner appropriated than the permanent substantial soil: partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right; but principally because few of them could be fit for use, till improved and ameliorated by the bodily labor of the occupant: which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the fairest and most reasonable title to an exclusive property therein.

attempt it because Blackstone, who is always a faithful index of the average opinions of his day, has summed them up in his second book and first chapter." (Maine here quotes above passages from Blackstone, and continues:)

"Some ambiguities of expression in this passage lead to the suspicion that Blackstone did not quite understand the meaning of the proposition which he found in his authorities, that property in the earth's surface was first acquired, under the law of nature, by the *occupant*; but the limitation which designedly or through misapprehension he has imposed on the theory brings it into a form which it has not infrequently assumed. Many writers more famous than Blackstone for precision of language have laid down that, in the beginning of things, occupancy first gave a right against the world to an exclusive but temporary enjoyment, and that afterwards this right, while it remained exclusive, became perpetual. Their object in so stating their theory was to reconcile the doctrine that in the state of nature *res nullius* became property through occupancy, with the inference which they drew from the Scriptural history that the patriarchs did not at first permanently appropriate the soil which had been grazed over by their flocks and herds.

"The only criticism which could be directly applied to the theory of Blackstone would consist in inquiring whether the circumstances which make up his picture of a primitive society are more or less probable than other incidents which could be imagined with equal readiness. Pursuing this method of examination, we might fairly ask whether the man who had *occupied* (Blackstone evidently uses this word with its ordinary English meaning) a particular spot of ground for rest or shade would be permitted to retain it without disturbance. The chances surely are that his right to possession would be exactly

§ 5. (1) **Ownership of animals and wells.**—The article of food was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments, incident to that method of provision, induced them to gather together such animals as were of a more tame and sequacious nature; and to establish a permanent property in their flocks and herds, in order to sustain themselves in a less precarious manner, partly by the milk of their dams and partly by the flesh of the young. The support of these their cattle made the article of *water* also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells; the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common. Thus we find Abraham, who was but a sojourner, asserting his right to a well in the country of Abimelech, and exacting an oath for his security, “because he had digged that well.”<sup>e</sup> And Isaac, [6] about ninety years afterwards, reclaimed this his father’s property; and, after much contention with the Philistines, was suffered to enjoy it in peace.<sup>f</sup>

<sup>e</sup> Gen. xxi. 30.

<sup>f</sup> Gen. xxvi. 15. 18, etc.

coextensive with his power to keep it, and that he would be constantly liable to disturbance by the first comer who coveted the spot and thought himself strong enough to drive away the possessor. But the truth is that all such cavil at these positions is perfectly idle from the very baselessness of the positions themselves. What mankind did in the primitive state may not be a hopeless subject of inquiry, but of their motives for doing it it is impossible to know anything. These sketches of the plight of human beings in the first ages of the world are effected by first supposing mankind to be divested of a great part of the circumstances by which they are now surrounded, and by then assuming that, in the condition thus imagined, they would preserve the same sentiments and prejudices by which they are now actuated,—although, in fact, these sentiments may have been created and engendered by those very circumstances of which, by the hypothesis, they are to be stripped.”—MAINE, *Ancient Law*, c. VIII.

Upon this criticism of Blackstone by Maine, Sir Frederick Pollock remarks: “Blackstone’s account of the origin of property is loose enough to deserve nearly all of Maine’s criticism. He wholly fails to distinguish between physical

§ 6. (2) Ownership of land.—All this while the soil and pasture of the earth remained still in common as before, and open to every occupant: except, perhaps, in the neighborhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. Otherwise when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the east; where the climate itself, and the boundless extent of their territory, conspire to retain them still in the same savage state of vagrant liberty, which was universal in the earliest ages; and which Tacitus informs us continued among the Germans till the decline of the Roman empire.<sup>5</sup> We have also a striking ex-

z *Colunt discreti et diversi; ut fons, ut campus, ut nemus placuit.* (They dwell separately, in different parts, as a fountain, plain, or grove pleased them.) De Mor. Ger. 16.

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control or 'detention,' possession in law, and ownership, and he talks as if our refined legal conceptions had come to primeval man ready made, and in exactly the form and language of eighteenth century publicists. But perhaps it was needless cruelty to suggest that Blackstone either did not understand the technical meaning of occupation or intended to impose on his readers by playing with a verbal ambiguity. The word '*occupare*' is, after all, not purely technical in Latin; it certainly has no technical meaning in the passage of Cicero which Blackstone quotes (Comm. ii, 4; Cic. '*de Fin.*' iii, 20, § 67). Cicero was neither an original philosopher nor a great jurist; but no one would charge him with supposing that the right of a spectator in a theater to the place he has taken ('*eum locum quem quisque occupavit*') had anything to do with the permanent acquisition of *dominium*. It would be more plausible to credit him with an inkling of the historical truth pointed out by Maine in these pages, that the notion of absolute legal ownership, and still more the presumption that everything ought to have an owner, or that, as our own books say, 'the law must needs reduce the properties of all goods to some man,' are rather modern than primitive. Blackstone's neglect to observe that the detached individual man whom he postulates is a kind of person altogether unknown to archaic institutions is the common and fatal fault, as Maine has in effect said, of all individualist theories of society: of Hobbes', which Locke's was intended to refute, no less than of Blackstone's, which is a slight modification of Locke's."—MAINE, *Ancient Law* (Pollock's ed.), 314.



ample of the same kind in the history of Abraham and his nephew Lot.<sup>a</sup> When their joint substance became so great that pasture and other conveniences grew scarce, the natural consequence was that a strife arose between their servants; so that it was no longer practicable to dwell together. This contention Abraham thus endeavored to compose: "Let there be no strife, I pray thee, between thee and me. Is not the whole land before thee? Separate thyself, I pray thee, from me. If thou wilt take the left hand then I will go to the right; or if thou depart to the right hand, then I will go to the left." This plainly implies an acknowledged right, in either, to occupy whatever ground he pleased, that was not preoccupied by other tribes. "And Lot lifted up his eyes, and beheld all the plain of Jordan, that it was well watered everywhere, even as the garden of the Lord. Then Lot chose him all the plain of Jordan, and journeyed east; and Abraham dwelt in the land of Canaan."

[7] Upon the same principle was founded the right of migration, or sending colonies to find out new habitation, when the mother country was overcharged with inhabitants; which was practiced as well by the Phœnicians and Greeks, as the Germans, Scythians, and other northern people. And, so long as it was confined to the stocking and cultivation of desert uninhabited countries, it kept strictly within the limits of the law of nature. But how far the seizing on countries already peopled, and driving out or massacring the innocent and defenseless natives, merely because they differed from their invaders in language, in religion, in customs, in government, or in color; how far such a conduct was consonant to nature, to reason, or to Christianity, deserved well to be considered by those, who have rendered their names immortal by thus civilizing mankind.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit, without encroaching upon former occupants; and, by constantly occupying the same individual spot, the fruits of the earth were consumed, and its spontaneous produce destroyed, without any provision for a future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence; and this

<sup>a</sup> Gen. c. xiii.

necessity produced, or at least promoted and encouraged, the art of agriculture. And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities, without the assistance of tillage: but who would be at the pains of tilling it, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not, therefore, a separate property in lands, as well as movables, been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey; which, according to some philosophers, is the genuine state of <sup>(8)</sup> nature. Whereas now (so graciously has Providence interwoven our duty and our happiness together) the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. Necessity begat property; and, in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide, by their manual labor, for the necessary subsistence of all; and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

§ 7. 2. **Occupancy, original title to property.**—The only question remaining is, how this property became actually vested: or what it is that gave a man an exclusive right to retain in a permanent manner that specific land, which before belonged generally to everybody, but particularly to nobody. And, as we before observed that occupancy gave the right to the temporary *use* of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the *substance* of the earth itself; which excludes everyone else but the owner from the use of it. There is indeed some difference among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with this absolute property: Grotius

and Puffendorf insisting, that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding that there is no such implied assent, neither is it necessary that there should be; for that the very act of occupancy, alone, being a degree of bodily labor, is from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title. A dispute that savors too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained; every man seizing to his own continued <sup>[9]</sup> use such spots of ground as he found most agreeable to his own convenience, provided he found them unoccupied by anyone else.

§ 8. a. Dereliction.—Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it; for then it becomes, naturally speaking, *publici juris* (of public right) once more, and is liable to be again appropriated by the next occupant. So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such an express dereliction, that a property will be vested in the first fortunate finder that will seize it to his own use. But if he hides it privately in the earth or other secret place, and it is discovered, the finder acquires no property therein; for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses or drops it by accident, it cannot be collected from thence that he designed to quit the possession; and therefore in such a case the property still remains in the loser, who may claim it again of the finder. And this, we may remember, is the doctrine of the law of England, with relation to treasure-trove.<sup>1</sup>

§ 9. 3. Transfer of ownership.—But this method, of one man's abandoning his property, and another seizing the vacant possession, however well founded in theory, could not long subsist in

<sup>1</sup> See Book I, pag. 295.

fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established governments. In these it was found, that what became inconvenient or useless to one man, was highly convenient and useful to another; who was ready to give in exchange for it some equivalent, that was equally desirable to the former proprietor. Thus mutual convenience introduced commercial traffic, and the reciprocal transfer of property by sale, grant, or conveyance: which [10] may be considered either as a continuance of the original possession which the first occupant had; or as an abandoning of the thing by the present owner, and an immediate successive occupancy of the same by the new proprietor. The voluntary dereliction of the owner, and delivering the possession to another individual, amount to a transfer of the property: the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession: thus the consent expressed by the conveyance gives Titius a good right against me; and possession, or occupancy, confirms that right against all the world besides.

§ 10. a. **Succession to property on death.**—The most universal and effectual way of abandoning property is by the death of the occupant: when both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion: else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him; which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals, and unconnected with civil society: for then, by the principles before established, the next immediate occupant would acquire a right in all that the

deceased possessed. But as, under civilized governments which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property by disposing of his possessions by will; or, in case he neglects to dispose of it, or is not permitted to make any disposition [11] at all, the municipal law of the country then steps in, and declares who shall be the successor, representative, or heir of the deceased; that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion, which its becoming again common would occasion.\* And further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of escheats is adopted in almost every country whereby the sovereign of the state, and those who claim under his authority, are the ultimate heirs: and succeed to those inheritances, to which no other title can be formed.<sup>4</sup>

§ 11. (1) Intestate succession.—The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament.

\* It is principally to prevent any vacancy of possession, that the civil law considers father and son as one person; so that upon the death of either, the inheritance does not so properly descend, as continue in the hands of the survivor. Ff. 28. 2. 11.

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<sup>4</sup> Escheat.—The doctrine of escheats is not to be confounded with that doctrine of public law by which the state or the sovereign is the *ultimus hæres* of all vacant property. It took the place of that doctrine in the law of England, so far as land is concerned, but it rests in different principles and operates in a different way. Indeed, it differs from it as the doctrine of feudal tenure differs from that of eminent domain, which has since taken its place. "The state steps into the place of the feudal lord, by virtue of its sovereignty, as the original and ultimate proprietor of all the lands within its jurisdiction." (4 Kent's Comm. 424; Hinkle's Lessee v. Shadden, 2 Swan (32 Tenn.), 46, 48.) All property belongs to the nation. Those things not divided among individuals are public property. (Arnold v. Munday, 6 N. J. L. 1, 10 Am. Dec. 356. See note on Escheat, *post*, page \*241.)—HAMMOND.



We are apt to conceive at first view that it has nature on its side; yet we often mistake for nature what we find established by long and inveterate custom. It is certainly a wise and effectual, but clearly a political, establishment; since the permanent right of property, vested in the ancestor himself, was no *natural*, but merely a *civil*, right. It is true, that the transmission of one's possessions to posterity has an evident tendency to make a man a good citizen and a useful member of society: it sets the passions on the side of duty, and prompts a man to deserve well of the public, when he is sure that the reward of his services will not die with himself, but be transmitted to those with whom he is connected by the dearest and most tender affections. Yet, reasonable as this foundation of the right of inheritance may seem, it is probable that its immediate original arose not from speculations altogether so delicate and refined, and if not from fortuitous circumstances, at least, from a plainer and more simple principle. A man's children or nearest relations are usually about him on his <sup>[12]</sup> death-bed, and are the earliest witnesses of his decease. They became, therefore, generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore, also, in the earliest ages, on failure of children, a man's servants born under his roof were allowed to be his heirs; being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir."<sup>1</sup>

§ 12. (2) *Testamentary succession.*—While property continued only for life, testaments were useless and unknown; and, when it became inheritable, the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigency of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by *testament*; that is, by written or oral instructions properly *witnessed* and authenticated, accord-

<sup>1</sup> Gen. xv. 3.

ing to the *pleasure* of the deceased: which we therefore emphatically style his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his movables from his wife and children; and, in general, no will was permitted of lands till the reign of Henry the Eighth; and then only for a certain portion: for it was not till after the restoration that the power of devising real property became so universal as at present.

Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them; every distinct country having different ceremonies and requisites to make a testament completely valid: neither does anything vary more than the right of inheritance under different <sup>[13]</sup> national establishments. In England, particularly, this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he never can be their immediate heir, by any the remotest possibility: in general, only the eldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance: in real estates males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates, the females of equal degree are admitted together with the males, and no right of primogeniture is allowed.

This one consideration may help to remove the scruples of many well-meaning persons, who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son, by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice: while others so scrupulously adhere to the supposed intention of the dead, that if a will of lands be attested by only *two* witnesses instead of *three*, which the law requires, they are apt to imagine that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if, on the one hand, the son had by nature a right to succeed

to his father's lands; or as if, on the other hand, the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests, that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society. The positive law of society, which is with us the municipal law of England, directs it to vest in such person as the last proprietor shall by will, attended with certain requisites, appoint; and, in defect of such appointment, to go to some particular person, who from the result [14] of certain local constitutions, appears to be the heir at law. Hence it follows, that, where the appointment is regularly made, there cannot be a shadow of right in anyone but the person appointed: and, where the necessary requisites are omitted, the right of the heir is equally strong and built upon as solid foundation, as the right of the devisee would have been, supposing such requisites were observed.

§ 13. 4. Things in common.—But, after all, there are some few things, which notwithstanding the general introduction and continuance of property, must still unavoidably remain in common; being such wherein nothing but an usufructuary property is capable of being had: and therefore they still belong to the first occupant, during the time he holds possession of them, and no longer. Such (among others) are the elements of light, air, and water; which a man may occupy by means of his windows, his gardens, his mills, and other conveniences: such, also, are the generality of those animals which are said to be *feræ naturæ* (wild by nature), or of a wild and untamable disposition: which any man may seize upon and keep for his own use or pleasure. All these things, so long as they remain in possession, every man has a right to enjoy without disturbance; but if once they escape from his custody, or he voluntarily abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.

§ 14. 5. Ownerless things.—Again, there are other things, in which a permanent property *may* subsist, not only as to the temporary use, but also the solid substance; and which yet would be

frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are forests and other waste grounds, which were omitted to be appropriated in the general distribution of lands: such also are wrecks, estrays, and that species of wild animals, which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of game. With regard to these and some others, as disturbances and quarrels [15] would frequently arise among individuals, contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension, by vesting the things themselves in the sovereign of the state; or else in his representatives appointed and authorized by him, being usually the lords of manors. And thus the legislature of England has universally promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly maxim, of assigning to everything capable of ownership a legal and determinate owner.

## OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

§ 15. *Classification of things.*—The objects of dominion or property are *things*, as contradistinguished from *persons*; and things are by the law of England distributed into two kinds: things *real*, and things *personal*. Things real are such as are permanent, fixed, and immovable, which cannot be carried out of their place; as lands and tenements: things personal are goods, money, and all other movables; which may attend the owner's person wherever he thinks proper to go.<sup>1</sup>

<sup>1</sup> *Real and personal property distinguished.*—Is the distinction between real and personal property a natural and essential one, or is it merely the creature of positive law? Mr. Austin (Lectures on Jurisprudence, I. 59, 60) and some other recent writers take the latter view, and even call it “needless and accidental.” But it is evident that property in land differs from any other kind of property. It is the control of a certain portion of the earth's surface (or of the nation's territory) without reference to the physical substance occupying the space. We may remove the buildings, the soil itself, the strata under the soil, and they cease to be real property and become personal. But the space itself remains, and is still our close. We cannot remove or change it. We cannot destroy it as we can all other property. However complete our ownership may be by the law, nature has fixed limits to it that belong to no other kind of property. Moreover real property must necessarily be held subject to the rights of the state. Every nation must for its own existence as such have a territory and be lord paramount of that territory. Each individual proprietor must hold all his rights subject to the rights of the state: for it is in the power of the state to maintain its own territorial existence that his title depends. (United States v. Repentigny, 5 Wall. 211, 18 L. Ed. 627.)

In England (where out of twenty million inhabitants only thirty to thirty-five thousand own a foot of the soil, and the number is constantly diminishing, while that of the landless increases) the practical enforcement of the state's rights is fast becoming a question of intense interest, though it addresses itself more directly to legislators and economists than to practicing lawyers. Many thinking men are disposed to advocate the theory that the state is, as a matter of necessity, the only proprietor of the soil, and that individual rights are and must always be subordinate. An able statement of this view is in an article on “The Tenure of Land.” (West. Rev. July, 1864. See, also, J. S. Mill's Principles of Political Economy. Yet Mr. Mill quotes, apparently with approbation, Austin's attack “on the darkening distinction between real and personal



In treating of things real, let us consider, first, their several sorts or kinds; secondly, the tenures by which they may be holden; thirdly, the estates which may be had in them; and, fourthly, the title to them, and the manner of acquiring and losing it.

property—a distinction which has no foundation in the philosophy of law, but solely in its history, and which Austin emphatically characterizes as a cause of complexness, disorder, and darkness, which nothing but the extirpation of the distinction can thoroughly cure.” [Ed. Rev. Oct. 1863, p. 226, note.] This illustrates the disregard of all connection between law and life common alike to legal and lay writers.)

“Landed property is felt even by those most tenacious of its rights to be a different thing from other property, and where the bulk of the community have been disinherited of their share of it, and it has become the exclusive attribute of a small minority, men have generally tried to reconcile it to their sense of justice by endeavoring to attach duties to it, and erecting it into a sort of magistracy, either moral or legal. But if the state is at liberty to treat the possessors of land as public functionaries, it is only going one step further to say that it is at liberty to discard them. The claim of the land owners to the land is altogether subordinate to the general policy of the state. The principle of property gives them no right to the land, but only a right to compensation for whatever portion of their interest in the land it may be the policy of the state to deprive them of.” (Prin. of Pol. Econ., i, p. 285.) “To me it seems almost an axiom that property in land should be interpreted strictly, and that the balance in all cases of doubt should incline against the proprietor. The reverse is the case with the property in movables, and in all things the product of labor; over these the owner’s power, both of use and exclusion, should be absolute, except where positive evil to society would result from it; but in the case of land no exclusive right should be permitted in any individual which cannot be shown to be productive of positive good. To be allowed any exclusive right at all over any portion of the common inheritance, while there are others who have no portion is already a privilege. No quantity of movable goods which a person can acquire by his labor prevents others from acquiring the like by the same means; but from the very nature of the case, whoever owns land keeps it from somebody else.” (Prin. of Pol. Econ., i, p. 287.)

The general tendency of our law at present, especially in the western states, is to do away with all distinction, and regard individual ownership of real estate as precisely of the same character with personal. “We, in general, own our land in simple absoluteness, and need not talk of allodium, or free and common socage.” (Per Woodward, J., in *Pierson v. Armstrong*, 1 Iowa, 282, 294, 63 Am. Dec. 440.)

Yet there is unquestionably a distinction in the nature of things between the two. The community as a whole has a right of control over the territory as a whole very different from any it possesses over the personal fortunes of its

§ 16. 1. **Things real.**—First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments.

citizens. It must have this for its safety; it cannot help having it, so far as other nations are concerned. Each individual proprietor of land must hold all his rights subject to the rights of the state. No matter what may be the changing forms under which these paramount rights may appear, we find them always existing and founded in the very nature of the case. The common ownership of the early Saxons and other Germanic tribes, the feudal tenures of the middle ages, the eminent domain of modern law, are only so many varying expressions of a single principle. Real property law is now often treated as if it related only to individual estates, but this is an arbitrary division of the subject. We cannot fully discuss the rules of law relating to a piece of land to-day without taking account of those which regulate the action of government in taxing it, forfeiting it, confiscating it to its own use, etc. We cannot even define accurately the rights of the individual owner without studying the same rules, which give and limit to the body politic rights as substantial and valuable as those held by a feudal lord—rights in some respects more arbitrary than any feudal lord ever claimed.

The power of the sovereign over the land of the country, and the dependence of all private titles upon that, are stated in the most forcible terms in Forsyth's Cases on C. L., p. 14, quoting Lord Mansfield in *Campbell v. Hall*, Cowp. 209; 20 St. Tr. 323. And see *Smith v. Brown*, 2 Salk. 666. The same expressions will be found in many American cases on the right of eminent domain. It is only when private property in land is the subject of discussion that this element seems forgotten.

Some of our recent jurists treat the distinction of land and chattels, or realty and personalty (in the English sense), as an unlucky attempt to express the scientific difference between *res mobiles*, *immobiles*, which they regard as the original or natural classification. (Amos, *Systematic View*, p. 131, et seq.; 2 Austin, *Lecture xlv*, pp. 804, 805; Holland on *Jurisprudence*, pp. 135, 136.) But the distinction between *mobilia*, *immobilia*, was certainly not a primitive one in the Roman law. It is due to the classic jurists (Gaius, ii. 42; Ulpian, xix. 8; Dig. ii. 8, 15; Code, i. 2, 14, pr.), and even they use *res soli* oftener, I think, than *res immobiles*. Besides, they introduce a third term, *se moventia*, not having any counterpart in our classification. There is no evidence of any early use of motion as a criterion of legal qualities in the Roman more than in the English law. We find traces of it in the forms of writs (F. N. B. 88 B); but no rules of law based upon it.

The distinction of *movable* and *immovable* seems to be of small importance in itself. Much personal property is as immovable as land, either in a literal sense or in the sense by which we denote a want of complete power over the property. Thus houses on leased land, growing crops, heavy fixed machinery, etc., are actually immovable. Shares in the public funds, or in railroads and other local works, are immovable in so far that the owner cannot at pleasure

§ 17. a. **Land.**—*Land* comprehends all things of a permanent, substantial nature; being a word of a very extensive signification, as will presently appear more at large.

remove them from under the control of whatever government rules the territory; in this partaking to a most important degree of the peculiarity of real estate. We must then look elsewhere for the basis of a distinction, if one is to be made.

There is nothing in the physical nature of land differing widely from other property. Houses would of course become chattels at once, severed from the soil; but so would the soil itself if displaced. There is no part of a man's land that he may not, under some circumstances, sever and sell as personal property. The surface soil may be carted off to build a railroad, or enrich other land, and quarries and mines might exhaust all the contents of a close as deep as men could go under the physical conditions, leaving nothing but a hole. Still the hole would remain, and remain the owner's; it would have all the legal qualities of real estate; over that section of the earth's surface he would have the same control as ever.

On the other hand, this very permanency is a limit of the owner's right. He cannot by any means whatever destroy or transmute his property in land. He may destroy houses, and remove, as we have just seen, the physical contents of his close; but he would be obliged to leave the close itself, the section of space, just as he found it. "Everything properly embraced within the description of personal property is both movable and perishable. Land is immovable and imperishable. Personal property is at the absolute disposal of the owner. He can use, transport, or destroy. Real property can only be used. It is not the subject of transportation or destruction. The surface of the earth may be changed and occupied for different purposes; it may be forced to yield up portions of its wealth, in mineral and agricultural products, to the hand of man; but the foundation, the thing itself, will remain forever. An individual may hold the right of possession for a period, but in the progress of time he must pass along and leave that right behind him for the enjoyment of others. Hence the rule naturally follows that no person can by any possible arrangement become invested with the absolute ownership of land. . . . It has therefore become an accepted rule of public law that the absolute and ultimate right of property shall be regarded as vested in the sovereign or corporate power of the state where the land lies, . . . because it is the only one which is certain to survive the generations of men as they pass away." (Bingham on Real Estate, pp. 2, 3.)

From this train of thought, then, we reach a conclusion as to what constitutes the peculiar nature of real estate. Not its immobility *merely*, but the permanency and unchangeability, of which the immobility is only an outward sign. But in what does the *permanency* inhere? Not in the earth or rocks of the soil, nor in the houses thereon; all these may be changed and taken away, may be converted into personal chattels and other chattels fixed in their places,

§ 18. **b. Tenements.**—*Tenement* is a word of still greater extent, and though in its vulgar acceptation [17] is only applied to houses and other buildings, yet in its original, proper, and legal sense it signifies everything that may be *holden*, provided it be of a permanent nature;<sup>2</sup> whether it be of a substantial and sensible,

and thus converted into real estate. What is permanent is simply the *space*—the definite part of the earth's surface. That which makes real estate differ from all other kinds of property is that it consists in the owner's control over a certain defined part of the earth on which we dwell. In this respect no other property has anything in common with what lawyers mean by *land*.

But municipal law treats it as a part not of the earth's surface in general, but of the national domain—the territory occupied by the state. All its important legal qualities are derived from this relation. The state for its very existence must have a territory—must exercise sovereign power over that territory—must therefore be brought into peculiar relations with all individuals exercising other powers over portions of the same. Here is the cardinal distinction. All other kinds of property may or may not bring its owner into contact with the state. Real property *must* do so, because both the state and the private owner *must* control it. It is not necessary for our purpose to enumerate all the points of contact between the two owners. The chief of them are these: (1) As to all foreign nations the state is the owner in chief. It may cede any portion of its domain to a conqueror, and the rights of the private owner will be at the mercy of the latter, except so far as the rights of conquest are controlled by modern laws of war. In other cases any foreign power that wishes to make any use of private land must have permission from the state. The individual owner has no right to transfer his title to a foreign power without the sanction of his own government. Until recently it has been the general rule that he could not even transfer it to the individual subject of a foreign power. (2) The state may take any part of its own territory out of the hands of an individual owner when it pleases, subject only to such restrictions as the state itself imposes by constitution or otherwise. (3) If the land is left without an individual owner, the state must for its own safety and welfare take charge of it. (4) The state must control the owner's use of it so as to prevent its being a nuisance to others.

Beside these necessary points of control, history shows that the ownership of the soil gives the possessor a relation to the state different from and superior to every other kind of property.—HAMMOND.

2 "In *People ex rel. v. Kelsey*, 14 Abb. Pr. (N. Y.) 376, it is said: 'The word "tenement" signifies everything which may be holden, if it be of a permanent nature, and a wharf or pier is so permanent that it becomes a part of the soil and freehold itself.' In *People v. Westervelt*, 17 Wend. (N. Y.) 676, it was said: 'No doubt the notion that tenements comprehended chattels real was taken, in *Vredenberg v. Morris*, 1 Johns. Cas. (N. Y.) 223, from the very general words of Blackstone (2 Bl. Comm. 16, 17), who says that "it includes

or of an unsubstantial ideal kind. Thus *liberum tenementum*, frank-tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like:<sup>a</sup> and, as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements.<sup>b</sup>

§ 19. **c. Hereditaments: corporeal and incorporeal.**—But an *hereditament*, says Sir Edward Coke,<sup>c</sup> is by much the largest and most comprehensive expression: for it includes not only lands and tenements, but whatsoever may be *inherited*, be it corporeal, or incorporeal, real, personal, or mixed. Thus an heirloom, or implement of furniture which by custom descends to the heir together with an house, is neither land, nor tenement, but a mere movable; yet, being inheritable, is comprised under the general word “hereditament”: and so a condition, the benefit of which may descend to a man from his ancestor, is also an hereditament.<sup>d</sup>

Hereditaments, then, to use the largest expression, are of two kinds: corporeal and incorporeal. Corporeal consist of such as affect the senses; such as may be seen and handled by the body:

<sup>a</sup> Co. Litt. 6.

<sup>c</sup> 1 Inst. 6.

<sup>b</sup> *Ibid.* 19, 20.

<sup>d</sup> 3 Rep. 2.

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everything that may be holden, provided it be of a permanent nature.’ But none of his illustrations given at the same page go so far; and the generality of his phrases is still more plainly restricted by Co. Litt. 6a, to which he refers. Coke’s words are: ‘Tenementum, tenement, is a large word, to pass not only lands and other inheritances which are holden, but also offices, rents, profits *a prendre* out of lands, and the like, wherein a man hath any frank-tenement, and whereof he is seised *ut de libero et tenemento*.’ The illustrations of the same writer (Co. Litt. 19 and 20a) show also that the term in its technical sense is confined to freeholds. Perkins, § 114, is to the same effect. Preston on Estates, 8, 9, is very full in his examples, all of which are confined to freeholds; indeed, terms of years are expressly excluded. Wood’s Inst. 114, also contains a very full enumeration to the same effect. Blackstone himself excludes terms for years by so many words at another place (Bl. Comm. 386; Co. Litt. 118b, s. p.)” *Orchard v. Wright etc. Store Co.*, 225 Mo. 414, 20 Ann. Cas. 1072, 125 S. W. 486, 495.



incorporeal are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.<sup>3</sup>

§ 20. (1) **Corporeal hereditaments** — (a) **Land**.—Corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only. For *land*, says Sir Edward Coke,<sup>e</sup> comprehendeth in its legal signification any ground, soil, or earth whatsoever; as arable meadows, pastures, woods, moors, waters, marshes, furzes, and heath. [18] It legally includeth also all castles, houses, and other buildings: for they consist, saith he, of two things; *land*, which is the foundation, and *structure* thereupon: so that, if I convey the land or ground, the structure or building passeth therewith. It is observable that *water* is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law: and therefore I cannot bring an action to recover possession of a pool or other piece of water, by the name of *water* only; either by calculating its capacity, as, for so many cubical yards; or, by superficial measure, for twenty acres of water; or by general description, as for a pond, a watercourse, or a rivulet: but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water*.<sup>f</sup> For water is a movable, wandering thing, and must of necessity con-

<sup>e</sup> 1 Inst. 4.

<sup>f</sup> Brownl. 142.

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<sup>3</sup> **Corporeal and incorporeal hereditaments**.—This distinction, though of great antiquity and authority, is obviously founded on a misconception. For it is manifest that a freehold estate in possession, which is the plainest example of a corporeal hereditament, is of the same *nature* (though not of the same extent or value) as a right of way over the same piece of land, which is clearly an incorporeal hereditament. It is, equally with the right of way, a “creature of the mind,” or rather, of the law, and can neither be seen nor handled. It is the land itself which “affects the senses”: but this is precisely the same thing in both cases. The true distinction is, that a corporeal hereditament is an interest in land which confers possession (or, as it was formerly called, “seisin”) of the land upon the person in whom it is vested; while the incorporeal hereditament, however valuable it may be, does not entitle its owner to possession of the land. This distinction was of vast importance in feudal times, and, even now, is not without practical consequences. However, the student can hardly be expected to understand it until he has become further acquainted with the subject of this book.—STEPHEN, 1 Comm. (16th ed.), 101.

tinue common by the law of nature;<sup>4</sup> so that I can only have a temporary, transient, usufructuary property therein: wherefore, if a body of water runs out of my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immovable: and therefore in this I may have a certain, substantial property; of which the law will take notice, and not of the other.

§ 21. (i) **Superjacent and subjacent space.**—Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards. *Cujus est solum, ejus est usque ad cælum* (he who owns the ground possesses also to the sky), is the maxim of the law, upwards: therefore no man may erect any building, or the like, to overhang another's land: and, downwards, whatever is in a direct

<sup>4</sup> **Ice as realty.**—In holding that when the water of a stream running in its natural channel is congealed the ice attached to the soil constitutes a part of the land and belongs to the owner of the bed of the stream, the Indiana court says: "The entire ground upon which any property in water as water, flowing in a stream, is denied, in distinction from the admitted property in its *impetus*, is in that, as Blackstone states, 'it is a movable, wandering thing, and must of necessity continue common by the law of nature.' 2 Bl. Comm. 18. In *Sury v. Pigot*, Poph. 166, it is quaintly said, that an *ejectione firma* will not lie for water 'because it is not *firma*, sed *currit*.' But when this 'movable, wandering thing' has congealed and become attached to the soil, does it not, like any other accession thereto, become part of the realty? Wherein does it differ from alluvion, or accretion, which is but the imperceptible deposit or addition of earth, sand, gravel, and other matter made by rivers, floods or other causes, upon land? Angell, *Watercourses*, § 53. It is the adhering of property to something else, by which the owner of one thing becomes possessed of a right to another. Webster's Dictionary, where is cited the sentence from Richard Cobden, 'The golden alluvions are there (in California and Australia) spread over a far wider space; they are found not only on the banks of rivers and in their beds, but are scattered over the surface of vast plains.' This addition is alluvion, whether arising from natural or artificial causes. 2 Hilliard, *Real Prop.*, 195, note a; *Bouv. Law Dic.* It has been held, 'the seaweed thus thrown up by the sea, may be considered as one of those marine increases arising by slow degrees; and according to the rule of the common law, it belongs to the owner of the soil.' *Emans v. Turnbull*, 2 Johns. (N. Y.) 313, 3 Am. Dec. 427." *State v. Pottmeyer*, 33 Ind. 402, 405, 5 Am. Rep. 224. See, also, *Mill River Woolen Mfg. Co. v. Smith*, 34 Conn. 462; *Allen v. Weber*, 80 Wis. 531, 27 Am. St. Rep. 51, 14 L. R. A. 361, 50 N. W. 514; *Washington Ice Co. v. Shortall*, 101 Ill. 46, 40 Am. Rep. 196. *Contra*: *Higgins v. Kusterer*, 41 Mich. 318, 32 Am. Rep. 160, and note, 2 N. W. 13.

line between the surface of any land and the center of the earth, belongs to the owner of the surface; as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but everything under it, or over it.<sup>5</sup> And therefore if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows. Not but the particular names of the things are [19] equally sufficient to pass them, except in the

5 **Rights in superjacent space.**—It is the theory of the law that the land owner owns above and below the surface. (This theory is expressed by the maxim, *Cujus est solum, ejus est usque ad cælum et ad inferos*—he who owns the ground possesses also to the sky and to the center of the earth.) But it is an undetermined question whether the principle means that the ownership of the land carries with it the possession of the column of air above, or merely that the land owner is entitled to complain of the occupation of the space above him which materially interferes with his enjoyment of his land. Lord Ellenborough, in 1815, raised the question whether passing over a man's land in a balloon would be a trespass. He then expressed the opinion that it was not in itself a trespass "to interfere with the column of air superincumbent on the close," although he held that a man was a trespasser who fired a gun on his own land so that the shot fell on his neighbor's land. (*Pickering v. Rudd* 4 Camp. 219, 1 Stark. 56.) Lord Blackburn later expressed the opinion that the balloonist would be a technical trespasser. (*Kenyon v. Hart*, 6 Best & S. 249, 122 Eng. Reprint, 1188.) Erecting a building so that the eaves overhang another's land has been held to be a trespass. (*Smith v. Smith*, 110 Mass. 302.) And ejectment has been allowed against a company that had strung a telephone wire over the plaintiff's land. (*Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 116 Am. St. Rep. 563, 9 Ann. Cas. 858, 11 L. R. A. (N S.) 920, 79 N. E. 716.) In a case in which it was held that the owner of a stallion was liable for damage done by the horse kicking and biting the plaintiff's mare through a wire fence which separated the plaintiff's and defendant's closes, Lord Coleridge said: "It seems to me sufficiently clear that some portion of the horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law." (*Ellis v. Loftus Iron Co.*, L. R. 10 C. P. 10.) It may be doubted whether this case was not decided rather on the theory of the common-law duty of the owner of cattle to keep them in than on the theory of trespass. It has, however, also been held that in a quarrel between two neighbors, where one of them reached her arm across the fence, she was guilty of a trespass. "The mere fact that plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did." (*Hannabalon v. Sessions*, 116 Iowa, 457, 93 Am. St. Rep. 250, 90 N. W. 93.) In *Butler v. Frontier Telephone Co.*, 186 N. Y. 486, 116 Am. St. Rep. 563, 9 Ann. Cas. 858, 11 L. R. A. (N. S.) 920, 79 N. E. 716, ejectment was allowed against a

instance of water; by a grant of which, nothing passes but a right of fishing;<sup>a</sup> but the capital distinction is this; that by the name of a castle, messuage, toft, croft, or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of; but by the name of land, which is *nomen generalissimum* (the most general name), everything terrestrial will pass.<sup>b</sup>

<sup>a</sup> Co. Litt. 4.

<sup>b</sup> *Ibid.* 4, 5, 6.

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defendant who had strung a telephone wire over the plaintiff's land. If the branches or roots of a tree of one man encroach upon the land of another, the latter may cut away the branches or roots up to the boundary line. *Norris v. Baker*, 1 Rolle R. 394, 81 Eng. Reprint, 559; *Grandona v. Lovdal*, 70 Cal. 161, 11 Pac. 623; *Hickey v. Mich. Co.*, 96 Mich. 498, 35 Am. St. Rep. 621, 21 L. R. A. 729, 55 N. W. 989. And he may do so without notice to the owner of the tree, if he does not enter upon the latter's land. *Lemmon v. Webb*, [1895] App. Cas. 1. And if overhanging branches cause damage to his neighbor, the owner of the tree is responsible for the tort. *Smith v. Giddy*, [1904] 2 K. B. 448. See 2 Mod. Am. Law, p. 35.

## CHAPTER THE THIRD.

[20]

### OF INCORPOREAL HEREDITAMENTS.

§ 22. **Character of an incorporeal hereditament.**—An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within, the same.<sup>a 1</sup> It is not the thing corporate itself, which

<sup>a</sup> Co. Litt. 19, 20.

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1 **Incorporeal hereditaments.**—In defining this term Blackstone has not repeated his definition of hereditament, apparently taking it for granted that no one would apply the name of the sub-class to anything which may not be inherited, that being an essential property of the class. (Text, p. 18.) But experience shows that the definition taken by itself has sometimes been applied to objects that are incorporeal, but in no sense hereditaments, e. g., to mining licenses (*Beatty v. Gregory*, 17 Iowa, 109, 85 Am. Dec. 546), public easements, etc. Mr. Broom, therefore, has corrected this by adding "transmissible to heirs, according to the law regulating the inheritance of land." (*Broom and Hadley*, ii, 20.) But he has also changed Blackstone's "issuing out of a thing corporate, whether real or personal," and said that "except in a few cases an incorporeal hereditament issues out of or is annexed to a corporeal hereditament." (*Broom and Hadley*, ii, 20.) There was no such limitation to the common-law conception; but in fact the few kinds of incorporeal hereditaments still in use in American law do thus issue out of land, I believe, without exception; and even in England, according to Serjeant Stephen, "the term of incorporeal hereditament is in effect exclusively applied to the class of things *real*; and may in such case be defined as a right annexed to, or issuing out of, or exercisable within an hereditament corporeal of that class." (*New Com.*, vol. 1, 666.).

A hereditament at common law was not necessarily land or even real property. Anything (in possession) that would descend to a man's heirs, instead of passing to his executor or administrator, was a hereditament; and if not land it was an incorporeal hereditament. Thus annuities to a man and his heirs, tithes, advowsons, offices, corodies, franchises, dignities, were incorporeal hereditaments. Most of these have dropped out of the class with us in America, because they no longer pass to heirs in the strict sense of the word, if they have not become obsolete entirely. Tithes, advowsons, corodies, are unknown with us. Offices and franchises have lost entirely their hereditary character. Rents are almost the only such hereditaments enumerated by Blackstone that may still be regarded as such when held as distinct objects of ownership (in gross), and these are rare. The only remaining examples are usually appendant to some estate in land (ways, commons), and as such



may consist in lands, houses, jewels, or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, as the logicians speak, corporeal hereditaments are the substance, which may be always seen, always handled: incorporeal hereditaments are but a sort of accidents, which inhere in and are supported by that substance; and may belong or not belong to it, without any visible alteration therein. Their existence is merely in idea and abstracted contemplation; though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion

are *easements*. For this reason easements and incorporeal hereditaments are often confounded together, and what is true of one term is spoken of as belonging to the other. But an easement is not necessarily a hereditament, and most incorporeal hereditaments are not easements.

A still worse blunder is that of ranking estates and easements together as divisions of a single genus. One may have an estate of any quantity in an easement, as well as in a piece of land or corporeal hereditament; but it is on the assumption that the easement is also an *incorporeal* hereditament. One can have no estate in an easement in gross, or in a chattel.

Easement and its correlative servitude belong to the class of words that denote the object of a right, and not the right itself; and in that respect are in the same category with hereditament. But servitude connotes the object with regard to the land over which the right is to be exercised, not the object of the right itself. It is not an appurtenance of the servient estate, any more than the sum due (the *duitie* in the precise old phrase of the Y. B.) is a part of the debtor's property. It is what in mathematics would be called a *minus*, a negative quantity. Hence for the purposes of classification it had better be dismissed from thought, as only another name for the same thing or object of right, regarded from the standpoint of duty instead of right.

Remainders and reversions have often in recent books been included among *incorporeal* hereditaments, because they formerly "lay in grant" and not in livery. But Stephen has well said that "the more convenient and juster arrangement is that adopted by Blackstone. The larger use of the term confounds the estate which may be had in the property with the property itself." (New Com., vol. 1, 666, n. d.) The remainder or reversion is as truly a form of estate as a freehold in possession, and may have either a corporeal or incorporeal hereditament for its object. But a title to enter for condition broken is properly called an incorporeal hereditament. The party entitled has no estate in the land whatever, and there is no confusion. (Marquis of Winchester's Case, 3 Coke, 2; 2 Wooddesson, 38.) If we call reversions and remainders incorporeal hereditaments we must revise many well-settled rules of law, e. g., that a rent cannot be granted out of an incorporeal hereditament; for it is agreed that rent may be reserved on the grant of a reversion, even

of an incorporeal hereditament, we must be careful not to confound together the profits produced, and the thing, or hereditament, which produces them. An annuity, for instance, is an incorporeal hereditament: for though the money, which is the fruit or product of this annuity, is doubtless of a corporeal nature, yet the annuity itself, which produces that money, is a thing invisible, has only a mental existence, and cannot be delivered over from hand to hand. So tithes, if we consider the <sup>[21]</sup> produce of them, as the tenth sheaf or tenth lamb, seem to be completely corporeal; yet they are indeed incorporeal hereditaments: for they, being merely a contingent right, collateral to or issuing out of lands, can never be the object of sense: they are neither capable of being shown to the eye, nor of being delivered into bodily possession.

§ 23. **Kinds of incorporeal hereditaments.**—Incorporeal hereditaments are principally of ten sorts; advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities, and rents.

§ 24. 1. **Advowsons.**—Advowson is the right of presentation to a church, or ecclesiastical benefice.<sup>2</sup> Advowson, *advocatio*, signifies *in clientelam recipere*, the taking into protection; and therefore is synonymous with patronage, *patronatus*: and he who has the right of advowson is called the patron of the church. For, when lords of manors first built churches on their own demesnes, and appointed the tithes of those manors to be paid to the officiating ministers, which before were given to the clergy in common

if a dry reversion that had before no rent attached to it. (Whitlock's Case, 8 Coke, 69.)

American writers have gone still further and added uses and trusts to the list of incorporeal hereditaments, although Professor Wooddesson had said distinctly: "With us a trust or beneficial estate in lands is never ranked among incorporeal hereditaments" (2 Lectures, 38, Lect. xxi), and Lord Coke's well-known description of a use (1 Inst. 272 b) as neither *jus in re* nor *jus ad rem*, but collateral to the land, might have been a sufficient warning. One writer (Mr. A. Bingham) has even divided the whole subject of real estate into the two heads of *Estates* and *Easements*, as if one could have any easement except by an estate in it.—HAMMOND.

<sup>2</sup> See 2 Poll. & Maitl. Hist. Eng. Law (2d ed.), 136; Williams, Real Prop. (21st ed.), 441.

(from whence, as was formerly mentioned,<sup>b</sup> arose the division of parishes), the lord, who thus built a church, and endowed it with glebe or land, had of common right a power annexed of nominating such minister as he pleased (provided he were canonically qualified) to officiate in that church, of which he was the founder, endower, maintainer, or, in one word, the patron.<sup>c</sup> 3

This instance of an advowson will completely illustrate the nature of an incorporeal hereditament. It is not itself the bodily possession of the church and its appendages; but it is a right to give some other man a title to such bodily possession. The advowson is the object of neither the sight nor the touch; and yet it perpetually exists in the mind's eye, and in contemplation of law. It cannot be delivered from man to man by any visible bodily transfer, nor can corporal possession be [22] had of it. If the patron takes corporal possession of the church, the churchyard, the glebe or the like, he intrudes on another man's property; for to these the parson has an exclusive right. The patronage can therefore be only conveyed by operation of law, by verbal grant, either oral or written, which is a kind of invisible, mental transfer: and being so vested, it lies dormant and unnoticed, till occasion calls it forth: when it produces a visible, corporeal fruit, by entitling some clerk, whom the patron shall please to nominate, to enter and receive bodily possession of the lands and tenements of the church.

§ 25. a. Advowsons appendant or in gross.—Advowsons are either advowsons *appendant*, or advowsons *in gross*. Lords of manors being originally the only founders, and of course the only patrons, of churches,<sup>d</sup> the right of patronage or presentation, so long as it continues annexed to the possession of the manor, as some have done from the foundation of the church to this day, is called

<sup>b</sup> Book I. pag. 112.

<sup>c</sup> This original of the *jus patronatus* (right of patronage), by building and endowing the church, appears also to have been allowed in the Roman empire. Nov. 56. t. 12. c. 2. Nov. 118. c. 23.

<sup>d</sup> Co. Litt. 119.

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3 Advowson, or right of presentation, is no longer confined to lords of manors, but is vested in many cases in other private persons, and in corporations, both lay and ecclesiastical. *Keen v. Denny*, [1894] 3 Ch. 169.

an advowson appendant,<sup>e</sup> and it will pass, or be conveyed, together with the manor, as incident and appendant thereto, by a grant of the manor only, without adding any other words.<sup>f</sup> But where the property of the advowson has been once separated from the property of the manor, by legal conveyance, it is called an advowson in gross, or at large, and never can be appendant any more; but is for the future annexed to the person of its owner, and not to his manor or lands.<sup>g</sup> <sup>4</sup>

§ 26. b. Advowsons presentative, collative, or donative.—Advowsons are also either *presentative*, *collative*, or *donative*.<sup>h</sup> An advowson presentative is where the patron hath a right of presentation to the bishop or ordinary, and moreover to demand of him to institute his clerk, if he finds him canonically qualified: and this is the most usual advowson. An advowson collative is where the bishop and patron are one and the same person: in which case the bishop cannot present to himself; but he does, by the one act of collation, or [<sup>23</sup>] conferring the benefice, the whole that is done in common cases, by both presentation and institution. An advowson donative is when the king, or any subject by his license, doth found a church or chapel, and ordains that it shall be merely in the gift or disposal of the patron; subject to his visitation only, and not to that of the ordinary; and vested absolutely in the clerk by the patron's deed of donation, without presentation, institution, or induction.<sup>i</sup> This is said to have been anciently the only way of conferring ecclesiastically benefices in England; the method of institution by the bishop not being established more early than the time of Archbishop Becket in the reign of Henry II.<sup>k</sup> And therefore, though Pope Alexander III,<sup>l</sup> in a letter to Becket, severely

• *Ibid.* 121.

† *Ibid.* 307.

g *Ibid.* 120.

h *Ibid.*

<sup>1</sup> Co. Litt. 344.

<sup>k</sup> Seld. Tith. c. 12. § 2.

<sup>l</sup> Decretal. l. 3. t. 7. c. 3.

<sup>4</sup> This is the view of Blackstone; but it seems to be at variance with that of other authorities (Ive's Case (1597), 5 Rep., at 11 b; Hartopp's and Cock's Case (1627), Hutt. 88, 123 Eng. Reprint, 1120). Perhaps there is a confusion between "appendant" and "appurtenant."—STEPHEN, 2 Comm. (16th ed.), 810 n.

inveighs against the *prava consuetudo* (erroneous practice), as he calls it, of investiture conferred by the patron only, this, however, shows what was then the common usage. Others contend that the claim of the bishops to institution is as old as the first planting of Christianity in this island; and in proof of it they allege a letter from the English nobility to the pope in the reign of Henry the Third, recorded by Matthew Paris,<sup>m</sup> which speaks of presentation to the bishop as a thing immemorial. The truth seems to be, that, where the benefice was to be conferred on a mere layman, he was first presented to the bishop, in order to receive ordination, who was at liberty to examine and refuse him: but where the clerk was already in orders, the living was usually vested in him by the sole donation of the patron: till about the middle of the twelfth century, when the pope and his bishops endeavored to introduce a kind of feudal dominion over ecclesiastical benefices, and, in consequence of that, began to claim and exercise the right of institution universally, as a species of spiritual investiture.

However this may be, if, as the law now stands, the true patron *once* waives this privilege of donation, and presents to the bishop and his clerk is admitted and instituted, the <sup>[24]</sup> advowson is now become forever presentative, and shall never be donative any more.<sup>n</sup> For these exceptions to general rules, and common right, are ever looked upon by the law in an unfavorable view, and construed as strictly as possible. If, therefore, the patron, in whom such peculiar right resides, does once give up that right, the law, which loves uniformity, will interpret it to be done with an intention of giving it up forever; and will therefore reduce it to the standard of other ecclesiastical livings.

§ 27. 2. *Tithes*.—A second species of incorporeal hereditaments is that of tithes;<sup>5</sup> which are defined to be the tenth part of the increase, yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants: the first species being usually called *predial*, as of corn, grass, hops,

<sup>m</sup> A. D. 1239.

<sup>n</sup> Co. Litt. 344. Cro. Jac. 63.

<sup>5</sup> The modern law of tithes may be found in Williams, Real Prop. 447; 2 Stephen's Comm. (16th ed.), 817.



and wood;<sup>o</sup> the second *mixed*, as of wool, milk, pigs, etc.,<sup>p</sup> consisting of natural products, but nurtured and preserved in part by the care of man; and of these the tenth must be paid in gross; the third *personal*, as of manual occupations, trades, fisheries, and the like; and of these only the tenth part of the clear gains and profits is due.<sup>q 6</sup>

It is not to be expected from the nature of these general Commentaries, that I should particularly specify, what things are tithable, and what not, the time when, or the manner and proportion in which, tithes are usually due. For this I must refer to such authors as have treated the matter in detail: and shall only observe that, in general, tithes are to be paid for everything that yields an annual increase, as corn, hay, fruit, cattle, poultry, and the like; but not for anything that is of the substance of the earth, or is not of annual increase, as stone, lime, chalk, and the like; nor for creatures that are of a wild nature, or *feræ naturæ*, as deer, hawks, etc., whose increase, so as to profit the owner, is not annual, but casual.<sup>r</sup> It will rather be our business to consider, 1. The original of the right of tithes. 2. In whom [<sup>25</sup>] that right at present subsists. 3. Who may be discharged, either totally or in part, from paying them.

§ 28. a. *Origin of tithes.*—As to their original, I will not put the title of the clergy to tithes upon any divine right; though such a right certainly commenced, and I believe as certainly ceased, with the Jewish theocracy. Yet an honorable and competent maintenance for the ministers of the gospel is, undoubtedly, *jure divino* (by divine right); whatever the particular mode of that maintenance may be. For, besides the positive precepts of the New Testament, natural reason will tell us, that an order of men, who are separated from the world, and excluded from other lucrative professions, for the sake of the rest of mankind, have a right to be

o 1 Roll. Abr. 635. 2 Inst. 649.

p *Ibid.*

q 1 Roll. Abr. 656.

r 2 Inst. 651.

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<sup>6</sup> The Tithe Act of 1832 introduced various modifications in the law of tithes. The Tithe Commutation Act of 1836, and the various amendments thereto, provide a system for the commutation of tithe into tithe rent-charge. This subject is treated in 2 Stephen's Comm. (16th ed.), 823 ff.

furnished with the necessities, conveniences, and moderate enjoyments of life, at their expense, for whose benefit they forego the usual means of providing them. Accordingly all municipal laws have provided a liberal and decent maintenance for their national priests or clergy: ours in particular have established this of tithes, probably in imitation of the Jewish law: and perhaps, considering the degenerate state of the world in general, it may be more beneficial to the English clergy to found their title on the law of the land than upon any divine right whatsoever, unacknowledged and unsupported by temporal sanctions.

We cannot precisely ascertain the time when tithes were first introduced into this country. Possibly they were contemporary with the planting of Christianity among the Saxons, by Augustin the Monk, about the end of the sixth century. But the first mention of them, which I have met with in any written English law, is in a constitutional decree, made in a synod held A. D. 786,<sup>\*</sup> wherein the payment of tithes in general is strongly enjoined. This canon, or decree, which at first bound not the laity, was effectually confirmed by two kingdoms of the heptarchy, in their parliamentary conventions of estates, respectively consisting of the kings of Mercia [26] and Northumberland, the bishops, dukes, senators, and people. Which was a few years later than the time that Charlemagne established the payment of them in France,<sup>†</sup> and made that famous division of them into four parts; one to maintain the edifice of the church, the second to support the poor, the third the bishop, and the fourth the parochial clergy.<sup>‡</sup>

The next authentic mention of them is in the *fœdus Edwardi et Guthruni*; or the laws agreed upon between King Guthrun the Dane, and Alfred and his son Edward the Elder, successive kings of England, about the year 900. This was a kind of treaty between those monarchs, which may be found at large in the Anglo-Saxon laws:<sup>¶</sup> wherein it was necessary, as Guthrun was a pagan, to provide for the subsistence of the Christian clergy under his dominion; and, accordingly, we find <sup>x</sup> the payment of tithes not only enjoined,

▪ Selden, c. 8. § 2.

† A. D. 778.

‡ Book II. ch. 11. Seld. c. 6. § 7. Sp. of Laws, b. 31. c. 12.

¶ Wilkins, pag. 51.

x Cap. 6.

but a *penalty* added upon nonobservance: which law is seconded by the laws of Athelstan,<sup>7</sup> about the year 930. And this is as much as can certainly be traced out, with regard to their legal original.

§ 29. *b. Tithes, to whom due.*—We are next to consider the persons to whom they are due. And upon their first introduction (as hath formerly been observed<sup>8</sup>) though every man was obliged to pay tithes in general, yet he might give them to what priests he pleased;<sup>a</sup> which were called *arbitrary* consecrations of tithes: or he might pay them into the hands of the bishop, who distributed among his diocesan clergy the revenues of the church, which were then in common.<sup>b</sup> But, when dioceses were divided into parishes, the tithes of each parish were allotted to its own particular minister; first by common consent, or the appointments of lords of manors, and afterwards by the written law of the land.<sup>c</sup>

[27] However, arbitrary consecrations of tithes took place again afterwards, and became in general use till the time of King John.<sup>d</sup> Which was probably owing to the intrigues of the regular clergy, or monks of the Benedictine and other rules, under Archbishop Dunstan and his successors; who endeavored to wean the people from paying their dues to the secular or parochial clergy (a much more valuable set of men than themselves), and were then in hopes to have drawn, by sanctimonious pretenses to extraordinary purity of life, all ecclesiastical profits to the coffers of their own societies. And this will naturally enough account for the number and riches of the monasteries and religious houses, which were founded in those days, and which were frequently endowed with tithes. For a layman, who was obliged to pay his tithes somewhere, might think it good policy to erect an abbey, and there pay them to his own monks; or grant them to some abbey already erected; since, for this dotation, which really cost the patron little or nothing, he might, according to the superstition of the times, have masses forever sung for his soul. But, in process of years, the income of the poor laborious parish priests being scandalously reduced by these arbitrary consecrations of tithes, it was remedied by Pope Innocent

<sup>7</sup> Cap. 1.

<sup>8</sup> Book I. Introd. § 4.

<sup>a</sup> 2 Inst. 646. Hob. 296.

<sup>b</sup> Seld. c. 9. § 4.

<sup>c</sup> LL. Edgar. c. 1. & 2. Canut. c. 11.

<sup>d</sup> Selden, c. 11.

the Third\* about the year 1200 in a decretal epistle, sent to the Archbishop of Canterbury, and dated from the palace of Lateran: which has occasioned Sir Henry Hobart and others to mistake it for a decree of the council of Lateran held A. D. 1179, which only prohibited what was called the infeudation of tithes, or their being granted to mere laymen,† whereas this letter of Pope Innocent to the archbishop enjoined the payment of tithes to the parsons of the respective parishes where every man inhabited, agreeable to what was afterwards directed by the same pope in other countries.‡ This epistle, says Sir Edward Coke,§ bound not the lay subjects of this realm: but, being reasonable and just (and, he might have [28] added, being correspondent to the ancient law) it was allowed of, and so became *lex terræ* (the law of the land). This put an effectual stop to all the arbitrary consecrations of tithes; except some footsteps which still continue in those portions of tithes, which the parson of one parish hath, though rarely, a right to claim in another: for it is now universally held,¹ that tithes are due, of common right, to the parson of the parish, unless there be a special exemption. This parson of the parish, we have formerly seen,² may be either the actual incumbent, or else the appropriator of the benefice: appropriations being a method of endowing monasteries, which seems to have been devised by the regular clergy, by way of substitution to arbitrary consecrations of tithes.¹

§ 30. c. Exemption from tithes.—We observed that tithes are due to the parson of common right, unless by special exemption: let us therefore see, thirdly, who may be exempted from the payment of tithes, and how lands, and their occupiers, may be exempted or discharged from the payment of tithes, either in part or totally, first, by a real composition; or, secondly, by custom or prescription.

\* Opera Innocent. III. tom. 2. pag. 452.

† Decretal. l. 3. t. 30. c. 19.

‡ *Ibid.* c. 26.

§ 2 Inst. 641.

¹ Regist. 46. Hob. 296.

² Book I. pag. 385.

¹ In extraparochial places the king, by his royal prerogative, has a right to all the tithes. See Book I. p. 113. 284.

§ 31. (1) **By a real composition.**—First, a real composition is when an agreement is made between the owner of the lands, and the parson or vicar, with the consent of the ordinary and the patron, that such lands shall for the future be discharged from payment of tithes, by reason of some land or other real recompense given to the parson, *in lieu* and satisfaction thereof.<sup>m</sup> This was permitted by law, because it was supposed that the clergy would be no losers by such composition; since the consent of the ordinary, whose duty it is to take care of the church in general, and of the patron, whose interest it is to protect that particular church, were both made necessary to render the composition effectual: and hence have arisen all such compositions as exist at this day by force of the common law. But, experience showing that even this caution was ineffectual, and [29] the possessions of the church being, by this and other means, every day diminished, the disabling statute 13 Eliz., c. 10 (Dilapidations, 1571), was made: which prevents, among other spiritual persons, all parsons and vicars from making any conveyances of the estates of their churches, other than for three lives or twenty-one years. So that now, by virtue of this statute, no real composition made since the 13 Eliz. (1571) is good for any longer term than three lives or twenty-one years, though made by consent of the patron and ordinary: which has indeed effectually demolished this kind of traffic; such compositions being now rarely heard of, unless by authority of parliament.

§ 32. (2) **By discharge by custom or prescription.**—Secondly, a discharge by custom or prescription, is where time out of mind such persons or such lands have been, either partially or totally, discharged from the payment of tithes. And this immemorial usage is binding upon all parties; as it is in its nature an evidence of universal consent and acquiescence, and with reason supposes a real composition to have been formerly made. This custom or prescription is either *de modo decimandi* (of a particular manner of tithing), or *de non decimando* (of an exemption from tithes).

§ 33. (a) **De modo decimandi.**—A *modus decimandi*, commonly called by the simple name of a *modus* only, is where there

<sup>m</sup> 2 Inst. 490. Regist. 38. 13 Rep. 40.



is by custom a particular manner of tithing allowed, different from the general law of taking tithes in kind, which are the actual tenth part of the annual increase. This is sometimes a pecuniary compensation, as twopence an acre for the tithe of land: sometimes it is a compensation in work and labor, as that the parson shall have only the twelfth cock of hay, and not the tenth, in consideration of the owner's making it for him: sometimes, in lieu of a large quantity of crude or imperfect tithe, the parson shall have a less quantity, when arrived to greater maturity, as a couple of fowls in lieu of tithe eggs; and the like. Any means, in short, whereby the general law of tithing is altered, and a new method of taking them is introduced, is called a *modus decimandi*, or special manner of tithing.

[30] To make a good and sufficient *modus*, the following rules must be observed. 1. It must be *certain* and *invariable*,<sup>n</sup> for payment of different sums will prove it to be no *modus*, that is, no original real composition; because that must have been one and the same, from its first original to the present time. 2. The thing given, in lieu of tithes, must be beneficial to the *parson*, and not for the emolument of *third persons* only:<sup>o</sup> thus a *modus*, to repair the *church* in lieu of tithes, is not good, because that is an advantage to the parish only; but to repair the *chancel* is a good *modus*, for that is an advantage to the parson. 3. It must be something *different* from the thing compounded for:<sup>p</sup> one load of hay, in lieu of *all* tithe hay, is no good *modus*: for no parson would *bona fide* (in good faith) make a composition to receive less than his due in the same species of tithe; and therefore the law will not suppose it possible for such composition to have existed. 4. One cannot be discharged from payment of one species of tithe, by paying a *modus* for another.<sup>q</sup> Thus a *modus* of 1*l.* for every *milch* cow will discharge the tithe of *milch* kine, but not of *barren* cattle: for tithe is, of common right, due for both; and therefore a *modus* for one shall never be a discharge for the other. 5. The recompense must be in its nature as durable as the tithes discharged by it; that is, an inheritance certain:<sup>r</sup> and therefore *modus* that every *inhabi-*

<sup>n</sup> 1 Keb. 602.

<sup>o</sup> 1 Roll. Abr. 649.

<sup>p</sup> 1 Lev. 179.

<sup>q</sup> Cro. Eliz. 446. Salk. 657.

<sup>r</sup> 2 P. Wms. 462.

*tant* of a house shall pay 4*d.* a year, in lieu of the owner's tithes, is no good *modus*; for possibly the house may not be inhabited, and then the recompense will be lost. 6. The *modus* must not be too large, which in law is called a *rank modus*: as if the real value of the tithes be 60*l. per annum*, and a *modus* is suggested of 40*l.* this *modus* will not be good; though one of 40*s.* might have been valid.\* For, in these cases of prescriptive or customary *modus*'s, the law supposes an original real composition to have been regularly made; which being lost by length of time, the immemorial usage is admitted as evidence to show that it once did exist, and that from thence [31] such usage was derived. Now, time of memory hath been long ago ascertained by the law to commence from the reign of Richard the First;† and any custom may be destroyed by evidence of its nonexistence in any part of the long period from his days to the present; wherefore, as this real composition is supposed to have been an equitable contract, or the full value of the tithes, at the time of making it, if the *modus* set up is so rank and large, as that it beyond dispute exceeds the value of the tithes in the time of Richard the First, this *modus* is *felo de se* and destroys itself. For, as it would be destroyed by any direct evidence to prove its nonexistence at any time since that era, so also it is destroyed by carrying in itself this internal evidence of a much later original.

§ 34. (b) *De non decimando*.—A prescription *de non decimando* is a claim to be entirely discharged of tithes, and to pay no compensation in lieu of them. Thus the king by his preroga-

\* Ninth edition inserts here, "Indeed, properly speaking, the doctrine of *rankness* in a *modus* is a mere rule of evidence, drawn from the improbability of the fact, and not a rule of law." [Pyke v. Dowling, Hil. 19 Geo. III. C. B.]

‡ 11 Mod. 60.

† This rule was adopted, when by the statute of Westm. 1. (3 Edw. I, c. 39—Limitation, 1275), the reign of Richard I. was made the time of limitation in a writ of right. But, since by the statute 32 Hen. VIII. c. 2 (Prescription, 1540), this period (in a writ of right) hath been very rationally reduced to sixty years, it seems unaccountable, that the date of legal prescription or memory, should still continue to be reckoned from an era so very antiquated. See 2 Roll. Abr. 269. pl. 16.

tive is discharged from all tithes.<sup>u</sup> So a vicar shall pay no tithes to the rector, nor the rector to the vicar, for *ecclesia decimas non solvit ecclesiæ* (the church does not pay tithes to the church).<sup>v</sup> But these *personal* privileges (not arising from or being annexed to the land) are personally confined to both the king and the clergy; for their tenant or lessee shall pay tithes, though in their own occupation their lands are not generally tithable.<sup>w</sup> And, generally speaking, it is an established rule, that, in *lay* hands, *modus de non decimando non valet* (an exemption from tithing is of no force).<sup>x</sup> But spiritual persons or corporations, as monasteries, abbots, bishops, and the like, were always capable of having their lands totally discharged of tithes, by various ways,<sup>y</sup> as, 1. By real composition: 2. By the pope's bull of exemption: 3. By unity of possession; as when the rectory of a parish, and lands in the same parish, both belonged to a religious [32] house, those lands were discharged of tithes by this unity of possession: 4. By prescription; having never been liable to tithes, by being always in spiritual hands: 5. By virtue of their order; as the knights templars, cistercians, and others, whose lands were privileged by the pope with a discharge of tithes.<sup>z</sup> Though upon the dissolution of abbeys by Henry VIII most of these exemptions from tithes would have fallen with them, and the lands become tithable again; had they not been supported and upheld by the statute 31 Hen. VIII, c. 13 (Religious Houses, 1539), which enacts, that all persons who should come to the possession of the lands of any abbey then dissolved, should hold them free and discharged of tithes, in as large and ample a manner as the abbeys themselves formerly held them. And from this original have sprung all the lands, which, being in lay hands, do at present claim to be tithe-free: for, if a man can show his lands to have been such abbey lands, and also immemorially discharged of tithes by any of the means before mentioned, this is now a good prescription *de non decimando*. But he must show both these requisites: for abbey lands, without a special ground of discharge,

<sup>u</sup> Cro. Eliz. 511.

<sup>v</sup> Cro. Eliz. 479, 511. Sav. 3. Moor. 910.

<sup>w</sup> *Ibid.* 479.

<sup>x</sup> *Ibid.* 511.

<sup>y</sup> Hob. 309. Cro. Jac. 308.

<sup>z</sup> 2 Rep. 44. Seld. Tith. c. 13. § 2.

are not discharged of course; neither will any prescription *de non decimando* avail in total discharge of tithes, unless it relates to such abbey lands.

§ 35. **3. Commons.**—Common, or right of common, appears from its very definition to be an incorporeal hereditament: being a profit which a man hath in the land of another; as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like.<sup>a 7</sup> And hence common is chiefly of four sorts; common of pasture, of piscary, of turbary, and of estovers.<sup>8</sup>

§ 36. **a. Common of pasture.**—Common of pasture is a right of feeding one's beasts on another's land; for in those waste grounds, which are usually called commons, the property of the soil is generally in the lord of the manor; as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant, because of vicinage, or in gross.<sup>b</sup>

§ 37. **(1) Common appendant.**—<sup>[33]</sup> Common *appendant* is a right, belonging to the owners or occupiers of arable land, to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are either beasts of the plow, or such as manure the ground. This is a matter of most universal right: and it was originally permitted,<sup>c</sup> not only for the encouragement of agriculture, but for the necessity of the thing. For, when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plow or manure the land without beasts; these beasts could not be sustained without pasture; and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed

<sup>a</sup> Finch, Law. 157.

<sup>c</sup> 2 Inst. 86.

<sup>b</sup> Co. Litt. 122.

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<sup>7</sup> A right of common can only be exercised in respect of the natural produce of the soil; a right to take crops produced by human labor, or manufactured articles, cannot be claimed as a right of common. *Smart v. Jones*, 15 Com. B., N. S., 717, 143 Eng. Reprint, 966.

<sup>8</sup> See 1 Poll. & Maitl. Hist. Eng. Law (2d ed.), 620.

this right of common, as inseparably incident, to the grant of the lands; and this was the original of common appendant: which obtains in Sweden, and the other northern kingdoms, much in the same manner as in England.<sup>d</sup>

§ 38. (2) **Common appurtenant.**—Common *appurtenant* ariseth from no connection of tenure, nor from any absolute necessity:<sup>9</sup> but may be annexed to lands in other lordships,<sup>e</sup> or extend to other beasts, besides such as are generally commonable; as hogs, goats, or the like, which neither plow nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, it is therefore not of general right; but can only be claimed by immemorial usage and prescription,<sup>f</sup> which the law

<sup>d</sup> Stiernh. de Jure Sueonum, l. 2. c. 6.    <sup>f</sup> Co. Litt. 121, 122.

<sup>e</sup> Cro. Car. 482. 1 Jon. 397.

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<sup>9</sup> **Use of the word "appurtenant."**—The principle of appurtenancy is not confined to rights of common, but is applicable to incorporeal hereditaments in general. Incorporeal hereditaments appurtenant consist of such as are not naturally and originally appendant to corporeal hereditaments, but have been annexed to them, either by some express deed of grant, or by *prescription* from long enjoyment. Rights of common and rights of way or passage over the property of another person are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed, they will pass by a conveyance of the lands to which they have been annexed, without mention of the appurtenances; although these words, "with the appurtenances," have been usually inserted in conveyances, for the purpose of distinctly showing an intention to comprise such incorporeal hereditaments of this nature as may belong to the lands. But if such rights of common or of way, though usually enjoyed with the lands, should not have been strictly appurtenant to them, a conveyance of the lands merely, with their appurtenances, without mentioning the rights of common or way, would not have been sufficient to comprise them. It was, therefore, usual in conveyances to insert at the end of the "parcels," or description of the property, a number of "general words" in which were comprised, not only all rights of way and common, etc., which might belong to the premises, but also such as might be therewith used or enjoyed. But now, by the Conveyancing Act of 1881, a conveyance of land made after the year 1881 shall be deemed to include and shall by virtue of the act operate to convey, with the land, all commons, ways, and other liberties, privileges, easements, rights, and advantages whatsoever reputed to appertain to, or at the time of conveyance enjoyed with, the land or any part thereof. In consequence of this enactment, general words are now rarely employed.—WILLIAMS, Real Prop. (21st ed.), 426.



esteems sufficient proof of a special grant or agreement for this purpose.

§ 39. (3) **Common because of vicinage.**—Common *because of vicinage*, or neighborhood, is where the inhabitants of two townships, which lie contiguous to each other, have usually intercommoned with one another; the beasts of the one straying mutually into the other's fields, without any molestation from either.<sup>10</sup> This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits: and therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally [34] into the other's common: but if they escape, and stray thither of themselves, the law winks at the trespass.<sup>§</sup>

§ 40. (4) **Common in gross.**—Common *in gross*, or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person; being granted to him and his heirs by deed: or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

§ 41. (5) **Restrictions on commons of pasture.**—All these species, of pasturable common, may be and usually are limited as to number and time; but there are also commons without stint,

§ Co. Litt. 122.

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<sup>10</sup> **Common of vicinage.**—Professor Wooddesson has said truly that common *per cause de vicinage* is not properly a right of common or incorporeal hereditament, but only an excuse for trespass; or in modern terms, it is not an easement, but a mere license. He also points out that it extends to other cases than the example given by Blackstone, as where cattle are lawfully placed in one field or pasture and stray into an adjoining common being open and uninclosed. (Lectures, ii. 50.) So where two neighbors let their lands lie open without a partition fence, but put cattle each into his own land, their relative rights and duties are those of common of vicinage. Much petty litigation might have been saved in some states if this common-law principle had been remembered by lawyers and judges.—HAMMOND.

and which last all the year.<sup>11</sup> By the statute of Merton, however, and other subsequent statutes,<sup>h</sup> the lord of a manor may inclose so much of the waste as he pleases, for tillage or wood ground, provided he leaves common sufficient for such as are entitled thereto. This inclosure, when justifiable, is called in law "improving"; an ancient expression signifying the same as "improving."<sup>12</sup> The lord hath the sole interest in the soil; but the interest of the lord and commoner, in the common, are looked upon in law as mutual. They may both bring actions for damage done,

<sup>h</sup> 20 Hen. III. c. 4 (Manors, 1235). 29 Geo. II. c. 36 (Inclosure, 1755), and 31 Geo. II. c. 41 (Inclosure, 1757).

<sup>i</sup> 2 Inst. 474.

<sup>11</sup> Commons without stint.—Where an incorporeal hereditament is capable of being held in gross, it may be created either by an original grant to that effect, or by separation of an originally appendant or appurtenant right from the dominant tenement to which it was formerly annexed. (*Musgrave v. Gave* (1741), Willes, 319, 125 Eng. Reprint, 1193; *Bunn v. Channen* (1813), 5 Taunt. 244, 128 Eng. Reprint, 683.) At one time there seems to have been very considerable doubt whether such a separation was permissible; at any rate, without the consent of the owner of the servient tenement. (*Drury v. Kent* (1603), Cro. Jac. 15, 79 Eng. Reprint, 13; *Daniel v. Hanslip* (1672), 2 Lev. 67, 83 Eng. Reprint, 452.) But this doubt seems to have been confined to cases in which the right claimed was of an indefinite character, e. g., so-called "common without stint"—a feature extremely rare in incorporeal hereditaments, and quite inconsistent with their character. (*Ormerod v. Todmorden Mill Co.* (1883), 11 Q. B. D., at p. 172, per Bowen, L. J.)—STEPHEN, 1 Comm. (16th ed.), 266.

<sup>12</sup> Meaning of the word "approve."—"Approve" in this sense is not the common word—Lat. *approbare*—neither does it stand for *appropriare*, as has been conjectured with some plausibility. It represents an old French verb, *aproer* or *approuer*, to profit or enrich, from *preu* or *prou*, itself an obscure word, which in modern French survives in "*ni prou ni peu*" (cf. *preux, prouesse*). In Latin of the late thirteenth century (Statute of Westminster and Fleta) it appears in reflective construction as *se appruare*. "*Se appruare de*" . . . is therefore "to make one's profit of" . . . exactly what in the statute of Merton, where the word itself does not occur, is expressed by the phrase "*commodum suum facere*." The corresponding substantive is "approment" or "approvement" in the English of the fifteenth and sixteenth centuries. In the seventeenth century the spelling *approve*, *approvement*, and with it the mistaken derivation from *approbare*, came in. See the words in the new English Dictionary of the Philological Society.—POLLOCK, *Land Laws*, 179 n.

either against strangers, or each other: the lord for the public injury, and each commoner for his private damage.<sup>k 13</sup>

§ 42. **b. Common of piscary.**—Common of piscary is a liberty of fishing in another man's water.

<sup>k</sup> 9 Rep. 113.

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<sup>13</sup> **English inclosure and commons acts.**—The inclosure of common fields and waste lands, and the consequent extinction of common rights therein, were deemed to be objects of so much importance to agricultural improvement, that they were not left in modern times to depend on these ancient statutes; but were introduced very generally, throughout entire manors and parishes in almost every part of the kingdom, by force of local acts of parliament, passed from time to time for the purpose. To avoid the expense and delay attendant on this practice, was passed the Inclosure (Consolidation) Act of 1801; the aim of which was to consolidate a number of the regulations usually inserted in local Inclosure Acts, and to make them applicable, subject only to any special provisions, to every case of local inclosure. So popular did this policy of inclosure become, in the early years of the nineteenth century, when the rapid increase of population enabled huge fortunes to be realized by inclosing wastes for building purposes, that at last it was determined to do away altogether with the necessity of obtaining special powers from the legislature in each case, and to provide a scheme which should be easily applicable to all inclosure projects. This object was achieved by the passing of the Inclosure Act, 1845. \* \* \*

So long as the policy which produced the Inclosure Act of 1845, and its numerous amendments, continued to receive popular approval, the process of inclosure went on rapidly under its provisions. Year after year, sometimes twice in a single session, parliament passed a short act authorizing the carrying out of inclosure schemes recommended by the Inclosure Commissioners; until the disappearance of open spaces, especially in the neighborhood of large towns, began to inspire thoughtful people with a doubt whether the vaunted policy of the Inclosure Acts was really for the benefit of the nation. It was generally believed that, apart from questions of public health, the rights of the poorer commoners had been somewhat neglected in the awards of the commissioners. Popular feeling began to manifest itself. The formation, in the year 1865, of the Commons Preservation Society, marks the turn of the tide. Statutes, passed with the object of hindering the rapid extension of that process which parliament had hitherto been so anxious to promote, began to make their appearance. One of the earliest was the Metropolitan Commons Act of 1866, which expressly forbade the commissioners to entertain any proposal for the inclosure of a common within the Metropolitan Police District, and provided an elaborate machinery for the conversion of such commons into public parks and gardens. And this policy became general ten years later,

§ 43. c. Common of turbary.—As common of turbary is a liberty of digging turf upon another's ground.<sup>1</sup> There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects; though in one point they go much further: common of pasture being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and the rest, are a right of carrying away the very soil itself.<sup>14</sup>

§ 44. d. Common of estovers.—<sup>[35]</sup> Common of estovers or *estouviers*, that is, *necessaries* (from *estoffer*, to furnish), is a liberty of taking necessary wood, for the use or furniture of a house

<sup>1</sup> Co. Litt. 132.

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when the Commons Act, 1876, enacted that any common lands, in lieu of being inclosed, might be appropriated as open land, and regulated for the public use; and expressly provided, that any encroachment on, or inclosure of, a village green or recreation ground, having a known and defined boundary, should be a public nuisance, and summarily punishable before the magistrates. A civil jurisdiction is also thereby given to the county court of the district in the matter of any such nuisance; and that court may accordingly, as the justice of the case requires, grant injunctions or make orders of removal or abatement. The change of policy evidenced by the legislation of 1866 and 1876 has, in recent years, been carried still further by the Law of Commons Amendment Act, 1893, and the Commons Act, 1899; by the latter of which any district council is authorized to prepare a scheme for the regulation and management of any common within its district, and nonparliamentary grants or inclosures of commons, even for the most beneficent objects, are forbidden. So that the elaborate provisions of the Inclosure Act, 1845, though nominally unrepealed, have become almost a dead letter.—STEPHEN, 1 Comm. (16th ed.), 270.

<sup>14</sup> Commons of piscary and turbary.—Common of *piscary* is a liberty of fishing in another man's water, as common of *turbary* is a liberty of digging turf upon another man's ground for the purposes of a messuage to which the right is appendant or appurtenant. These may be claimed either by grant or by prescription; and a right of piscary may be either appurtenant or in gross. Common of turbary cannot be claimed as appurtenant to land, but only to a house; and it authorizes not the taking of turf except for the purpose of using the same as fuel, in the particular house to which the right is annexed. It has been recently decided, that the destruction of the house to which the right is *appendant*, with a view of rebuilding, does not destroy the right of turbary; which will attach to the new house, provided that the burden on the *servient tenement* is not thereby increased.—STEPHEN, 1 Comm. (16th ed.), 267.

or farm, from off another's estate. The Saxon word, *bote*, is used by us as synonymous to the French *estovers*: and therefore house-bote is a sufficient allowance of wood, to repair, or to burn in, the house; which latter is sometimes called fire-bote: plow-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry: and hay-bote or hedge-bote is wood for repairing of hays, hedges, or fences. These botes or estovers must be reasonable ones; and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.<sup>m 15</sup>

These several species of commons do all originally result from the same necessity as common of pasture; viz., for the maintenance and carrying on of husbandry: common of piscary being given for the sustenance of the tenant's family: common of turbary and fire-bote for his fuel; and house-bote, plow-bote, cart-bote, and hedge-bote, for repairing his house, his instruments of tillage, and the necessary fences of his grounds.

§ 45. 4. Ways.—A fourth species of incorporeal hereditaments is that of *ways*; or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town; nor yet of common ways, leading from a village into the fields; but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be grounded on a special permission; as when the owner of the land grants to another a liberty of passing over his grounds, to go to church, to market, or the like: in which case the gift or grant is particular; and confined to the grantee alone; it dies with the person; and, if the grantee leaves the country, he cannot assign

<sup>m</sup> Co. Litt. 41.

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<sup>15</sup> Like common of pasture, it may be claimed either by express grant or prescription; but it is doubtful whether it can exist in gross. This common of estovers is to be carefully distinguished from the house-bote, etc., of a tenant for life (p. \*122, *post*), which arises by operation of law as part of his life estate, and which is exercised, not *in alieno solo*, as every true incorporeal hereditament is, but *in suo solo*, i. e., in the land itself of the tenant for life.—STEPHEN, 1 Comm. (16th ed.), 268.



over his right to any other; nor can he justify taking another [36] person in his company.<sup>n 16</sup> A way may be also by prescription; as if all the owners and occupiers of such a farm have immemorially used to cross another's ground: for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land may clearly be created. A right of way may also arise by act and operation of law: for, if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come at it; and I may cross his land for that purpose without trespass.<sup>o 17</sup> For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same.<sup>p</sup> By the law of the twelve tables at Rome,

<sup>n</sup> Finch. Law. 31.

<sup>p</sup> Co. Litt. 56.

<sup>o</sup> *Ibid.* 63.

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16 No easements "in gross."—It is now the doctrine of the law that there can be no such thing as a true right of way, or any other easement, held "in gross," that is to say, independently of the claimant's interest in some tenement, for the benefit of which the easement is claimed.

17 Ways of necessity.—"These are termed ways of necessity. It is always of strict necessity; and this necessity must not be created by the party claiming the right of way. It never exists where a man can get to his property through his own land. That a road through his neighbor's would be a better road, more convenient, or less expensive, is not to the purpose. That the passage through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way over the land of another can exist. A right of way from necessity only extends to a single way. That a person claiming a way of necessity has already one way is a good plea, and bars the plaintiff. (*McDonald v. Lindall*, 3 Rawle (Pa.), 492.) It is founded on an implied grant, according to the legal maxim, *quando lex aliquid alicui concedit, concedere videtur et id sine quo res ipsa esse non potest*. (*Nichols v. Luce*, 24 Pick. (Mass.) 102, 35 Am. Dec. 302.) But whereabouts shall be the way? The owner of the land over which it exists has a right to locate it in the first instance, with this limitation, that it must be a convenient way. If he fails or refuses to locate, or makes an inconvenient or unreasonable location, the right devolves upon the grantee of the way. (*Russell v. Jackson*, 2 Pick. (Mass.) 574.) The right of way of necessity ceases with the necessity which gave rise to it; so that if a public road is opened, or the grantee purchases other land, which gives him a way over his own land, the first right of way ceases. (*Collins v. Prentice*, 15 Conn. 39, 38 Am. Dec. 61; *Pierce v. Selleck*, 18 Conn. 321; *New York Life Ins. & Trust Co. v. Milnor*, 1 Barb. Ch. (N. Y.) 353.) Sharswood. The grantee is to assign the way where he can best spare it. (*Bolton v. School Board of London*, 40 L. T., N. S., 582.)—HAMMOND.

where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased;<sup>18</sup> which was the established rule in public as well as private ways. And the law of England, in both cases, seems to correspond with the Roman.<sup>a</sup>

§ 46. 5. **Offices.**—Offices, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments: whether public, as those of magistrates; or private, as of bailiffs, receivers, and the like. For a man may have an estate in them, either to him and his heirs, or for life, or for a term of years, or during pleasure only: save only that offices of public trust cannot be granted for a term of years, especially if they concern the administration of justice, for then they might perhaps vest in executors or administrators.<sup>r</sup> Neither can any *judicial* office be granted in reversion; because though the grantee may be able to perform it at the time of the grant, yet before the office falls he may become unable and insufficient: but *ministerial* offices may be so granted;<sup>s</sup> for those may be executed by deputy. Also, by statute 5 and 6 Edw. VI, c. 16 (Sale of Offices, 1552), no public office shall be sold, under pain of disability to dispose of or hold it. For the law presumes that [37] he who buys an office will by bribery, extortion, or other unlawful means, make his purchase good, to the manifest detriment of the public.<sup>19</sup>

<sup>a</sup> Lord Raym. 725. 1 Brownl. 212. 2 Show. 28. 1 Jon. 297.

<sup>r</sup> 9 Rep. 97.

<sup>s</sup> 11 Rep. 4.

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<sup>18</sup> **Way out of repair.**—As to private ways, this is doubtful in English law. It has been denied by Lord Mansfield in *Taylor v. Whitehead*, Doug. 716, and by Serjeant Williams in notes to *Pomfret v. Ricroft*, 1 Saund. 322, while it is supported by the great authority of Comyns' Digest, *Chimin*, D. 6, citing *Henn's Case*, Jones, W. 296, as Blackstone does. The American cases are collected by Washburn (*Easements*, pp. 295, 564), and support his conclusion that he has no right to go out of the prescribed way, unless its founderous condition is the fault of the land owner.—HAMMOND.

<sup>19</sup> **Whether right to an office is property.**—"An examination of the decisions leads to the conviction that, in the early instances of controversy over the right to deprive one of an office, either by legislative abolishment

§ 47. 6. **Dignities.**—Dignities bear a near relation to offices. Of the nature of these we treated at large in the former book: it will therefore be here sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.

§ 48. 7. **Franchises.**—Franchises are a seventh species. Franchise and liberty are used as synonymous terms: and their definition is,<sup>a</sup> a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from

† See book I. ch. 12.

‡ Finch. L. 164.

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of the place or by removal under the written law, it was said in support of a decision sustaining the deprivation, that the thing involved was not property or a vested right of property and so it could be taken away. In support of a determination that the due process of law feature of the constitution applies to the deprivation of office it came to be frequently said that the thing is property because it is of pecuniary value. In support of the contrary theory and that the power to remove an officer for cause is not judicial, it was said that an office, or the right to an office, is not property—though not venturing to say that it is not a thing of value to its possessor. Where an effort was made in the initial stages of the confusion to support the latter view by something in the nature of logic, it was said that the thing is not property because not subject to absolute vestment and to be bought and sold and pass by inheritance. And again, that it is a mere agency, terminable by choice of the agent, or by legislative will, and has no element of gain except contingent upon service previously rendered. The teachings of the old masters of the law, Coke and Blackstone, that the right to an office and to take the emoluments thereof is property has been carelessly, it seems, brushed aside by the mere statement that conditions under which they wrote were different than those existing under our system; that the distinction renders that which was formerly properly denominated property not so now the feature generally referred to being that an office then was a hereditament, while it has no such element now. That demonstrated the very extreme of argument based on false logic, sometimes indulged in as an easy method of constructing a basis for an ultimate conclusion to be pronounced. It often happens, where the superstructure is suspended upon mere assertion at first and then there is effort to create a support, in reason that the reason is more the product of desire than of principle. That is well illustrated when we refer to the text of Blackstone and see that the right to an office and to take its emoluments—not the office contemplated as a place—was denominated property and not, necessarily, with reference to any of its features which some judicial writers have said rendered it then of

the crown, they must arise from the king's grant; or, in some cases, may be held by prescription, which, as has been frequently said, presupposes a grant. The kinds of them are various, and almost infinite: I will here briefly touch upon some of the principal; premising only, that they may be vested in either natural persons or bodies politic; in one man, or in many; but the same identical fran-

a property nature, but not now. Blackstone divided property into tangible, and such intangible things, or incorporeal things 'as can neither be seen or handled,' creatures of the mind, and existing only in contemplation. All were classed under the broad term 'property' and not, necessarily, because they were subjects of traffic. 2 Cooley's Blackstone, 37. In the details as to the intangible class of property we find an almost boundless field. It extends to substantially everything of any value, pecuniary or otherwise, to the individual—including the 'right to exercise an office and to take the fees and emoluments thereunto belonging.' It was said that was classable as within the intangible sphere because one might have an estate, that is, a right therein, among other things 'for a term of years or during pleasure only,' 'though no public office, in general, is a subject of sale.' 2 Bl. Comm. 37. Thus the word 'estate' was used in the broad sense of a rightful possession at pleasure, for life, or for years upon conditions subsequent or without condition, and property was regarded as including everything with it in the broad sense of the term, whether tangible, or intangible and only existing in contemplation of the senses—if valuable to the person in any sense. Who can doubt but that this conception was in the minds of the framers of the constitution while they were not in the peril of seeking information from an unreconcilable undigested mass of judicial sayings—just had the teachings of the old philosophers of the law for their guidance.

"Thus the efforts to give support to the idea that the right to an office is not property seems futile. They originated in such an early case as *Conner v. City of New York*, 1 Seld. (5 N. Y.) 285, to sustain the right of the legislature to deal with an office regardless of the will of the officer. It was followed in *Donahue v. County of Will*, 100 Ill. 94, to sustain the position that the right to an office is not under the protection of due process of law. That case is cited by most text-writers, while conceding by the reasoning that a distinction must be made between an officer and the right to an office, and that many courts hold that the latter is essentially property. *Throop on Public Officers*, § 18. In *Wammack v. Holloway*, 2 Ala. 31, the court said that the right to an office is 'as much a species of property as any other thing capable of being held or owned,' citing Blackstone and Bacon. It is no less property now than in the olden times because it is not a 'hereditament.'"—MARSHALL, J., in *Ekern v. McGovern*, 154 Wis. 157, 46 L. R. A. (N. S.) 796, 142 N. W. 595.

chise that has before been granted to one cannot be bestowed on another, for that would prejudice the former grant.<sup>w 20</sup>

§ 49. a. **Various franchises.**—To be a county palatine is a franchise, vested in a number of persons. It is likewise a franchise for a number of persons to be incorporated, and subside as a body politic: with a power to maintain perpetual succession and do other corporate acts: and each individual member of such corporation is also said to have a franchise or freedom. Other franchises are, to hold a court-leet: to have a manor or lordship; or, at least, to have a lordship paramount: to have waifs, wrecks, estrays, treasure-trove, royal fish, forfeitures, and deodands: to have a court of one's own, or liberty of holding pleas; and trying causes: to have the cognizance of pleas; which is a still greater liberty, being an exclusive right, so that no other court shall try causes arising

<sup>w</sup> 2 Roll. Abr. 191. Keilw. 196.

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<sup>20</sup> **Meaning of franchise.**—"What is a franchise? Under the English law Blackstone defines it as 'a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject.' 2 Bl. Comm. 37. Generalized, and divested of the special form which it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power or public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly, or by public agents, acting under such conditions and regulations as the government may impose in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely." *State of California v. Central Pac. R. R. Co.*, 127 U. S. 1, 40, 32 L. Ed. 150, 8 Sup. Ct. Rep. 1073.

"A 'franchise' has been often defined, so that the meaning of the term is well settled. Blackstone's definition is: 'A royal privilege or branch of the



within that jurisdiction: to have a bailiwick, or liberty exempt from the sheriff of the county; [<sup>38</sup>] wherein the grantee only, and his officers, are to execute all process: to have a fair or market; with the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like; which tolls must have a reasonable cause of commencement (as in consideration of repairs, or the like), else the franchise is illegal and void:<sup>x</sup> or, lastly, to have a forest, chase, park, warren, or fishery, endowed with privileges of royalty; which species of franchise may require a more minute discussion.

§ 50. **b. Franchise of forest.**—As to a *forest*: this, in the hands of a subject, is properly the same thing with a chase; being subject to the common law, and not to the forest laws.<sup>y</sup> But a *chase* differs from a park, in that it is not inclosed, and also in that a man may have a chase in another man's ground as well as in his own; being indeed the liberty of keeping beasts of chase or royal game therein, protected even from the owner of the land with a

<sup>x</sup> 2 Inst. 220.

<sup>y</sup> 4 Inst. 314.

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king's prerogative subsisting in the hands of a subject.' 2 Bl. Comm. 37. In this country it is a special privilege granted by the state, which does not belong to citizens of the country generally by common right. This is the distinguishing feature of a franchise. A right which belongs to the government when conferred upon the citizen is a franchise. No one can exercise the right of eminent domain, or establish a highway or railway and charge tolls for the same, without a grant from the legislature. Such rights as inhere in the sovereign power can only be exercised by the individual or corporation by virtue of a grant from such sovereign power, and when the state grants such a right it is a franchise." *Lasher v. People*, 183 Ill. 226, 75 Am. St. Rep. 103, 47 L. R. A. 802, 55 N. E. 663, 665.

"It will be observed that none of these, except corporations having the right to take tolls at bridges, wharfs, etc., have any application, under our laws. If, then, his enumeration is to be taken, the number of cases is small in which a franchise may be involved. If the Constitutional Convention and the General Assembly used the term according with its strict legal import, and we must presume they did, then in this country it can only embrace corporations, ferries, bridges, wharfs and the like, where tolls are authorized to be taken, and we may add the elective franchise, as it is granted by the constitution to a portion of the people to elect their officers. If others exist they do not occur to us at this time." *People v. Holtz*, 92 Ill. 426, 429.

power of hunting them thereon. A *park* is an inclosed chase, extending only over a man's own grounds. The word *park* indeed properly signifies an inclosure; but yet it is not every field or common, which a gentleman pleases to surround with a wall or paling, and to stock with a herd of deer, that is thereby constituted a legal park: for the king's grant, or at least immemorial prescription, is necessary to make it so.<sup>a</sup> Though now the difference between a real park, and such inclosed grounds, is in many respects not very material: only that it is unlawful at common law for any person to kill any beasts of park or chase,<sup>a</sup> except such as possess these franchises of forest, chase, or park.

§ 51. c. Franchise of freewarren.—*Freewarren* is a similar franchise, erected for preservation or custody (which the word signifies) of beasts and fowls of warren;<sup>b</sup> which, being *feræ naturæ* (of a wild nature), everyone had a natural right to kill as he could: but upon [39] the introduction of the forest laws, at the Norman Conquest, as will be shown hereafter, these animals being looked upon as royal game and the sole property of our savage monarchs, this franchise of freewarren was invented to protect them; by giving the grantee a sole and exclusive power of killing such game so far as his warren extended, on condition of his preventing other persons. A man, therefore, that has the franchise of warren, is in reality no more than a royal gamekeeper: but no man, not even a lord of a manor, could by common law justify sporting on another's soil, or even on his own, unless he had the liberty of freewarren.<sup>c</sup> This franchise is almost fallen into disrepute, since the new statutes for preserving the game; the name being now chiefly preserved in grounds that are set apart for breeding hares and rabbits. There are many instances of keen

<sup>a</sup> Co. Litt. 233. 2 Inst. 199. 11 Rep. 86.

<sup>a</sup> There are properly buck, doe, fox, marten, and roe; but in a common and legal sense extend likewise to all the beasts of the forest: which, besides the other, are reckoned to be hart, hind, hare, boar, and wolf, and in a word, all wild beasts of venary or hunting. (Co. Litt. 233.)

<sup>b</sup> The beasts are hares, conies, and roes: the fowls are either *campestres* (those frequenting fields), as partridges, rails, and quails; or *sylvestres* (those frequenting woods), as woodcocks and pheasants; or *aquatiles* (water-fowls), as mallards and herons. (*Ibid.*)

<sup>c</sup> Salk. 637.

sportsmen in ancient times, who have sold their estates, and reserved the freewarren, or right of killing game, to themselves; by which means it comes to pass that a man and his heirs have sometimes freewarren over another's ground.<sup>d</sup>

§ 52. d. Franchise of free fishery.—A *free fishery*, or exclusive right of fishing in a public river, is also a royal franchise; and is considered as such in all countries where the feudal polity has prevailed:<sup>e</sup><sup>21</sup> though the making such grants, and by that

<sup>d</sup> Bro. Abr. tit. Warren. 3.

<sup>e</sup> Seld. Mar. claus. I. 24. Dufresne. V. 503. Crag. de Jur. Feod II. 8. 15.

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<sup>21</sup> Free fishery.—Free fishery in the common-law sense as a royal franchise is of course unknown in this country; and common of piscary is probably equally so. But the right of free fishing, not only in the sea and its arms, bays, etc., but also in navigable waters of all kinds, is a well-established common right of all men who can reach the waters without committing a trespass, or who are willing to risk the consequences of a trespass upon banks which are the property of other men.

In some few cases, as at Newport, Rhode Island, there still exists a right of way along the shore for the purpose of fishing in the sea. But this is exceptional, and can be traced to peculiar customs. Strictly speaking, no man can claim to take fish as a right, unless the law gives him access to the place necessary for the purpose. When it does so, the presumption is that he may take fish there, unless the owner of the land can show some kind of *privilegium* that excludes him; and of this there probably are extremely few examples in the country. But the legislature may regulate the exercise of this as of all common rights of citizens; and does so the more freely because not hindered by private and prescriptive rights, either in navigable waters of the state, or in those non-navigable streams where the soil itself is private property. (*Commonwealth v. Chapin*, 5 Pick. (Mass.) 199; 16 Am. Dec. 386; *Waters v. Lilley*, 4 Pick. (Mass.) 145, 16 Am. Dec. 333; *Ingram v. Threadgill*, 14 N. C. 59; *Howes v. Grush*, 131 Mass. 207; *Doughty v. Conover*, 42 N. J. L. 193; *Weller v. Snover*, 42 N. J. L. 341; *Woolever v. Stewart*, 36 Ohio St. 146, 38 Am. Rep. 569.)

Still there are important differences between the right in navigable and non-navigable waters. Prescriptive rights may be obtained in the latter as well as rights by grant; while in the former, though prescription is not impossible, it could only be obtained by showing adverse enjoyment, not only against the owner, but against all the world beside. (*Chalker v. Dickinson*, 1 Conn. 382, 6 Am. Dec. 250; *Collins v. Benbury*, 25 N. C. 277, 38 Am. Dec. 722, 27 N. C. 118, 42 Am. Dec. 155; *Delaware & M. R. Co. v. Stump*, 8 Gill & J. (Md.) 479, 29 Am. Dec. 561; *Day v. Day*, 4 Md. 262; *Shrunk v. Schuylkill Nav. Co.*, 14

means appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter; and the rivers that were fenced in his time were directed to be laid open, as well as the forests to be disafforested.<sup>f</sup> This opening was extended, by the second<sup>g</sup> and third<sup>h</sup> charters of Henry III., to those also that were fenced under Richard I; so that a franchise of free fishery ought now to be at least as old as the reign of Henry II. This differs from a *several* fishery; because he that has a several fishery must also be the owner of the soil,<sup>i</sup> which in a free fishery is not requisite. It differs also from a

<sup>f</sup> Cap. 47. edit. Oxon.

<sup>g</sup> Cap. 20.

<sup>h</sup> 9 Hen. III. c. 16 (1225).

<sup>i</sup> M. 17 Edw. IV. 6 (1477). P. 18 Edw. IV. 4 (1478). T. 10 Hen. VII. 24. 26 (1494). Salk. 637.

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Serg. & R. (Pa.) 71. It should be needless to say that this does not apply to shell-fish, such as oysters, etc., that are *ascripticii glebæ* and therefore depend on an entirely different rule. *State v. Sutton*, 2 R. I. 434; *McCarty v. Holman*, 22 Hun (N. Y.), 53; *Robins v. Ackerly*, 24 Hun (N. Y.), 499.)

The decisions upon this difference are hopelessly conflicting in different states, owing to the acceptance or rejection of the supposed common-law doctrine that only waters where the tide ebbs and flows are navigable in the eye of the law. (*Houck on Rivers*; *The Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L. Ed. 1058; *The Hine v. Trevor*, 4 Wall. 555, 18 L. Ed. 451; *New England etc. Ins. Co. v. Dunham*, 11 Wall. 1, 20 L. Ed. 90.) This rests on the authority of Sir Matthew Hale's treatise, *De Jure Maris*, as commonly quoted; although it was shown twenty years ago that even had this been the English rule, it was not a rule of *law* to be followed here, but only an inference of fact, true in England but inapplicable here. It is not easy, however, to overthrow a doctrine once established on the authority of a great name, by drawing logical distinctions; and it is interesting to find that, even in England, the fact is now recognized that Lord Hale's opinion has been wrongly stated, and that he held navigability in law to depend on navigability in fact. I owe the information on which this statement is made to an opinion of counsel as to public rights in navigable rivers, printed by the corporation of Nottingham, England, in a recent case in which they were interested. From this opinion of Mr. P. Edward Dove, their counsel, I quote the following—

It has been decided in several recent cases (*Murphy v. Ryan*, 2 I. R. C. L. 143; *Pearce v. Scotcher*, 9 Q. B. D. 162) that there can be no public right of fishing in nontidal waters. The point has not yet come before any English court of appeal, and I have no hesitation in saying that it is not consistent with our earlier law. Indeed, doubts have been expressed about it by several

*common* of piscary before mentioned, in that the free fishery is an exclusive <sup>[40]</sup> right, the common of piscary is not so: and therefore, in a free fishery, a man has a property in the fish before they are caught; in a common of piscary not till afterwards.\* Some, indeed, have considered a *free* fishery not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor.<sup>1</sup> But the considering such right as originally a flower of the prerogative, till restrained by *magna carta*, and derived by royal grant (previous to the reign of Richard I) to such as now claim it by prescription, may remove some difficulties in respect to this matter, with which our books are embarrassed.\*

\* Ninth edition adds, "For it must be acknowledged, that the rights and distinctions of the three species of fishery are very much confounded in our law books; and that there are not wanting respectable authorities which maintain, that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with *common* of piscary." [See them well digested in Hargrave's notes on Co. Litt. 122.]

\* F. N. B. 88. Salk. 637.

1 2 Sid. 8.

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judges. For example, in *Bristow v. Cormican*, 10 I. R. C. L., at page 433, Whiteside, C. J., says: "Inquisitive lawyers have raised the question, Did Lord Hale propound dogmatically that navigable in law meant tidal, not that it really was so? . . . It may fairly be said that this question should now be thoroughly investigated in principle, and decided according to analogy and reason by the ultimate court of appeal." And at page 411, Dowse, B., says that he is by no means satisfied that the question has been thoroughly investigated.

After an examination of all the material for forming an opinion on the early law of rivers, I have come to the following conclusions: (1) Every river that is in fact navigable for ships or boats is a "public river" and a highway.

Hale (*De Jure Maris*, c. 11), in treating of the right of prerogative in rivers, says: "Another part of the king's jurisdiction in reformation of nuisances is to reform and punish nuisances in all rivers, whether fresh or salt, that are a common passage not only for ships and greater vessels, but also for smaller, as barges or boats; to reform the obstructions or annoyances that are therein to such common passage; for as the common highways on the land are for the common land passage, so these kind of rivers, whether fresh or salt, that bear boats or barges are highways by water; and as the highways by land are called *altæ viæ regię*, so these public rivers for public passage are called *fluvii regales* and *haut streames le Roy*; not in reference to the propriety of the river, but to the public use. . . . There be some streams or rivers that are private, not only in propriety or ownership but also in use, as



§ 53. 8. **Corodies.**—Corodies are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance.<sup>m</sup> In lieu of which (especially when due from ecclesiastical persons), a pension or sum of money is sometimes substituted.<sup>n</sup> And these may be reckoned another species of incorporeal hereditaments; though not chargeable on, or issuing from, any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance. To these may be added,

§ 54. 9. **Annuities.**—Annuities, which are much of the same nature: only that these arise from temporal, as the former from spiritual persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded: a rent-charge

<sup>m</sup> Finch. L. 162.

<sup>n</sup> See Book I. ch. 8.

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little streams and rivers, that are not a common passage for the king's people. Again, there be other rivers, as well fresh as salt, that are of common or public use for carriage of boats and lighters. And these, whether they are fresh or salt, whether they flow and reflow or not, are *prima facie publici juris*, common highways for man or goods, or both, from one inland town to another. Thus the rivers of Wey or Severn, of Thames, and divers others, as well above the bridges and ports as below, as well above the flowings of the sea as below, as well where they are become to be of private propriety, as in what parts they are of the king's propriety, are public rivers *juris publici*. And therefore all nuisances and impediments of passages of boats and vessels, though in the private soil of any person, may be punished by indictments and removed, and this was the reason of the statute of *Magna Carta*, cap. 23."

He goes on to say that even a river made navigable is *juris publici* if it was made navigable "at a common charge or by public authority." That Hale is right in not limiting public rights in rivers to the tidal portions, admits of easy proof. In the first place he is confirmed by c. 23 of *Magna Carta*, which he himself quotes; and that this refers to nontidal rivers is clear, not only from the very wide words of the statute, but more particularly from the last four words. In the next place Hale is confirmed by the very important evidence of the Hundred Rolls. One of the articles of inquiry was, "*de omnibus purpresturis quibuscunque factis super Regem vel regalem dignitatem, per quos factæ fuerunt, qualiter, et a quo tempore*"; and the following extracts under this head show clearly that any obstruction in rivers was treated by the common law as a common nuisance and a purpresture. The importance of this is evident when we remember what a purpresture was. And, as Coke adds in another place (2 Inst., p. 38, ed. 1642), "every publique river or streame is *alta via regia*, the king's highway." It is clear from this that the rivers in the following extracts from the Hundred Rolls are public rivers, and therefore, as Coke

being a burden imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor.<sup>o</sup> Therefore, if a man by deed grant to another the sum of 20*l. per annum*, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity: which is of so little account in the law, that if granted to an eleemosynary corporation, it is not within the statutes of mortmain:<sup>p</sup> and yet a man may have a real estate in it, though his security is merely personal.<sup>22</sup>

§ 55. 10. Rents.—<sup>[41]</sup> Rents are the last species of incorporeal hereditaments. The word, “rent” or “render,” *reditus*, signifies a compensation or return, it being in the nature of an acknowledgment given for the possession of some corporeal inheritance.<sup>a</sup> It is defined to be a certain profit issuing yearly out of

<sup>o</sup> Co. Litt. 144.

<sup>a</sup> Co. Litt. 144.

<sup>p</sup> *Ibid.* 2.

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puts it, “the king’s highways.” It is hardly necessary to point out that these rivers include many which are not tidal in any part.

Cases reported in the Year-Books also bear out the view that navigable rivers are highways, even above the flow of the tide; as, for example: And note, that it was found by the inquest that the water of Lea is the king’s highway, where the question was a nuisance in the Lea between Ware and Waltham. It was, moreover, held that if the river changed its course, the highway changed with it to the new channel. And note, that Thorpe says that if there be a water that is a highway, which water by increase of the water or by force of the same changes its course on to other soil, still is there as before a highway where this water is, as there was before in the old channel; so that the lord of the soil cannot disturb this newly made course. (Adjudged in the Nottingham Eyre.)

In some parts of the country rivers are not only highways, but they are the only highways (just as the Irrawaddy is the only highway in Burmah at the present day); e. g., in 1372 we are told that the Avon between Bath and Bristol was the only highway by which victuals could be brought, there being no land passage, *par obstacle de marreys*. (2 Rot. Parl. 312.)—HAMMOND.

22 Annuities and corodies.—The position of corodies and annuities among the hereditaments is not so difficult to explain as their exclusion from the tenements, and consequently from the Stat. de Donis. They correspond with the *feuda cavenæ et cameræ*, and, therefore, were capable of tenure, at least under the feudal law of the Continent.

Both were, no doubt, included under the *civiles annonas*, which were expressly

lands and tenements corporeal. It must be a *profit*; yet there is no occasion for it to be, as it usually is, a sum of money: for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered by way of rent.<sup>r</sup> It may also consist in services or manual operations; as, to plow so many acres of ground, to attend the king or the lord to the wars, and the like; which services in the eye of the law are profits. This profit must also be *certain*; or that which may be reduced to a certainty by either party. It must also issue *yearly*; though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year:<sup>s</sup> yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. It must *issue out* of the thing granted, and not be part of the land or thing itself; wherein it differs from an exception in the grant, which is always of part of the thing granted.<sup>t</sup> It must, lastly, issue out of *lands and tenements corporeal*; that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrain. Therefore, a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like.<sup>u</sup> But a grant of such annuity or sum may operate as a personal contract, and oblige the grantor to pay the money reserved, or subject him to an action of debt:<sup>v</sup> though it doth not affect the inheritance, and is no legal rent in contemplation of law.

<sup>r</sup> *Ibid.* 142.<sup>u</sup> Co. Litt. 144.<sup>s</sup> *Ibid.* 47.<sup>v</sup> *Ibid.* 47.<sup>t</sup> Plowd. 13. 8 Rep. 71.

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termed *res immobiles* by Justinian, Nov. vii. pr. In the time of Henry II, or soon after, they seem to have been confounded with rents, at least they are called so in the gloss to Vacarius, p. 188. It may fairly be inferred that they were at first regarded as of the same nature with rents proper, and that the distinction between them grew up in English law as the conception of real rights became more closely identified with land. In the civil law *reditus* and *pensiones* and *panes civiles* (rents, corodies, and annuities) had all been reckoned among *res immobiles*. (C. 31, § 2, *de jure dotium*, v. 12, and the gloss to it in Wenck's Vacarius, referring to Du Cange v. *Panis curiates*, where an example is given from the accounts of Henry II.)—HAMMOND.

§ 56. **a. Kinds of rents.**—There are at common law<sup>\*</sup> three manner of rents, rent-service, rent-charge, and rent-seck.

§ 57. (1) **Rent-service.**—*Rent-service* is so called <sup>[42]</sup> because it hath some corporal service incident to it, as at the least fealty, or the feudal oath of fidelity.<sup>†</sup> For, if a tenant holds his land by fealty, and ten shillings rent; or by the service of plowing the lord's land, and five shillings rent; these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrear, at the day appointed, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired.<sup>‡</sup>

§ 58. (2) **Rent-charge.**—A *rent-charge*, is where the owner of the rent hath no future interest, or reversion expectant in the land;<sup>23</sup> as where a man by deed maketh over to others his *whole*

\* Litt. § 213.

‡ Litt. § 215.

† Co. Litt. 142.

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<sup>23</sup> **Rent-charge.**—Judge Sharswood has pointed out in a note here that in states which do not recognize the statute of *quia emptores* as a part of their common law, there may be rent service without a reversion. "The description of a rent-charge is correct as applied to England, where the statute of *quia emptores* forbade subinfeudation; for there is, therefore, no connection of tenure between the grantor and grantee. In Pennsylvania, however, this statute was never in force; and although the connection of tenure is merely nominal—although the whole possibility of reverter upon failure of heirs is now vested in the commonwealth—yet that mere transfer has not altered the character of the estate or the legal incidents thereto annexed. In Pennsylvania, therefore, a *rent service* is not only where there is a reversion in the owner of the rent, as where a man grants an estate for life or years, reserving a rent, but also where he parts with the whole fee simple, reserving a rent. Distress is incident thereto of common right. A *rent-charge* is confined to the cases where the owner of land grants a rent thereout to a stranger, and by a special clause grants him also a right to distrain for the rent if it should be in arrear; without such a clause it would be a *rent-seck*. (*Ingersoll v. Sergeant*, 1 Whart. (Pa.) 337; *Franciscus v. Reigart*, 4 Watts (Pa.), 98; *Kenege v. Elliot*, 9 Watts (Pa.), 258, 262.)"

But in the general disappearance of distress for rent as a common-law right, and the substitution of statutory landlord's liens, it is doubtful whether the

estate in fee simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrear, or behind, it shall be lawful to distrain for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it.<sup>a</sup>

§ 59. (3) *Rent-seck*.—*Rent-seck, redditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

§ 60. (4) Other varieties of rents—(a) *Quit-rents*; (b) *Rack-rent*; (c) *Fee-farm rents*.—There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor,<sup>b</sup> which cannot be departed from or varied. Those of the freeholders are frequently called *chief rents, redditus capitales*; and

<sup>a</sup> Co. Litt. 143.

<sup>b</sup> 2 Inst. 19.

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distinction of the three kinds of rent will be hereafter of any practical consequence.

The student must bear in mind that all rents due on leases for years, or for use and occupation, etc., are not incorporeal hereditaments, and that this distinction has no meaning with reference to them. Only rents payable by the freehold tenant to others are such. When the owner of the land collects rent from the occupant for its use and enjoyment, as in the vast majority of cases known to modern practice, it would be absurd to treat such a rent as an incorporeal hereditament. The owner of the land, which is the corporeal hereditament, can no more have an incorporeal one issuing out of the same land, than he can have an easement over his own land.—HAMMOND.

By virtue of the Landlord and Tenant Act of 1730, the owner of a *rent-charge* may distrain on the land for arrears, even though he has no express power by the deed of charge. In the case of *rent-charges* created since 1881, the Conveyancing Act of 1881 allows the owner of a *rent-charge*, if the rent is in arrear for forty days, to exercise the further right of entering the land and holding the same, or any part thereof, or of demising it or a portion thereof to a trustee for a term of years, upon trust to raise the arrears; until, by one method or the other, the arrears have been discharged. See Stephen, 1 Comm. (16th ed.), 287.

*Rents-seck* have, by virtue of the provisions of recent statutes giving redress in case *rents-charge* are in arrears, practically ceased to exist.



both sorts are indifferently denominated *quit-rents*, *quieti redditus*; because thereby the tenant goes quit and free of all other services. When these payments were reserved in silver or white money, they were anciently called *white-rents*, or *blanch-farms*, *reditus albi*;<sup>e</sup> in contradistinction to rents reserved in work, grain, or baser money, which were called [42] *reditus nigri* or *blackmail*.<sup>d</sup> *Rack-rent* is only a rent of the full value of the tenement or near it.<sup>24</sup> A *fee-farm* rent is a rent-charge issuing out of an estate in fee; of at least one-fourth of the value of the lands, at the time of its reservation: <sup>e</sup> for a grant of lands, reserving so considerable a rent, is indeed only letting lands to farm in fee simple instead of the usual methods for life or years.\*

§ 61. **b. General rules as to rents.**—These are the general divisions of rent; but the difference between them (in respect to the remedy for recovering them) is now totally abolished; and all persons may have the like remedy by distress for rents-seek, rents of assize, and chief-rents, as in case of rents reserved upon lease.<sup>f</sup>

Rent is regularly due and payable upon the land from whence it issues, if no particular place is mentioned in the reservation:<sup>g</sup> but, in case of the king, the payment must be either to his officers at the exchequer or to his receiver in the country.<sup>h</sup> And, strictly, the rent is demandable and payable before the time of sunset of the day whereon it is reserved;<sup>i</sup> though perhaps not absolutely due till midnight.<sup>k</sup>

\* Therefore the creation of a new fee-farm rent is as impossible under the statute *quia emptores* as that of a new fee simple.

<sup>e</sup> In Scotland this kind of small payment is called *blanch-holding*, or *reditus albæ firmæ*.

<sup>d</sup> 2 Inst. 19.

<sup>e</sup> Co. Litt. 143.

<sup>f</sup> Stat. 4 Geo. II. c. 28 (Landlord and Tenant, 1730).

<sup>g</sup> Co. Litt. 201.

<sup>h</sup> 4 Rep. 73.

<sup>i</sup> Co. Litt. 302. 1. Anders. 253.

<sup>k</sup> 1 Saund. 287. Prec. Chanc. 555. Salk. 578.

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<sup>24</sup> **Rack-rent.**—Rack-rent, I need hardly explain, is the highest annual rent that can be obtained by the competition of those who desire to become tenants. It is not a strictly legal term, though sometimes used in acts of parliament; in legal documents it is represented by "the best rent that can be obtained without a fine."—POLLOCK, Land Laws, 155 n.

With regard to the original of rents, something will be said in the next chapter: and, as to distresses and other remedies for their recovery, the doctrine relating thereto, and the several proceedings thereon, these belong properly to the third part of our Commentaries, which will treat of civil injuries, and the means whereby they are redressed.<sup>25</sup>

<sup>25</sup> The subject of rents in English law has been much modified by modern statutes, especially by the Landlord and Tenant Act of 1730 and the Conveyancing Act of 1881.

## CHAPTER THE FOURTH.

### OF THE FEUDAL SYSTEM.

§ 62. **History of the feudal system.**—It is impossible to understand, with any degree of accuracy, either the civil constitution of this kingdom, or the laws which regulate its landed property, without some general acquaintance with the nature and doctrine of feuds, or the feudal law: <sup>1</sup> a system so universally received through-

**1 The feudal system.**—The one great law book of the last century may serve to illustrate two points, though I have some hesitation about mentioning the first of them. Blackstone's work was the first-fruits of a professorship of law; in the presence of that book every professor of law will always feel very small, but there it stands the imperishable monument of what may be done by obliging a lawyer to teach law. But in the second place let us take one of Blackstone's greatest exploits, his statement of our land law and of its history. Everyone nowadays can pick holes in "the feudal system" and some great writers can hardly mention it without loss of temper. But the theory of a feudal system it was that enabled Blackstone to paint his great picture, a picture incomplete and with many faults in it, but the first picture ever painted. Whence did he get the theory which made this possible? From Coke? Coke had no such theory, and because he had none was utterly unable to give any connected account of the law that he knew so well. No, the feudal system was a very early essay in comparative jurisprudence, and the man who had the chief part in introducing the feudal system into England was Henry Spelman. It was the idea of a law common to all the countries of Western Europe that enabled Blackstone to achieve the task of stating English law in a rational fashion. And so it will be found during the length of our national life; an isolated system cannot explain itself, still less explain its history. When great work has been done some fertilizing germ has been wafted from abroad; now it may be the influence of Azo and now of the Lombard feudists, now of Savigny and now of Brunner. Let me not be misunderstood:—there is not much "comparative jurisprudence" for those who do not know thoroughly well the things to be compared, not much "comparative jurisprudence" for Englishmen who will not slave at their law reports; but still there is nothing that sets a man thinking and writing to such good effect about a system of law and its history as an acquaintance however slight with other systems and their history. One of the causes why so little has been done for our mediæval law is I feel sure our very complete and traditionally consecrated ignorance of French and German law. English lawyers have for the last six centuries exaggerated the uniqueness of our legal history by overrating and antedating the triumphs of Roman law upon the continent. I know just enough to say this with confidence, that there are great masses of mediæval law very comparable with our own; a little knowledge of them would

out Europe, upwards of twelve centuries ago, that Sir Henry Spelman<sup>a</sup> does not scruple to call it the law of nations in our western world. This chapter will be therefore dedicated to this inquiry. And though, in the course of our observations in this and many other parts of the present book, we may have occasion to search pretty highly into the antiquities of our English jurisprudence, yet surely no industrious student will imagine his time misemployed, when he is led to consider that the obsolete doctrines of our laws are frequently the foundation, upon which what remains is erected; and that it is impracticable to comprehend many rules of the modern law, in a scholarlike scientific manner, with-

<sup>a</sup> Of Parliaments, 57.

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send us to our Year-Books with new vigor and new intelligence.—MAITLAND, 1 Collected Papers, 488.

See, also, Maitland, *Const. Hist. Eng.*, 142, where Professor Maitland attributes to Spelman, Wright, and Blackstone their respective shares as regards the introduction of feudal ideas into English law, saying: "The new learning was propagated among English lawyers by Sir Martin Wright; it was popularized and made orthodox by Blackstone in his easy, attractive manner." And as to the meaning of feudalism, Maitland says: "What do we mean by feudalism? Some such answer as the following is the best that I can give—A state of society in which the main social bond is the relation between lord and man, a relation implying on the lord's part protection and defense; on the man's part protection, service, and reverence, the service including service in arms. This personal relation is inseparably involved in a proprietary relation, the tenure of land—the man holds land of the lord, the man's service is a burden on the land, the lord has important rights in the land, and (we may say) the full ownership of the land is split up between man and lord. The lord has jurisdiction over his men, holds court for them, to which they owe suit. Jurisdiction is regarded as property, as a private right which the lord has over his land. The national organization is a system of these relationships: at the head there stands the king as lord of all, below him are his immediate vassals, or tenants in chief, who again are lords of tenants, who again may be lords of tenants, and so on, down to the lowest possessor of land. Lastly, as every other court consists of the lord's tenants, so the king's court consists of his tenants in chief, and so far as there is any constitutional control over the king it is exercised by the body of these tenants."

See further a learned article, entitled, "The Effect of Tenure on Real Property Law," by James Edward Hogg, in 25 *Law Quart. Rev.* 178.

"On the continent of Europe the feudal system of landholding seems to have come to maturity in the course of the tenth century. It is thought partly

out having recourse to the ancient. Nor will these researches be altogether void of rational entertainment as well as use: as in viewing the majestic ruins of Rome or Athens, of Balbec or Palmyra, it administers both pleasure and instruction to compare them with the drafts of the same edifices, in their pristine proportion and splendor.

§ 63. 1. Origin of feuds.—<sup>[45]</sup> The constitution of feuds<sup>b</sup> had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all migrating from the same *officina gentium* (the storehouse of nations), as Crag very justly entitles it,<sup>c</sup> poured them-

<sup>b</sup> See Spelman of Feuds, and Wright of Tenures, *per tot.*

<sup>c</sup> De Jure Feod. 19, 20.

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to have originated in the grants of land made by the Frank kings of the three preceding centuries to their kinsmen and followers upon the grantees' undertaking to continue faithful. The estates so granted are known as benefices. Other elements of feudalism are found in the practice of commendation—that is, of men submitting themselves to some powerful neighbor as their lord and thereby gaining protection in return for faithful service—and in the grants made by kings to powerful subjects of liberty of jurisdiction over the inhabitants of particular districts with immunity from the royal jurisdiction. The main features of the feudal system of tenures were (1) the principle that all land is held, either mediately or immediately, of the king; (2) the union of the relation of lord and man with that of landlord and tenant, whereby the personal service due from the vassal to his superior became the condition of his holding land granted to him by his lord; and (3) the jurisdiction of the lord over his tenants. The personal relation of lord and man was known to English law before the Norman Conquest. And it appears that English institutions were in other respects tending towards feudalism at the time of the Conquest. But the introduction into English law of the feudal principle that all land is held of the crown, and of the tenure of land by military service, seems to have been the immediate result of the Conquest and of William's dealings with the land. Although William introduced feudal *tenure* into England, it should be noted that his policy was opposed to the introduction of feudal *government*. At the assembly held at Salisbury in 1086 he caused all his subjects, *whosoever men they were*, to swear fealty to him as their supreme lord. Hence arose an important difference between the English law of feudal tenure and that prevailing on the Continent. The continental tenant owed fealty to his immediate lord only, and might well be summoned to go with his lord to war against the lord's superior, on pain of forfeiture, if he failed to comply. The English tenant did homage to his lord, saving his allegiance



selves in vast quantities into all the regions of Europe, at the declension of the Roman empire. It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions: and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers.<sup>d</sup> These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the northern languages<sup>e</sup> signifies a conditional stipend or reward.<sup>f 2</sup> Rewards

<sup>d</sup> Wright. 7.

<sup>e</sup> Sijelm. Gl. 216.

<sup>f</sup> Pontoppidan in his history of Norway (page 290) observes, that in the northern languages *odh* signifies *proprietas* (property) and *all totum* (the whole). Hence he derives the *odhal* right in those countries; and hence too perhaps is derived the *udal* right in Finland, etc. (See MacDoual. Inst. part. 2.) Now the transposition of these northern syllables, *allodh*, will give us the true etymology of the *allodium*, or absolute property of the feudists as, by a similar combination of the latter syllable with the word *fee* (which signifies, we have seen, a conditional reward or stipend) *feedh* or *feodum* will denote stipendiary property.

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to the king; and did not forfeit his holding if he stood by the king against his lord. See Stubbs, Const. Hist., §§ 93-97; Freeman, Norm. Conq., iv, 694; Hallam, Middle Ages, i, 174, 175, and note; Glanv. ix, 1; Bract. fo. 80 a, 81 b; Litt., ss. 88, 89; P. & M. Hist. Eng. Law, i, 5, 6, 19, 37, 43-50, 236-238, 242, 243, 278-280; Maitland, Domesday Book and Beyond, 67 sq., 151 sq., 318 sq."—WILLIAMS, Real Prop. (21st ed.), 13 n.

<sup>2</sup> Meaning of *feudum*.—In Digby, Real Property (5th ed.), 31 n, it is said: "The word *feudum* is not found earlier than the close of the ninth century. Stubbs, Const. Hist., i, p. 251, note 1. Its etymology has given rise to much controversy. Blackstone (ii, p. 45) thinks that it comes from two words in 'the northern languages, *fee*, signifying conditional stipend or reward, and *odh*, *proprietas*.' Sir F. Palgrave believes it to be simply a colloquial abbreviation of *emphyteusis* (Rise of English Commonwealth, ii, p. cccvii). Diez, however (Etymologisches Wörterbuch der Romanischen Sprachen), *sub voce* FIO, shows that *feudum* is a Latin recoinage of a word sprung from an old Teutonic root—Lombardian *fu*, Old High German *fehu* (*vich*), Gothic *faihu*, signifying cattle, or, generally, property; cattle being probably amongst the earliest subjects of property (see *sub voce* FEOH in Bosworth, Anglo-Saxon Dictionary, and compare *pecus*, *pecunia*). Hence *feudum*, the *d* being added for euphony (compare *feuum* in Domesday). Hence *fief*, *fee*, *feoffment*, etc.; and see Littré, Dictionnaire de la Langue Francaise, *sub voce*

or stipends they evidently were; and the condition annexed to them was, that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty:<sup>g</sup> and in case of the breach of this condition and oath, by not performing the stipulated service, or by deserting the lord in battle, the lands were again to revert to him who granted them.<sup>h</sup>

§ 64. 2. The feudal relation.—Allotments, thus acquired, naturally engaged such as accepted them to defend them: and as they all sprang from [46] the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. But, as that could not effectually be done in a tumultuous irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to and under the command of his immediate benefactor or superior; and so upwards to the prince or general himself. And the several lords were also reciprocally bound, in

g See this oath explained at large in Feud. l. 2. t. 7.

h Feud. l. 2. t. 24.

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FIEF. Sir H. Maine (Early History of Institutions, p. 157, etc.) describes the creation amongst the ancient Irish of a relation analogous to that of lord and vassal by the gift of stock by the chief, and its voluntary or forced acceptance by the tribesman."

In Halsbury, Laws of England (24:139 n), it is said: "The hypothesis is that the land was granted by a chieftain to his follower; in Latin as a *beneficium*, in the Teutonic languages as a fief, or fee—Latinized into *feudum*, *feodum*—or their equivalents. The English terms were feodum and fee (Pollock and Maitland, History of English Law, vol. I, p. 214, n. 2). The grant assumed and perpetuated the relation of lord and vassal; and the interest of the donee came to be hereditary. The leading idea in 'feud,' as used in the expression 'feudal system,' is that of vassalage; in the form 'fee' the hereditary nature of the vassal's interest is most prominent (see Pollock and Maitland, History of English Law, vol. I, pp. 44 et seq.); and as to the theory that the title to all land is derived ultimately from the king, see 2 Bl. Comm. 51. The term 'feu' is in every-day use in Scotland. Feu is there the prevailing tenure of land, and is now of the nature of a perpetual lease."

their respective gradations, to protect the possessions they had given. Thus the feudal connection was established, a proper military subjection was naturally introduced, and an army of feudatories were always ready enlisted, and mutually prepared to muster, not only in defense of each man's own several property, but also in defense of the whole, and of every part of this their newly acquired country: the prudence of which constitution was soon sufficiently visible in the strength and spirit, with which they maintained their conquests.

§ 65. 3. The feudal system on the Continent.—The universality and early use of this feudal plan, among all those nations, which in complaisance to the Romans we still call barbarous, may appear from what is recorded<sup>k</sup> of the Cimbri and Teutons, nations of the same northern original as those whom we have been describing, at their first irruption into Italy about a century before the Christian era. They demanded of the Romans, “*ut martius populus aliquid sibi terræ daret, quasi stipendium: cæterum, ut vellet, manibus atque armis suis uteretur.*” The sense of which may be thus rendered; they desired stipendiary lands (that is, feuds) to be allowed them, to be held by military and other personal services, whenever their lords should call upon them. This was evidently the same constitution, that displayed itself more fully about seven hundred years afterwards: when the Salii, Burgundians, and Franks broke in upon Gaul, the Visigoths on<sup>[47]</sup> Spain, and the Lombards upon Italy; and introduced with themselves this northern plan of polity, serving at once to distribute and to protect the territories they had newly gained. And from hence, too, it is probable that the Emperor Alexander Severus<sup>l</sup> took the hint of

<sup>l</sup> Wright. 8.

<sup>k</sup> L. Florus. l. 3. c. 3.

<sup>l</sup> “*Sola, quæ de hostibus capta sunt, limitaneis ducibus et militibus donavit; ita ut eorum ita essent, si hæredes illorum militarent, nec unquam ad privatos pertinerent: dicens attentius illos militaturos si etiam sua rura defenderent. Addidit sane his et animalia et servos, ut possent colere quod acceperant; ne per inopiam hominum vel per senectutem desererentur rura vicina barbariæ, quod turpissimum ille ducebat.* (The lands which were taken from the enemy on the borders he gave to his generals and soldiers; on condition that their heirs should be soldiers, and never belong to private stations: saying that they would fight more resolutely, if they at the same time defended their own

dividing lands conquered from the enemy among his generals and victorious soldiery, on condition of receiving military service from them and their heirs forever.

§ 66. a. **Feudal tenure supplants allodial ownership.**—Scarce had these northern conquerors established themselves in their new dominions, when the wisdom of their constitutions, as well as their personal valor, alarmed all the princes of Europe; that is, of those countries which had formerly been Roman provinces, but had revolted, or were deserted by their old masters, in the general wreck of the empire. Wherefore most, if not all, of them thought it necessary to enter into the same or a similar plan of policy. For whereas, before, the possessions of their subjects were perfectly *allodial* (that is, wholly independent, and held of no superior at all), now they parceled out their royal territories, or persuaded their subjects to surrender up and retake their own landed property, under the like feudal obligations of military fealty.<sup>m</sup> And thus, in the compass of a very few years, the feudal constitution, or the doctrine of tenure, extended itself over all the western world. Which alteration of landed property, in so very material a point, necessarily drew after it an alteration of laws and customs: so that the feudal laws soon drove out the Roman, which had hitherto universally obtained, but now became for many centuries lost and forgotten; and Italy itself (as some of the civilians, with more spleen than judgment, have expressed it) *belluinas, atque ferinas, immanesque Longobardorum leges accepit* (received the wild, fierce and barbarous laws of the Lombards).<sup>n</sup>

§ 67. 4. **The feudal system in England.**—<sup>[48]</sup> But this feudal polity, which was thus by degrees established over all the Continent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national con-

lands. He also gave animals and slaves with them, that they might cultivate what they had acquired; lest, through want of men, or by reason of old age, the neighboring lands should be utterly neglected, a thing which he considered most disgraceful." (*Æl. Lamprid. in Vita Alex. Severi.*)

<sup>m</sup> Wright, 10.

<sup>n</sup> Gravin. Orig. l. 1. § 139.

stitution, till the reign of William the Norman.<sup>o</sup> Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use: yet not so extensively, nor attended with all the rigor that was afterwards imported by the Normans. For the Saxons were firmly settled in this island, at least as early as the year 600: and it was not till two centuries after that feuds arrived to their full vigor and maturity, even on the Continent of Europe.<sup>p</sup>

§ 68. a. **The Norman Conquest.**—This introduction, however, of the feudal tenures into England, by King William,<sup>3</sup> does not seem to have been effected immediately after the Conquest, nor by the mere arbitrary will and power of the Conqueror; but to have been gradually established by the Norman barons, and others, in such forfeited lands as they received from the gift of the Conqueror, and afterwards universally consented to by the great council of the nation long after his title was established. Indeed, from the prodigious slaughter of the English nobility at the battle of Hastings, and the fruitless insurrections of those who survived, such numerous forfeitures had accrued, that he was able to reward his Norman followers with very large and extensive possessions, which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favorites. A supposition, grounded upon a mistaken sense of the word *conquest*; which in its feudal acceptation, signifies no more than *acquisition*: and this has led many hasty writers into a strange historical mistake, and one which upon the

<sup>o</sup> Spelm. Gloss. 218. Bract. l. 2. c. 16. § 7.

<sup>p</sup> Crag. l. 1. t. 4.

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3 **Origin of the feudal system.**—"If we go back to the eleventh century, we find a body of law in England which William the Conqueror is said to have promulgated, but with which, in truth, he had very little to do, for it was an effect of causes which, among other phenomena, produced William himself. The feudal system sprang from the economic necessities of mediæval Europe." Brooks Adams, in *Centralization and the Law*, p. 25.



slightest examination will be found to be most untrue. However, [49] certain it is, that the Normans now began to gain very large possessions in England; and their regard for the feudal law, under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the Continent, were probably the reasons that prevailed to effect its establishment here by law. And, though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon chronicle,<sup>a</sup> that in the nineteenth year of King William's reign an invasion was apprehended from Denmark; and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenseless: which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defense.

§ 69. b. Domesday Book.—For, as soon as the danger was over, the king held a great council to inquire into the state of the nation;<sup>r</sup> the immediate consequence of which was the compiling of the great survey called Domesday Book, which was finished in the next year: and in the latter end of that very year the king was attended by all his nobility at Sarum; where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person.<sup>s</sup>

<sup>a</sup> A. D. 1085.

<sup>r</sup> *Rex tenuit magnum concilium, et graves sermones habuit cum suis proceribus de hac terra quo modo incoleretur, et a quibus hominibus.* (The king held a great council, and had important debates with his nobles concerning this land, how it should be inhabited and by what men.) Chron. Sax. *ibid.*

<sup>s</sup> *Omnes prædia tenentes, quotquot essent notæ melioris per totam Angliam, ejus homines facti sunt, et omnes se illi subdidere, ejusque facti sunt vasalli, ac si fidelitatis juramenta præstiterunt, se contra alios quoscunque illi fidos futuros.* (All holding such estates as were of a better condition throughout

This may possibly have been the era of formally introducing the feudal tenures by law; and perhaps the very law, thus made at the council of Sarum, is that which is still extant,<sup>†</sup> [50] and couched in these remarkable words: "*statuimus, ut omnes liberi homines fadere et sacramento affirmant, quod intra et extra universum regnum Angliæ Wilhelmo regi domino suo fideles esse volunt; terras et honores illius omni fidelitate ubique servare cum eo, et contra inimicos et alienigenas defendere* (We decree that all freemen bind themselves by homage and fealty, that within and without the whole kingdom of England, they will be faithful to King William, their lord, and everywhere preserve his lands and honors with all fidelity, and defend him against all foreign and domestic enemies).'" The terms of this law (as Sir Martin Wright has observed<sup>‡</sup>) are plainly feudal: for, first, it requires the oath of fealty, which made in the sense of the feudists every man that took it a tenant or vassal: and, secondly, the tenants obliged themselves to defend their lord's territories and titles against all enemies foreign and domestic. But what clearly evinces the legal establishment of this system, is another law of the same collection,<sup>¶</sup> which exacts the performance of the military feudal services, as ordained by the general council. "*Omnes comites, et barones, et milites, et serrientes, et universi liberi homines totius regni nostri prædicti, habeant et teneant se semper bene in armis et in equis, ut decet et oportet: et sint semper prompti et bene parati, ad servitium suum integrum nobis explendum et peragendum, cum opus fuerit; secundum quod nobis debent de fadis et tenementis suis de jure facere, et sicut illis statuimus per commune concilium totius regni nostri prædicti* (That all earls, barons, soldiers, servants, and freemen of our whole kingdom aforesaid, keep and hold themselves always well furnished with arms and horses, as is suitable and proper: and be always ready and well prepared for fulfilling and performing their entire service to us when need shall be; according to what they are by law bound to do for us by reason of their fees

all England became his men, subjected themselves to him, were made his vassals, and took the oath of fealty, that they would be faithful to him against all, whomsoever they might be.) Chron. Sax. A. D. 1086.

† Cap. 52. Wilk. 228.

‡ Tenures. 66.

¶ Cap. 58. Wilk. 288.

and tenements, and as we have ordained by the common council of our whole kingdom aforesaid).”

The new polity, therefore, seems not to have been *imposed* by the conqueror, but nationally and freely *adopted* by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. And, in particular, they had the recent example of the French nation before their eyes; which had gradually surrendered up all its allodial or free lands into the king's hands, who restored them to the owners as a *beneficium* or feud, to be held to them and such of their heirs as they previously nominated to the king: and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vassals of the crown.\* The only difference between this change of tenures in France and that in England was, that the former was effected gradually, [51] by the consent of private persons; the latter was done at once, all over England, by the common consent of the nation.†

§ 70. c. Feudal tenures in England.—In consequence of this change, it became a fundamental maxim and necessary principle (though in reality a mere fiction) of our English tenures, “that the king is the universal lord and original proprietor of all the lands in his kingdom;‡ and that no man doth or can possess any part of it, but what has mediately or immediately been derived as a gift from him, to be held upon feudal services.” For, this being the real case in pure, original, proper feuds, other nations who adopted this system were obliged to act upon the same supposition, as a substruction and foundation of their new polity, though the fact was indeed far otherwise. And indeed by thus consenting to the introduction of feudal tenures, our English ancestors probably meant no more than to put the kingdom in a state of defense by establishing a military system; and to oblige themselves (in respect of their lands) to maintain the king's title and

\* Montesq. Sp. L. b. 31. c. 8.

† Pharaoh thus acquired the dominion of all the lands in Egypt, and granted them out to the Egyptians, reserving an annual render of the fifth part of their value. (Gen. xlvii.)

‡ *Tout fuit in luy, et vient de luy al commencement.* (All was his, and all proceeded originally from him. (M. 24 Edw. III. 65 (1349).)

territories, with equal vigor and fealty, *as if* they had received their lands from his bounty upon these express conditions, as pure, proper beneficiary feudatories. But whatever their meaning was, the Norman interpreters, skilled in all the niceties of the feudal constitutions, and well understanding the import and extent of the feudal terms, gave a very different construction to this proceeding: and thereupon took a handle to introduce not only the rigorous doctrines which prevailed in the duchy of Normandy, but also such fruits and dependencies, such hardships and services, as were never known to other nations;<sup>a</sup> as if the English had, in fact as well as theory, owed everything they had to the bounty of their sovereign lord.

§ 71. d. Modifications in the feudal system.—Our ancestors, therefore, who were by no means beneficiaries, but had barely consented to this fiction of tenure from <sup>[52]</sup> the crown, as the basis of a military discipline, with reason looked upon these deductions as grievous impositions, and arbitrary conclusions from principles that, as to them, had no foundation in truth.<sup>b</sup> However, this king, and his son, William Rufus, kept up with a high hand all the rigors of the feudal doctrines: but their successor, Henry I, found it expedient, when he set up his pretensions to the crown, to promise a restitution of the laws of King Edward the Confessor, or ancient Saxon system; and accordingly, in the first year of his reign, granted a charter,<sup>c</sup> whereby he gave up the greater grievances, but still reserved the fiction of feudal tenure, for the same military purposes which engaged his father to introduce it. But this charter was gradually broken through, and the former grievances were revived and aggravated, by himself and succeeding princes; till in the reign of King John they became so intolerable, that they occasioned his barons, or principal feudatories, to rise up in arms against him: which at length produced the famous great charter (*Magna Carta*) at Runnymede, which, with some alterations, was confirmed by his son, Henry III. And, though its immunities (especially as altered on its last edition by his son<sup>d</sup>) are very greatly short of those granted by Henry I, it was justly

<sup>a</sup> Spelm. of Feuds. c. 28.

<sup>b</sup> Wright, 81.

<sup>c</sup> LL. Hen. I. c. 1.

<sup>d</sup> 9 Hen. III (1225).

esteemed at the time a vast acquisition to English liberty. Indeed, by the further alteration of tenures that has since happened, many of these immunities may now appear, to a common observer, of much less consequence than they really were when granted; but this, properly considered, will show, not that the acquisitions under John were small, but that those under Charles were greater. And from hence also arises another inference; that the liberties of Englishmen are not (as some arbitrary writers would represent them) mere infringements of the king's prerogative, extorted from our princes by taking advantage of their weakness; but a restoration of that ancient constitution, of which our ancestors had been defrauded by the art and finesse of the Norman lawyers, rather than deprived by the force of the Norman arms.

§ 72. **Theory of the feudal system.**—[53] Having given this short history of their rise and progress, we will next consider the nature, doctrine, and principal laws of feuds; wherein we shall evidently trace the groundwork of many parts of our public polity, and also the original of such of our own tenures, as were either abolished in the last century, or still remain in force.

§ 73. **1. Lord and vassal.**—The grand and fundamental maxim of all feudal tenure is this; that all the lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown. The grantor was called the proprietor, or *lord*; being he who retained the dominion or ultimate property of the feud or fee: and the grantee, who had only the use and possession, according to the terms of the grant, was styled the feudatory or *vassal*, which was only another name for the tenant or holder of the lands; though, on account of the prejudices we have justly conceived against the doctrines that were afterwards grafted on this system, we now use the word *vassal* opprobriously, as synonymous to slave or bondman. The manner of the grant was by words of gratuitous and pure donation, *dedi et concessi* (I have given and granted); which are still the operative words in our modern infeudations or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the era of the new acquisition, at



a time when the art of writing was very little known: and therefore the evidence of property was reposed in the memory of the neighborhood; who in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs, adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

§ 74. 2. Oath of fealty; homage.—Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord;<sup>4</sup> openly and humbly kneeling, being ungirt,

<sup>4</sup> Fealty and homage—Livery of seisin.—It would be well if our modern books told us more of the real meaning of *fealty* and *homage*, and the distinction between them, even if it were necessary to omit the description so often repeated from Blackstone of the form in which homage was rendered. This to be sure is interesting, and lends picturesque color to what would otherwise be a dry statement of obsolete law. But it throws no light on the connection between these acts and the rights which they symbolized.

They mark distinct stages in the advance of the feudal system; fealty is the representative of the original tie between lord and man as a personal relation; homage is the recognition of the tenure of land by the dependent, the pledge of service to the *landlord*. It retains its distinctive character more completely in England than on the Continent, probably because it takes the place and fulfills the office of the *investiture*, otherwise unknown to the free tenures of the island.

The two terms distinguished in English law as a matter of form, and entirely confounded by the later writers of the Continent, preserve the memory of the two great stages of the feudal law. Fealty is the relation of inferior to superior, of *mann* to *hlaford*, in the Anglo-Saxon books, the purely personal relation which beginning with the *comitatus*, and continued in the form of commendation, belonged to socage tenure as well as to knight service, and even survived to take the form of allegiance to the king or commonwealth in our own day. Homage, on the other hand, only made its appearance when the relation became one of land as well as of persons. It was the recognition of service due to the lord, not merely as superior, but as the giver of a benefice or fee. It was rendered for each several holding, while fealty was personal. All other differences were merely consequences of this. We cannot doubt that the development of homage was coincident with the change from personal to territorial law, from sovereignty of the tribe to sovereignty of the territory, and especially with the introduction of feudalism into England. It also marked an important difference between the system there and elsewhere.

The importance given to the *livery* of seisin, the actual transfer of the tenement, the freehold by the *feoffor*, in English law, in contrast to its neglect

uncovered, [54] and holding up his hands both together between those of the lord, who sat before him; and there professing that "he did become his *man*, from that day forth, of life and limb and earthly honor": and then he received a kiss from his lord.\* Which ceremony was denominated *homagium*, or *manhood*, by the feudists, from the stated form of words, *devenio vester homo* (I become your man).†<sup>5</sup>

\* Litt. § 85.

† It was an observation of Dr. Arbuthnot, that tradition was nowhere preserved so pure and incorrupt as among children, whose games and plays are delivered down invariably from one generation to another. (Warburton's notes on Pope. vi. 134. 80.) Perhaps it may be thought puerile to observe (in confirmation of this remark) that in one of our ancient pastimes (the *King I am* or *basilinda* of Julius Pollux, *Onomastic*. l. 9. c. 7.) the ceremonies and language of feudal homage are preserved with great exactness.

on the Continent, has attracted general attention. Of course it has been attributed to Roman influence, like everything else not easily explicable; and it is surprising that Gundermann even has copied this explanation, although elsewhere he has expressly stated the true reason, or rather the fact which forms the complementary effect, that the English law places no weight on investiture, because it *coalesced with homage*. (Englisches Privatrecht, § 10, p. 202.)

Livery by the feoffor became important for the very reason that livery by the lord, i. e., *investiture*, did not. Merging in *homage*, an act subsequent to the *traditio*, and presupposing the latter, investiture could not well be the constitutive fact that gave the new estate, and livery of seisin *must* occupy its place. The contrast in this respect of common freeholds to copyholds, wherein an investiture by the lord or his steward always remained the form, and to the form which Edward II tried to establish for tenants *in capite*, shows us plainly why investiture was deemed incompatible with the rights of freemen.

Fealty, *fidelitas*, had become a duty of the subject generally without reference to the *comitatus*, at least as early as the ninth century. In the Capitulum instructing the Missi how they were to proceed in their investigations, A. D. 828 (Walter, C. J. G. ii. 374), it is expressly provided that they are to begin by selecting the better and more veracious men of each county, and if any of them be found not to have promised fealty already to the emperor, he is to do so. They are then to be instructed in their duties, and that they are to report delinquencies, as they desire to keep whole their faith and promise, knowing that if one be found to have spoken aught but truth he is to be reckoned untrue to his fealty—*infidelis*.—HAMMOND.

<sup>5</sup> While homage was peculiarly an incident of military tenure, it was also occasionally rendered by socage tenants.—POLLOCK & MAITLAND, 1 Hist. Eng. Law (2d ed.), 305.

§ 75. 3. **Feudal service.**—When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service*, which, as such, he was bound to render, in recompense for the land he held. This, in pure, proper and original feuds, was only twofold: to follow, or do *suit* to, the lord in his courts in time of peace; and in his armies or warlike retinue, when necessity called him to the field. The lord was, in early times, the legislator and judge over all his feudatories: and therefore the vassals of the inferior lords were bound by their fealty to attend their domestic courts-baron,<sup>s</sup> (which were instituted in every manor or barony, for doing speedy and effectual justice to all the tenants) in order as well to answer such complaints as might be alleged against themselves, as to form a jury or homage for the trial of their fellow-tenants: and upon this account, in all the feudal institutions both here and on the Continent, they are distinguished by the appellation of the peers of the court; *pares curtis*, or *pares curiæ*. In like manner the barons themselves, or lords of inferior districts, were denominated peers of the king's court, and were bound to attend him upon summons, to hear causes of greater consequence in the king's presence and under the direction of his grand justiciary; till in many countries the power of that officer was broken and distributed into other courts of judicature, the peers of the king's court still reserving to themselves (in [55] almost every feudal government) the right of appeal from those subordinate courts in the last resort. The military branch of service consisted in attending the lord to the wars, if called upon, with such a retinue, and for such a number of days, as were stipulated at the first donation, in proportion to the quantity of the land.

§ 76. 4. **Duration of feuds.**—At the first introduction of feuds, as they were gratuitous, so also they were precarious and held at the *will* of the lord,<sup>b</sup> who was then the sole judge whether his vassal performed his services faithfully. Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year: an annual distribution of lands being made

<sup>s</sup> Feud. l. 2. t. 55.

<sup>b</sup> Feud. l. 1. t. 1.

by their leaders in their general councils or assemblies.<sup>1</sup> This was professedly done, lest their thoughts should be diverted from war to agriculture; lest the strong should encroach upon the possessions of the weak; and lest luxury and avarice should be encouraged by the erection of permanent houses, and too curious an attention to convenience and the elegant superfluities of life. But, when the general migration was pretty well over, and a peaceable possession of the new-acquired settlements had introduced new customs and manners; when the fertility of the soil had encouraged the study of husbandry, and an affection for the spots they had cultivated began naturally to arise in the tillers; a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory.<sup>2</sup> But still feuds were not yet *hereditary*; <sup>3</sup> though frequently granted, by the favor of the lord, to the

<sup>1</sup> Thus Tacitus: (de Mor. Germ. c. 26.) "*agri ab universis per vices occupantur: arva per annos mutant* (they all occupy the lands by turns: the arable lands they change annually)." And Cæsar yet more fully: (de bell. Gall. l. 6. c. 21.) "*Necque quisquam agri modum certum, aut fines proprios habet; sed magistratus et principes, in annos singulos, gentibus et cognationibus hominum qui una coierunt, quantum eis et quo loco visum est, attribuant agri, atque anno post alio transire cogunt.* (Neither has anyone a certain proportion or fixed boundaries to his land; but the magistrates and princes every year assign to the people, and the kindred of those men who have assembled together, as much land, and in whatever place, as seems to them fit, and oblige them the next year to remove from it to another portion.)"

<sup>2</sup> Feud. l. l. t. 1.

<sup>3</sup> **Origin of "estates" in land.**—The grant of a fee conferred an interest which was capable of being inherited, and in time the word "fee" came to denote heritability. Digby, Hist. Real Prop. (5th ed.), 95; 1 Poll. & Maitl., Hist. Eng. Law (2d ed.), 235. When the grant was set forth in a deed, the heritability was expressed by making the grant to the donee and his "heirs." It then became established that the word "heirs" must be used. "Fee has now two senses: (1) it means land holden of a lord, as opposed to land owned allodially—fief; (2) an estate of inheritance, as opposed to an estate for life—*feodum* as opposed to *liberum tenementum*, also used in a secondary sense for an estate for life. *Feodum* or fee usually bears the second of the above senses." The interest of the grantee, considered in respect to its duration, was known as an estate in the land. "Henceforth, therefore, the law speaks of *estates*, and not of property or ownership in land." Digby, Hist. Real Prop. (5th ed.), 60. "Thus are established the first elements of that wonderful calculus of estates which, even in our own day, is perhaps the most distinctive feature of English private law." 2 Poll. & Maitl., Hist. Eng. Law (2d ed.), 11.

children of the former possessor; till in process of time it became unusual, and was therefore thought hard, to reject the heir, if he were capable to perform the services:<sup>1</sup> and therefore infants, women and professed monks, who were incapable of [56] bearing arms, were also incapable of succeeding to a genuine feud. But the heir, when admitted to the feud which his ancestor possessed, used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud: which was called a relief, because it re-established the inheritance, or in the words of the feudal writers, "*incertam et caducam hereditatem relevabat* (it raised up the uncertain and fallen inheritance)." This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

§ 77. a. **Feuds become hereditary.**—For in process of time feuds came by degrees to be universally extended, beyond the life of the first vassal, to his *sons*, or perhaps to such one of them, as the lord should name; and in this case the form of the donation was strictly observed: for if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions; and as they died off, their shares reverted to the lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation.<sup>m</sup> But when such a feud was given to a man and his *heirs*, in general terms, then a more extended rule of succession took place; and when a feudatory died, his male descendants *in infinitum* (forever) were admitted to the succession. When any such descendant, who thus had succeeded, died, his male descendants were also admitted in the first place; and, in defect of them, such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feudal succession, that "none was capable of inheriting a feud, but such as was of the blood of, that is, lineally descended from, the first feudatory."<sup>n</sup> And the descent, being thus confined to males, originally extended to all the males alike; all the sons, without any distinction of primogeniture, succeeding to equal por-

<sup>1</sup> Wright, 14.

<sup>n</sup> *Ibid.* 183.

<sup>m</sup> Wright, 17.



tions of the father's feud. But this being found upon many accounts inconvenient (particularly, by dividing the services, and thereby weakening the strength of the feudal union), and *honorary* feuds (or titles of nobility) being now introduced, which were not of [57] a divisible nature, but could only be inherited by the eldest son;<sup>o</sup> in imitation of these *military* feuds (or those we are now describing) began also in most countries to descend according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest.<sup>p</sup>

§ 78. 5. Feuds inalienable.—Other qualities of feuds were, that the feudatory could not alien or dispose of his feud; neither could he exchange, nor yet mortgage, nor even devise it by will, without the consent of the lord.<sup>q</sup> <sup>7</sup> For, the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself, or from his posterity who were presumed to inherit his valor, to others who might prove less able. And, as the feudal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection, in return for his own fealty and service; therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord;<sup>r</sup> it being equally unreasonable, that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

§ 79. 6. Subinfeudation.—These were the principal, and very simple, qualities of the genuine or original feuds: which were all of a military nature, and in the hands of military persons: though the feudatories, being under frequent incapacities of cultivating

<sup>o</sup> Feud. 2. t. 55.

<sup>q</sup> *Ibid.* 29.

<sup>p</sup> Wright, 32.

<sup>r</sup> *Ibid.* 30.

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<sup>7</sup> Freedom of alienation.—“Every limitation on alienation based on the principles of the early customary law has disappeared by the time of Bracton.” Digby, *Hist. Real Prop.* (5th ed.), 157. The subject of the tenant's power of alienating his tenement is fully discussed in 1 Poll. & Maitl., *Hist. Eng. Law* (2d ed.), 329 ff. This note bears equally upon \*287, *post*.

and manuring their own lands, soon found it necessary to commit part of them to inferior tenants; obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction: which returns, or *reditus*, were the original of rents. And by these means the feudal polity was greatly extended; these inferior feudatories (who held what are called in the Scots law “*rere-fiefs*”) being under similar obligations of fealty, to do suit of court, to answer the stipulated <sup>[58]</sup> renders or rent-service, and to promote the welfare of their immediate superiors or lords.\*

§ 80. 7. Proper and improper feuds.—But this at the same time demolished the ancient simplicity of feuds; and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession; which were held no longer sacred, when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*, proper and improper feuds; under the former of which divisions were comprehended such, and such only, of which we have before spoken; and under that of improper or derivative feuds were comprised all such as do not fall within the other description: such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But, where a difference was not expressed in the creation, such new-created feuds did in all other respects follow the nature of an original, genuine, and proper feud.†

§ 81. 8. Corruption of the feudal system.—But as soon as the feudal system came to be considered in the light of a civil establishment, rather than as a military plan, the ingenuity of the same ages, which perplexed all theology with the subtlety of scholastic disquisitions, and bewildered philosophy in the mazes of meta-

\* Wright, 20.

† Feud, 2. t. 7.

physical jargon, began also to exert its influence on this copious and fruitful subject: in pursuance of which, the most refined and oppressive consequences were drawn from what originally was a plan of simplicity and liberty, equally beneficial to both lord and tenant, and prudently calculated for their mutual protection and defense. From this one foundation, in different countries of Europe, very different superstructures have been raised: what effect it has produced on the landed property of England will appear in the following chapters.

## OF THE ANCIENT ENGLISH TENURES.

§ 82. **English tenures, feudal.**—In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements and hereditaments might have been holden; as the same stood in force, till the middle of the last century. In which we shall easily perceive that all the particularities, all the seeming and real hardships, that attended those tenures, were to be accounted for upon feudal principles and no other; being fruits of, and deduced from, the feudal policy.

§ 83. 1. **Nature of feudal tenure.**—Almost all the real property of this kingdom is by the policy of our laws supposed to be granted by, dependent upon and *holden* of some superior lord, by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a *tenement*, the possessors thereof *tenants*, and the manner of their possession a *tenure*.<sup>1</sup> Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king; who is styled the lord *paramount*, or above all. Such

1 **Tenure.**—Tenure in its first technical sense meant feudal tenure; the vassal “held” of his lord: he did not own the land. “Allodial tenure” was never heard of, until in modern times the term was introduced, to denote the “alod” or “odal right” of the pre-feudal time. At first there is but one kind, freehold. The unfreeman did not “hold” the land: he and his land were *held* together. Gradually as the church gave practical effect to its doctrine of the brotherhood of man, and as feudalism proved that subordination and freedom could exist together, the relation of the unfreeman to his land was conceived of as “servile” or “base” tenure, out of which grew the later copyhold tenure. This shows its nature as a true variety of *holding*, capable of assuming all the forms of estate without changing its character as a tenure.

Leasehold tenure, on the other hand, is not a tenure at all in the feudal sense, because the lessee has no “hold” or tenure of the land: no seisin, as the law of England expressed it. But he was necessarily a freeman, and therefore could not be reckoned among the serfs. The easiest escape from the difficulty was to say that he held by a different kind of tenure, and was a freeman, but had not a freehold. Therefore there is no variety of estates in leasehold, answering to those of freehold, or even of copyhold. It is a single form of estate, less than freehold, but always held by a freeman. That

tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and thus partaking of a middle nature, were called *mesne*, or middle, lords. So that if the king granted a manor to A, and he granted a portion of the land to B, now B was said to hold <sup>[60]</sup> of A, and A of the king; or in other words, B held his lands immediately of A, but mediately of the king. The king, therefore, was styled lord paramount; A was both tenant and lord, or was a *mesne lord*; and B was called tenant *paravail*, or the lowest tenant; being he who was supposed to make avail, or profit, of the land.<sup>a</sup> In this manner are all the lands of the kingdom holden, which are in the hands of subjects: for according to Sir Edward Coke,<sup>b</sup> in the law of England we have not properly *allodium*;<sup>2</sup> which, we have seen,<sup>c</sup> is the name by which the feudists

<sup>a</sup> 2 Inst. 296.

<sup>c</sup> Pag. 47.

<sup>b</sup> 1 Inst. 1.

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it is not a tenure in the feudal sense is shown by its survival to the present day, when it is in constant use, although feudal tenures have long been obsolete.

Copyhold depending on immemorial custom cannot now be created, nor can freehold be changed into it. But it may be turned into freehold by a mere conveyance of the freehold to the copyholder by the lord, or by a release to him of the seignorial rights; and such transmutation is called *enfranchisement*. Or, on the other hand, the copyholder may convey to the lord, and this will be an *extinguishment* of the copyhold. (1 Stephen's New Com. 229, n. f.)

How closely connected all these terms are—*tenure*, *estate*, *title*—and how easily they pass into one another, is shown by the fact that the statute which did most to destroy feudalism had no reference to tenure at all, but was intended to affect estates, and operated most directly upon titles. This was stat. *Quia Emptores*, 18 Edw. I, which regulated the sale of hereditaments, changed the transfers from feudal to allodial in their nature, broke up subinfeudation, and prevented the formation of new fees and therefore of manors. Every sale since that time has been the transfer of an old fee, not the creation of a new one. This began the process that ended with the stat. 12 Car. II, c. 24, or rather with the reforms of the commonwealth, preserved by that statute, in the abolition of all strictly feudal tenures.—HAMMOND.

2 Meaning of *allodium*.—Land owned by a subject, and not held of a lord, is called allodial land (Co. Litt. 1 b; 2 Bl. Comm. 47); and a system of allodial ownership appears to have preceded the feudal system in England, the land then owned being termed, according to the mode of acquisition, bookland or folkland (Co. Litt. 65 a, Hargrave's note; Pollock and Maitland, His-



abroad distinguish such estates of the subject, as are not holden of any superior. So that at the first glance we may observe, that our lands are either plainly feuds, or partake very strongly of the feudal nature.

§ 84. a. *Tenants in capite*.—All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him, in right of his crown and dignity, were called his tenants *in capite*, or in chief; which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burdensome services, than inferior tenures did.<sup>d</sup> This distinction ran through all the different sorts of tenure; of which I now proceed to give an account.

§ 85. 2. *Kinds of feudal services*—a. *Free and base services; certain and uncertain services*.—There seem to have subsisted among our ancestors four principal species of lay tenures, to which all others may be reduced: the grand criteria of which were the natures of the several services or renders, that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain*. *Free* services were such as were not unbecoming the character of a soldier, or a freeman to perform; as to serve <sup>[61]</sup> under his lord in the wars, to pay a sum of money, and the like. *Base* services were such as were fit only for peasants, or persons of a servile rank;

<sup>d</sup> In the Germanic constitution, the electors, the bishops, the secular princes, the imperial cities, etc., which hold directly from the emperor, are called the *immediate* states of the empire; all other landholders being denominated *mediate* ones. Mod. Un. Hist. xlii. 61.

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tory of English law, vol. I, pp. 37 et seq.; Digby, History of the Law of Real Property, 5th ed., pp. 11 et seq.). Such ownership is assumed to have been—at any rate as to bookland, or land received by grant—absolute ownership, and the term ‘*allodium*’ is used to denote land owned absolutely. The term survived the institution of the feudal system, and was applied to land held of a lord, so that a man was sometimes said to hold *in allodio*; but the *allodium* and the *beneficium* were then becoming transformed into the *feodum* (Pollock and Maitland, History of English Law, p. 49; Digby, History of the Law of Real Property, 5th ed., p. 26).—HALSBURY, 24 Laws of England, 138 n.

as to plow the lord's land, to make his hedges, to carry out his dung, or other mean employments. The *certain* services, whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretense; as, to pay a stated annual rent, or to plow such a field for three days. The *uncertain* depended upon unknown contingencies: as, to do military service in person, or pay an assessment in lieu of it, when called upon; or to wind a horn whenever the Scots invaded the realm; which are free services: or to do whatever the lord should command; which is a base or villein service.

§ 86. 3. Species of feudal tenures—a. Frank-tenements: (1) Knight service; (2) Free socage; b. Villeinage: (1) Pure villeinage; (2) Villein socage.—From the various combinations of these services have arisen the four kinds of lay tenure which subsisted in England, till the middle of the last century; and three of which subsist to this day. Of these Bracton (who wrote under Henry the Third) seems to give the clearest and most compendious account, of any author ancient or modern;\* of which the following is the outline or abstract.† “Tenements are of two kinds, *frank-tenement*, and *villeinage*. And, of frank-tenements, some are held freely in consideration of homage and *knight service*; others in *free socage* with the service of fealty only.” And again,‡ “of villeinages some are pure, and others privileged. He that holds in *pure villeinage* shall do whatsoever is commanded him, and always be bound to an uncertain service. The other kind of villeinage is called *villein socage*; and these villein socmen do villein services, but such as are certain and determined.” Of which the sense seems to be as follows: first, where the service was *free*, but *uncertain*, as military service with homage, that tenure was called the tenure in [62] chivalry, *per servitium militare*, or by knight ser-

\* l. 4. tr. 1. c. 28.

† *Tenementorum aliud liberum, aliud villenagium. Item, liberorum aliud tenetur libere pro homagio et servitio militari; aliud in libero socagio cum fidelitate tantum, § 1.*

‡ *Villenagiorum aliud purum, aliud privilegiatum. Qui tenet in puro villenagio faciet quicquid ei præceptum fuerit, et semper tenebitur ad incerta. Aliud genus villenagii dicitur villanum socagium; et hujusmodi villani socmanni — villana faciunt servitia, sed certa et determinata, § 5.*

vice. Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, etc., that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements; the others were *villeinous* or servile: as, thirdly, where the service was *base* in its nature, and *uncertain* as to time and quantity, the tenure was *purum villenagium*, absolute or pure villeinage. Lastly, where the service was *base* in its nature, but reduced to a *certainly*, this was still villeinage, but distinguished from the other by the name of privileged villeinage, *villenagium privilegiatum*; or it might be still called socage (from the *certainly* of its services) but degraded by their *baseness* into the inferior title of *villanum socagium*, villein socage.

§ 87. 3. a. (1) **Knight service.**—The first, most universal, and esteemed and most honorable species of tenure, was that by knight service, called in Latin *servitium militare*, and in law-French *chivalry*, or *service de chivaler*, answering to the *sief d'haubert* of the Normans,<sup>b</sup> which name is expressly given it by the Mirror.<sup>c</sup> This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the genuine effect of the feudal establishment in England. To make a tenure by knight service, a determinate quantity of land was necessary, which was called a knight's fee, *feodum militare*; the value of which, not only in the reign of Edward II,<sup>k</sup> but also of Henry II,<sup>l</sup> and therefore probably at its original in the reign of the conqueror, was stated at 20*l. per annum*; and a certain number of these knight's fees were requisite to make up a barony. And he who held this proportion of land (or a whole fee) by knight service, was bound to attend his lord to the wars for forty days in every year, if called upon:<sup>m</sup> which attendance was his *reditus* or return, his rent or service, for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty

<sup>b</sup> Spelm. Gloss. 219.

<sup>c</sup> C. 2. § 27.

<sup>k</sup> Stat. de milit. 1 Edw. II (Knighthood, 1307). Co. Litt. 69.

<sup>l</sup> Glanvill. l. 9. c. 4.

<sup>m</sup> See writs for this purpose in Memorand. Scacch. 36 prefixed to Maynard's Year-Book. Edw. II.

days, and so in proportion.<sup>a 3</sup> And there is reason to [63] apprehend, that this service was the whole that our ancestors meant to subject themselves to; the other fruits and consequences of this tenure being fraudulently superinduced, as the regular (though unforeseen) appendages of the feudal system.

§ 88. (a) **Incidents of knight service.**—This tenure of knight service had all the marks of a strict and regular feud: it was granted by words of pure donation, *dedi et concessi* (I have given and granted):<sup>o</sup> was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin; and was perfected by homage and fealty. It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry; viz., aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat: all which I shall endeavor to explain, and show to be of feudal original.

§ 89. (i) **Aids.**—Aids were originally mere benevolences granted by the tenant to his lord, in times of difficulty and distress;<sup>p</sup> but in process of time they grew to be considered as a matter of right, and not of discretion. These aids were principally three: first, to ransom the lord's person, if taken prisoner; a necessary

<sup>a</sup> Litt. § 95.

<sup>o</sup> Co. Litt. 9.

<sup>p</sup> *Auxilia fiunt de gratia et non de jure,—cum dependeant ex gratia tenentium et non ad voluntatem dominorum.* (Aids arise from favor not from right—since they depend on the goodwill of the tenants, not on the will of their lords.) Bracton. l. 2. tr. 1. c. 16. § 8.

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**3 Greater and lesser tenants in chief.**—In 1 Poll. & Mait., Hist. Eng. Law (2d ed.), 259, we read: "In Henry II's day the allotment of military service upon the lands of the tenants in chief may be regarded as complete. It is already settled that this tenant in chief owes the king the service of one knight, while another owes the service of twenty knights. Historians have often observed that the tenants in chief of the Norman king, even his military tenants in chief, form a very miscellaneous body, and this is important in our constitutional history; a separation between the greater and the lesser tenants must be effected in course of time, and the king has thus a power of defining what will hereafter be the 'estate' of the baronage. In Henry II's day the king had many tenants, each of whom held of him but one knight's fee, or but two or three knights' fees. On the other hand, there were nobles each of

consequence of the feudal attachment and fidelity: insomuch that the neglect of doing it, whenever it was in the vassal's power, was by the strict rigor of the feudal law, an absolute forfeiture of his estate.<sup>a</sup> Secondly, to make the lord's eldest son a knight; a matter that was formerly attended with great ceremony, pomp, and expense. This aid could not be demanded till the heir was fifteen years old, or capable of bearing arms:<sup>r</sup> the intention of it being to breed up the eldest son and heir apparent of the seignior, to deeds of arms and chivalry, for the better defense of the nation. Thirdly, to marry the lord's eldest daughter, by giving her a suitable portion: for daughter's portions were in those days extremely slender; few lords being able to save much out of <sup>[64]</sup> their income for this purpose; nor could they acquire money by other means, being wholly conversant in matters of arms: nor by the nature of their tenure, could they charge their lands with this, or any other encumbrances. From bearing their proportion to these aids no rank or profession was exempted: and therefore even the monasteries, till the time of their dissolution, contributed to the knighting of their founder's male heir (of whom their lands were holden) and the marriage of his female descendants.<sup>s</sup> And one cannot but observe, in this particular, the great resemblance which the lord and vassal of the feudal law bore to the patron and client of the Roman republic; between whom also there subsisted a mutual fealty, or engagement of defense and protection. With regard to the matter of aids, there were three which were usually raised by the client; viz., to marry the patron's daughter; to pay his debts; and to redeem his person from captivity.<sup>t</sup>

<sup>a</sup> Feud. l. 2. t. 24.

<sup>r</sup> 2 Inst. 233.

<sup>s</sup> Philips's Life of Pole. I. 223.

<sup>t</sup> *Erat autem hæc inter utrosque officiorum vicissitudo—ut clientes ad collocandas senatorum filias de suo conferrent; in æris alieni dissolutionem gratuitam pecuniam erogarent; et ab hostibus in bello captos redimerent.* (But

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whom had many knights' fees; a few had fifty and upwards. Now, to describe the wide lands held of the king by one of his mightier tenants, the terms *honor* and *barony* were used." It is suggested that the distinction between peers and commoners may have arisen from the distinction between the tenants who had few knights' fees and those who had many. See Halsbury, 24 Laws of Eng., 140 n.



But besides these ancient feudal aids, the tyranny of lords by degrees exacted more and more; as, aids to pay the lord's debts (probably in imitation of the Romans), and aids to enable him to pay aids or reliefs to his superior lord; from which last, indeed, the king's tenants *in capite* (in chief, i. e., of the king) were, from the nature of their tenure, excused, as they held immediately of the king who had no superior. To prevent this abuse, King John's *magna carta*<sup>u</sup> ordained, that no aids be taken by the king without consent of parliament, nor in any wise by inferior lords, save only the three ancient ones above mentioned. But this provision was omitted in Henry III's charter, and the same oppressions were continued till the 25 Edw. I (1297), when the statute called *confirmatio chartarum* (a confirmation of the charters) was enacted; which in this respect revived King John's charter, by ordaining that none but the ancient aids should be taken. But though the species of aids was thus restrained, yet the quantity <sup>[65]</sup> of each aid remained arbitrary and uncertain. King John's charter indeed ordered that all aids taken by inferior lords should be reasonable;<sup>w</sup> and that the aids taken by the king of his tenants *in capite* should be settled by parliament.<sup>x</sup> But they were never completely ascertained and adjusted till the statute Westm. I, 3 Edw. I, c. 36 (Knighthood, 1275), which fixed the aids of inferior lords at twenty shillings, or the supposed twentieth part of every knight's fee, for making the eldest son a knight, or marrying the eldest daughter; and the same was done with regard to the king's tenants *in capite* (in chief) by statute 25 Edw. III, c. 11 (King's Son and Daughter, 1351). The other aid, for ransom of the lord's person, being not in its nature capable of any certainty, was therefore never ascertained.

§ 90. (ii) Reliefs.—Relief, *relevium*, was before mentioned as incident to every feudal tenure, by way of fine or composition with

there was this reciprocity of service between them—that the clients should give a sum of money for marrying the daughters of their lords, pay their debts, and ransom them when taken captive in war.) Paul. Manutius de Senatu Romano. c. 1.

<sup>u</sup> Cap. 12. 15.

<sup>w</sup> Cap. 15.

<sup>x</sup> *Ibid.* 14.

the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. But, though reliefs had their original while feuds were only life estates, yet they continued after feuds became hereditary; and were therefore looked upon, very justly, as one of the greatest grievances of tenure: especially when, at the first they were merely arbitrary and at the will of the lord; so that, if he pleased to demand an exorbitant relief, it was in effect to disinherit the heir.<sup>7</sup> The English ill-brooked this consequence of their new adopted policy; and therefore William the Conqueror by his laws<sup>2</sup> *ascertained* the relief, by directing (in imitation of the Danish heriets) that a certain quantity of arms, and habiliments of war should be paid by the earls, barons, and vavasors respectively; and, if the latter had no arms, they should pay 100s.<sup>4</sup> William Rufus broke through this composition, and again demanded arbitrary uncertain reliefs, as due by the feudal laws:

<sup>7</sup> Wright, 99.

<sup>2</sup> C. 22, 23, 24.

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<sup>4</sup> *Heriot and relief.*—The relation of the *heriot* to the *relief* has been one of the chief battle-fields on which the fight of different theories of the early law has been waged. The date of the origin of the heriot has been material only as bearing upon this; and most of those who have studied the subject do not doubt their identity, or at least that it was upon the plan of the heriets that the Norman Conqueror fashioned his plan of relief, as Blackstone (Cf. 2 Comm. \*423) says. The main distinction recognized between them is that the heriot is the act of the leaving, relief of the incoming tenant or heir. (Kemble, Saxons in England, i, 178.) This is exactly the difference we should expect to find, if heriot were the rule before the notion of hereditary estates was thought of, and relief took its place when the succession of the heir came to be considered a right. Indeed, it would become *ipso facto* the new form if the rights of the deceased were regarded as instantly passing to the heir, from whom anything left by the ancestor must be demanded.

Kemble supposes that the heriot began in the *comitatus*—therefore among freemen—and was extended to the unfree tenants by imitation. I know no authority for this. It is certain that in the tenth century the lord took the unfreeman's chattels at his death without exception. (See Rect. Sing. Pers. in Thorpe's Ancient Laws, vol. 1, pp. 431–445.) If the “best beast,” or “best chattel” was all that he got in the eleventh under Canute, we might rather infer that this was an amelioration of the former custom than a new hardship inflicted on the helpless class. The notion of a hereditary estate in land was not yet formed; but when it was introduced after the Conquest, it would be natural to impose some condition analogous to that of the tenants who remained in possession of their land, because *ascripti glebæ*, which might well

thereby in effect obliging every heir to new-purchase or *redeem* his land:<sup>a</sup> but his brother Henry I, by the charter before mentioned, restored his father's law [66] and ordained that the relief to be paid should be according to the law so established, and not an arbitrary redemption.<sup>b</sup> But afterwards, when by an ordinance in 27 Hen. II (1181), called the assize of arms, it was provided that every man's armor should descend to his heir, for defense of the realm: and it thereby became impracticable to pay these acknowledgments in arms, according to the laws of the conqueror, the composition was universally accepted of 100s. for every knight's fee; as we find it ever after established.<sup>c</sup> But it must be remembered, that this relief was only then payable, if the heir at the death of his ancestor had attained his full age of one and twenty years.

§ 91. (iii) **Primer seisin.**—Primer *seisin* was a feudal burden, only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. It was a right which the king had, when any of his tenants *in capite* died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands, if they were in immediate possession; and half a year's profits, if the lands were in reversion expectant on an estate for life.<sup>d</sup> This seems to be little more than an additional relief: but grounded upon this feudal reason; that, by the ancient law of feuds, immediately upon a death of a vassal the superior was entitled to enter and take seisin or possession of the land, by way of protection against intruders, till the heir appeared to claim it and receive investiture: and for the time the lord so

<sup>a</sup> 2 Roll. Abr. 514.

<sup>b</sup> "*Hæres non redimet terram suam sicut faciebat tempore fratris mei, sed legitima et justa relevatione relevabit eam.*" (An heir shall not redeem his land as he used to do in the time of my brother, but I will release it for a just and lawful relief.)" (Text. Roffens. cap. 34.)

<sup>c</sup> Glanv. l. 9. c. 4. Litt. § 112.

<sup>d</sup> Co. Litt. 77.

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be the relief. The fixing of the amount, as a year's rent or something of the kind, would be the next step in the natural order of the development of individual rights and their increased certainty.—HAMMOND.

See Pollock & Maitland, Hist. Eng. Law; Stubbs, Constitutional Hist. Eng., vol. I.

held it, he was entitled to take the profits; and unless the heir claimed within a year and day, it was by the strict law a forfeiture.\* This practice, however, seems not to have long obtained in England, if ever, with regard to tenure under inferior lords; but, as to the king's tenures *in capite*, this *prima seisin* (primer seisin) was expressly declared, under Henry III and Edward II, to belong to the king by prerogative, in contradistinction to other lords.† And the king was entitled to enter and receive the [67] whole profits of the land, till livery was sued; which suit being commonly within a year and day next after the death of the tenant, therefore the king used to take at an average the *first-fruits*, that is to say, one year's profits of the land.‡ And this afterwards gave a handle to the popes, who claimed to be feudal lords of the church, to claim in like manner from every clergyman in England the first year's profits of his benefice, by way of *primitiæ*, or first-fruits.

§ 92. (iv) *Wardship*.—These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female,<sup>b</sup> the lord was entitled to the *wardship* of the heir, and was called the guardian in chivalry. This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males, and sixteen in females. For the law supposed the heir male unable to perform knight service till twenty-one; but as for the female, she was supposed capable at fourteen to marry, and then her husband might perform the service. The lord, therefore, had no wardship, if at the death of the ancestor the heir male was of the full age of twenty-one, or the heir female of fourteen: yet, if she was then under fourteen, and the lord once had her in ward, he might keep her so till sixteen, by virtue of the statute of Westm. I, 3 Edw. I, c. 22 (*Ward, 1275*), the two additional years being given by the legislature for no other reason but merely to benefit the lord.<sup>1</sup>

\* Feud. l. 2. t. 24.

† Stat. Marlbr. c. 16 (52 Hen. III. c. 16, 1267). 17 Edw. II. c. 3 (*Prerogativa Regis, Alleged Statute of, 1324*).

‡ Staundf. Prerog. 12.

<sup>b</sup> Litt. § 103.

<sup>1</sup> *Ibid.*

§ 93. (aa) **Wardship of the lands.**—This wardship, so far as it related to land, though it was not nor could be part of the law of feuds, so long as they were arbitrary, temporary, or for life only; yet, when they became hereditary, and did consequently often descend upon infants, who by reason of their age could neither perform nor stipulate for the services of the feud, does not seem upon feudal principles to have been unreasonable. For the wardship of the land, or custody of the feud, was retained by the lord, that he might out of the profits thereof provide a fit person <sup>(68)</sup> to supply the infant's services, till he should be of age to perform them himself. And, if we consider the feud in its original import, as a stipend, fee, or reward for actual service, it could not be thought hard that the lord should withhold the stipend, so long as the service was suspended. Though undoubtedly to our English ancestors, where such a stipendiary donation was a mere supposition or figment, it carried abundance of hardship; and accordingly it was relieved by the charter of Henry I before mentioned, which took this custody from the lord, and ordained that the custody, both of the land and the children should belong to the widow or next of kin. But this noble immunity did not continue many years.

§ 94. (bb) **Wardship of the body.**—The wardship of the body was a consequence of the wardship of the land; for he who enjoyed the infant's estate was the properest person to educate and maintain him in his infancy: and also, in a political view, the lord was most concerned to give his tenant a suitable education, in order to qualify him the better to perform those services which in his maturity he was bound to render.

§ 95. (cc) **Delivery from wardship.**—When the male heir arrived to the age of twenty-one, or the heir female to that of sixteen, they might sue out their livery or *ouster le main*:<sup>k</sup> that is, the delivery of their lands out of their guardian's hands. For this they were obliged to pay a fine, namely, half a year's profits of the land; though this seems expressly contrary to *magna carta*.<sup>1</sup> However, in consideration of their lands having been so long in ward, they were excused all reliefs, and the king's tenants also all

<sup>k</sup> Co. Litt. 77.

<sup>1</sup> 9 Hen. III. c. 3 (1225).



primer seisins.<sup>m</sup> In order to ascertain the profits that arose to the crown by these fruits of tenure, and to grant the heir his livery, the itinerant justices, or justices in eyre, had it formerly in charge to make inquisition concerning them by a jury of the county,<sup>n</sup> commonly called an *inquisitio post mortem* (inquisition after death); which was instituted to inquire (at the death of any man of fortune) the value of his estate, the tenure by which it was [69] holden, and who and of what age his heir was; thereby to ascertain the relief and value of the primer seisin, or the wardship and livery accruing to the king thereupon. A manner of proceeding that came in process of time to be greatly abused, and at length an intolerable grievance; it being one of the principal accusations against Empson and Dudley, the wicked engines of Henry VII, that by color of false inquisitions they compelled many persons to sue out livery from the crown, who by no means were tenants thereunto.<sup>o</sup> And, afterwards, a court of wards and liveries was erected,<sup>p</sup> for conducting the same inquiries in a more solemn and legal manner.

§ 96. (dd) **Knighthood.**—When the heir thus came of full age, provided he held a knight's fee,<sup>5</sup> he was to receive the order of knighthood, and was compellable to take it upon him, or else pay a fine to the king. For in those heroical times, no person was

<sup>m</sup> Co. Litt. 77.

<sup>n</sup> Hovoden. sub Ric. I.

<sup>o</sup> 4 Inst. 198.

<sup>p</sup> Stat. 32 Hen. VIII. c. 46 (King's Wards, 1540).

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<sup>5</sup> **Tenants of the king.**—All our American editors limit this by adding "*in capite* under the crown," and to the same effect prefix "king's" to the word "vassals" below on same page. This reading will be found in the notes at the foot of the page [in Hammond's edition], as indicated by the figure 9, referring thither, signifying that they were first added in the ninth or posthumous edition.

Although the subject is of no present interest it illustrates the reasons which induced the editor to reject the additions thus made from the text, and follow that of the eighth edition, the last which was certainly Blackstone's own work. There is reason to believe that some of these changes Dr. Burn, the editor of the ninth edition, made without any authority from Blackstone's papers, and entirely on his own. By reference to book I, page 404, the reader will see that the same change was made there in the same way, after Blackstone

qualified for deeds of arms and chivalry who had not received this order, which was conferred with much preparation and solemnity. We may plainly discover the footsteps of a similar custom in what Tacitus relates of the Germans, who in order to qualify their young men to bear arms, presented them in a full assembly with a shield and lance; which ceremony, as was formerly hinted,<sup>a</sup> is supposed to have been the original of the feudal knighthood.<sup>r</sup> This prerogative, of compelling the vassals to be knighted, or to pay a fine, was expressly recognized in parliament, by the statute *de militibus*, 1 Edw. II (Knighthood, 1307); was exerted as an expedient for raising money by many of our best princes, particularly by Edward VI and Queen Elizabeth; but yet was the occasion of heavy murmurs when exerted by Charles I: among whose many misfortunes it was, that neither himself nor his people seemed able to distinguish between the arbitrary stretch, and the legal exertion, of prerogative. However, among the other concessions made by [70] that unhappy prince, before the fatal recourse to arms, he agreed to divest himself of this undoubted flower of the crown, and it was

<sup>a</sup> Vol. I. pag. 404.

<sup>r</sup> "*In ipso concilio vel principum aliquis, vel pater, vel propinquus, scuto frameaque juvenem ornant. Hæc apud illos toga, hic primus juventutis honos: ante hoc domus pars videntur; mox reipublicæ.* (In that council either some one of the princes, or the father, or relation, adorns the youth with a spear and buckler: this is the toga among them, the first honor of youth: before this ceremony, he was merely a member of his family, now, he becomes a member of the republic.) De Mor. Germ. 13.

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had left the passage unaltered through the eight editions printed in his lifetime.

The chief ground for thinking that this limitation to the *king's* tenants was a discovery made by Dr. Burn, and not by the author of the Commentaries, is the fact that there is no evidence for its truth in the original authorities. See Coke on the Stat. de Militibus, 2 Inst. 593, and the commissions of Edw. VI, and Q. Elizabeth in 15 Rymer's Fœdera, 124, 493; with the stat. 16, Car. I, c. 20, and 2 Rushw. Coll. 70; cited by Mr. Christian, who first pointed out the inaccuracy of this addition to the text in his note to this passage, saying, "I do not find that this prerogative was confined to the king's tenants," though apparently without suspecting the authorship.

It is a little hard that Blackstone should thus be made responsible for the errors of his posthumous editor, and at the same time accused of learning from the same posthumous editor all that he knew on such subjects.—HAMMOND.

accordingly abolished by statute 16 Car. I. c. 20 (Order of Knighthood, 1640).

§ 97. (v) Marriage.—But, before they came of age, there was still another piece of authority, which the guardian was at liberty to exercise over his infant wards; I mean the right of *marriage* (*maritagium*, as contradistinguished from *matrimonium*), which in its feudal sense signifies the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. For, while the infant was in ward, the guardian had the power of tendering him or her a suitable match, without *disparagement*, or inequality: which if the infants refused, they forfeited the value of the marriage, *valorem maritagii*, to their guardian;<sup>s</sup> that is, so much as a jury would assess, or anyone would *bona fide* give to the guardian for such an alliance:<sup>t</sup> and, if the infants married themselves without the guardian's consent, they forfeited double the value, *duplicem valorem maritagii* (double the value of the marriage).<sup>u</sup> This seems to have been one of the greatest hardships of our ancient tenures. There are indeed substantial reasons why the lord should have the *restraint* and *control* of the ward's marriage, especially of his female ward; because of their tender years, and the danger of such female ward's intermarrying with the lord's enemy.<sup>w</sup> But no tolerable pretense could be assigned why the lord should have the *sale*, or *value* of the marriage. Nor, indeed, is this claim of strictly feudal original; the most probable account of it seeming to be this: that by the custom of Normandy the lord's consent was necessary to the marriage of his *female* wards;<sup>x</sup> which was introduced into England, together with the rest of the Norman doctrine of feuds: and it is likely that the lords usually took money for such their consent, since in the often-cited charter of Henry the First, he engages for the future to take nothing for *his* consent; which also he promises in general to give provided such female ward were not [71] married to his enemy. But this, among other beneficial parts of that charter, being disregarded, and guardians still continuing to dispose of their wards in a very arbitrary un-

<sup>s</sup> Litt. § 110.

<sup>t</sup> Stat. Mert. c. 6. Co. Litt. 82.

<sup>u</sup> *Ibid.* § 110.

<sup>w</sup> Bract. l. 2. c. 37. § 6.

<sup>x</sup> Gr. Cust. 95.

equal manner, it was provided by King John's great charter, that heirs should be married without disparagement, the next of kin having previous notice of the contract;<sup>7</sup> or, as it was expressed in the first draft of that charter, *ita maritentur ne disparagentur, et per consilium propinquorum de consanguinitate sua*.<sup>8</sup> But these provisions in behalf of the relations were omitted in the charter of Henry III; wherein<sup>a</sup> the clause stands merely thus, "*hæredes maritentur absque disparagatione* (heirs should be married without disparagement)": meaning certainly, by *hæredes*, heirs female, as there are no traces before this to be found of the lord's claiming the marriage<sup>b</sup> of heirs male; and as Glanvill<sup>c</sup> expressly confines it to heirs female. But the king and his great lords thenceforward took a handle from the ambiguity of this expression to claim them both, *sive sit masculus sive femina* (whether they be male or female), as Bracton more than once expresses it;<sup>d</sup> and also, as nothing but disparagement was restrained by *magna carta*, they thought themselves at liberty to make all other advantages that they could.<sup>e</sup> And afterwards this right, of selling the ward in marriage or else receiving the price or value of it, was expressly declared by the statute of Merton;<sup>f</sup> which is the first direct mention of it that I have met with, in our own or any other law.

§ 98. (vi) **Fines**.—Another attendant or consequence of tenure by knight service was that of  *fines*  due to the lord for every  *alienation* , whenever the tenant had occasion to make over his land to another. This depended on the nature of the feudal connection; it not being reasonable nor allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord: and, as the [72] feudal obligation was considered as reciprocal, the lord also could not alienate his seignior

<sup>7</sup> Cap. 6. edit. Oxon.

<sup>8</sup> Cap. 3. *Ibid*.

<sup>a</sup> Cap. 6.

<sup>b</sup> The words *maritare* (to marry) and *maritagium* (marriage) seem *ex vi termini* (from the strict sense of the word) to denote the providing of an *husband*.

<sup>c</sup> 1. 9. c. 9. & 12. & 1. 9. c. 4.

<sup>d</sup> 1. 2. c. 38. § 1.

<sup>e</sup> Wright, 97.

<sup>f</sup> 20 Hen. III. c. 6 (Wardship, 1235).

without the consent of his tenant, which consent of his was called an *attornment*. This restraint upon the lords soon wore away; that upon the tenants continued longer. For, when everything came in process of time to be bought and sold, the lords would not grant a license to their tenant, to alien, without a fine being paid; apprehending that, if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was much more reasonable that a stranger should make the same acknowledgment on his admission to a newly purchased feud. With us in England, these fines seem only to have been exacted from the king's tenants *in capite*, who were never able to alien without a license: but, as to common persons, they were at liberty, by *magna carta*,<sup>g</sup> and the statute of *quia emptores*<sup>h</sup> (if not earlier), to alien the whole of their estate, to be holden of the same lord, as they themselves held it of before. But the king's tenants *in capite*, not being included under the general words of these statutes, could not alien without a license: for if they did, it was in ancient strictness an absolute forfeiture of the land;<sup>i</sup> though some have imagined otherwise. But this severity was mitigated by the statute 1 Edw. III, c. 12 (Sale of Land, 1326), which ordained, that in such case the lands should not be forfeited, but a reasonable fine be paid to the king. Upon which statute it was settled, that one-third of the yearly value should be paid for a license of alienation; but, if the tenant presumed to alien without a license, a full year's value should be paid.<sup>k 6</sup>

<sup>g</sup> Cap. 32.

<sup>i</sup> 2 Inst. 66.

<sup>h</sup> 18 Edw. I. c. 1 (1290).

<sup>k</sup> *Ibid.* 67.

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<sup>6</sup> In the middle of the thirteenth century the tenant enjoyed a large power of disposing of his tenement by act *inter vivos*, though this was subject to some restraints in favor of his lord. About the history of these restraints different opinions have been held. The old English tradition, represented by Coke, regarded it as a process by which limits were gradually set to ancient liberty. On the other hand, the cosmopolitan "learning of feuds," which Blackstone made popular, assumed the inalienability of the fief as a starting point:—gradually the powers of the tenant grew at the expense of the lord. Of late years a renewed attention to the English authorities has occasioned a reaction in favor of Coke's doctrine. The evidence deserves a patient examination, the result of which may be that we shall see some truth in both of



§ 99. (vii) *Escheat*.—The last consequence of tenure in chivalry was *escheat*; which is the determination of the tenure, or dissolution of the mutual bond between the lord and tenant, from the extinction of the blood of the latter by either natural or civil means: if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony; whereby every inheritable quality was entirely blotted out <sup>[73]</sup> and abolished. In such cases the land escheated, or fell back, to the lord of the fee;<sup>1</sup> that is, the tenure was determined by breach of the original condition, expressed or implied in the feudal donation. In the one case, there were no heirs subsisting of the blood of the first feudatory or purchaser, to which heirs alone the grant of the feud extended: in the other, the tenant, by perpetrating an atrocious crime, showed that he was no longer to be trusted as a vassal, having forgotten his duty as a subject; and therefore forfeited his feud, which he held under the implied condition that he should not be a traitor or a felon. The consequence of which in both cases was, that the gift, being determined, resulted back to the lord who gave it.<sup>m</sup>

§ 100. (b) Other species of knight service; grand serjeanty. These were the principal qualities, fruits, and consequences of the tenure by knight service: a tenure, by which the greatest part of the lands in this kingdom were holden, and that principally of the king *in capite*, till the middle of the last century; and which was created, as Sir Edward Coke expressly testifies,<sup>n</sup> for a military purpose; viz., for defense of the realm by the king's own principal subjects, which was judged to be much better than to trust to hirelings or foreigners. The description here given is that of knight service proper; which was to attend the king in his wars. There were also some other species of knight service; so called, though improperly, because the service or render was of a free and honorable nature, and equally uncertain as to the time of rendering as

<sup>1</sup> Co. Litt. 13.<sup>n</sup> 4 Inst. 192.<sup>m</sup> Feud. l. 2. t. 86.

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the rival opinions, and come to the conclusion that the controversy has been chiefly occasioned by an attempt, common to all parties, to make the law of the Norman reigns more definite than really it was.—POLLOCK & MAITLAND, 1 Hist. Eng. Law (2d ed.), 329.

that of knight service proper, and because they were attended with similar fruits and consequences. Such was the tenure by *grand serjeanty*, *per magnum servitium*, whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person; as to carry his banner, his sword, or the like; or to be his butler, champion, or other officer, at his coronation.\* It was in most other respects like knight service;† only he was not bound to pay aid,‡ or escuage;‡ [74] and, when tenant by knight service paid five pounds for a relief on every knight's fee, tenant by grand serjeanty paid one year's value of his land, were it much or little.§ Tenure by *cornage*, which was, to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty.†

§ 101. (c) *Escuage or scutage*.—These services, both of chivalry and grand serjeanty, were all personal, and uncertain as to their quantity or duration. But, the personal attendance in knight service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it; by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee; and therefore this kind of tenure was called *scutagium* (scutage) in Latin, or *servitium scuti* (service money); *scutum* being then a well-known denomination for money: and in like manner it was called, in our Norman French, *escuage*; being indeed a pecuniary instead of a military, service. The first time this appears to have been taken was in the 5 Hen. II (1158), on account of his expedition to Toulouse; but it soon came to be so universal, that personal attendance fell quite into disuse. Hence we find in our ancient histories, that, from this period, when our kings went to war, they levied scutages on their tenants, that is, on all the landholders of the kingdom, to defray their expenses, and to hire troops: and these assessments, in the time of Henry II,

\* Litt. § 153.

† *Ibid.* § 158.

‡ 2 Inst. 233.

‡ Litt. § 158.

§ *Ibid.* § 154.

† *Ibid.* § 156.

seem to have been made arbitrarily and at the king's pleasure.<sup>7</sup> Which prerogative being greatly abused by his successors, it became matter of national clamor; and King John was obliged to consent, by his *magna carta*, that no scutage should be imposed without consent of parliament.<sup>u</sup> But this clause was omitted in his son Henry III's charter; where we only find,<sup>v</sup> that scutages (75) or escuage should be taken as they were used to be taken in the time of Henry II: that is, in a reasonable and moderate manner. Yet afterwards by statute 25 Edw. I, c. 5 & 6 (Taxation, 1297),<sup>8</sup> and many subsequent statutes<sup>x</sup> it was enacted, that the king should take no aids or tasks but by the common assent of the realm. Hence it is held in our old books, that escuage, or scutage could not be levied but by consent of parliament;<sup>y</sup> such scutages being indeed the groundwork of all succeeding subsidies, and the land tax of later times.

<sup>u</sup> *Nullum scutagium ponatur in regno nostro, nisi per commune consilium regni nostri. cap. 12.* (Let no scutage be imposed but by the common council of our kingdom.)

<sup>v</sup> Cap. 37.

<sup>x</sup> See Book I. pag. 140.

<sup>y</sup> Old Ten. tit. Escuage.

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<sup>7</sup> There was only one half century during which scutages were frequently imposed, namely, between 1190 and 1240. "The early history of scutage is now in the crucible." There are two recent tracts on the subject: (1) J. F. Baldwin, *Scutage and Knight Service*, Chicago, 1897; and (2) J. H. Round, *The Red Book of the Exchequer* (privately printed), 1898. Mr. Baldwin shows, among other things, that as compared with other sources of revenue, the importance of the scutages may easily be overrated. It is said that in the whole course of English history scutage was levied only some forty times. See 1 Poll. & Maitl. Hist. Eng. Law (2d ed.), 253, 267. "Knights' fees were cut up into fractional parts in a manner which would have been impossible had the service been really military. To what extent the service of the tenants *in capite* of the king was changed to a money payment seems doubtful. Perhaps the commutation was a matter of special arrangement, and in the absence of arrangement the tenant had to furnish military service or pay a fine for his default. Blackstone declines to recognize tenure by escuage as tenure by knight service, and sees in it, as was indeed the fact, the destruction of the advantages of the feudal constitution, leaving only its hardships."—HALSBURY, 24 Laws of England, 141 n.

<sup>8</sup> Mr. Jenks advises us that, as a matter of fact, scutage is not mentioned by name in the 25 Edw. I. See 1 Stephen's Comm. (16th ed.), 122 n.

Since, therefore, escuage differed from knight service in nothing, but as a compensation differs from actual service, knight service is frequently confounded with it. And thus Littleton<sup>z</sup> must be understood, when he tells us, that tenant by homage, fealty, and escuage, was tenant by knight service: that is, that this tenure (being subservient to the military policy of the nation) was respected<sup>a</sup> as a tenure in chivalry.<sup>b</sup> But as the actual service was uncertain, and depended upon emergencies, so it was necessary that this pecuniary compensation should be equally uncertain, and depend on the assessments of the legislature suited to those emergencies. For had the escuage been a settled invariable sum, payable at certain times, it had been neither more nor less than a mere pecuniary rent: and the tenure instead of knight service would have been of another kind, called socage,<sup>c</sup> of which we shall speak in the next chapter.

§ 102. (d) Corruption of knight service.—For the present I have only to observe, that by the degenerating of knight service, or personal military duty, into escuage, or pecuniary assessments, all the advantages (either promised or real) of the feudal constitution were destroyed, and nothing but the hardships remained. Instead of forming a national militia composed of barons, knights, and gentlemen, bound by their interest, their honor, and their oaths, to defend their king and country, the whole of this system of [76] tenures now tended to nothing else, but a wretched means of raising money to pay an army of occasional mercenaries. In the meantime the families of all our nobility and gentry groaned under the intolerable burdens, which (in consequence of the fiction adopted after the Conquest) were introduced and laid upon them by the subtlety and finesse of the Norman lawyers. For, besides the scutages to which they were liable in defect of personal attendance, which, however, were assessed by themselves in parliament, they might be called upon by the king or lord paramount for *aids*, whenever his eldest son was to be knighted or his eldest daughter married; not to forget the ransom of his own person. The heir, on

<sup>z</sup> § 103.

<sup>a</sup> Wright, 122.

<sup>b</sup> *Pro feodo militari reputatur.* Flet. 1. 2. c. 14. § 7.

<sup>c</sup> Litt. § 97, 120.

the death of his ancestor, if of full age, was plundered of the first emoluments arising from his inheritance, by way of *relief* and *primer seisin*; and, if under age, of the whole of his estate during infancy. And then, as Sir Thomas Smith<sup>d</sup> very feelingly complains, "when he came to his own, after he was out of *wardship*, his woods decayed, houses fallen down, stock wasted and gone, lands let forth and plowed to be barren," to make amends he was yet to pay half a year's profits as a fine for suing out his *livery*; and also the price or value of his *marriage*, if he refused such wife as his lord and guardian had bartered for, and imposed upon him; or twice that value, if he married another woman. Add to this the untimely and expensive honor of *knighthood*, to make his poverty more completely splendid. And when by these deductions his fortune was so shattered and ruined, that perhaps he was obliged to sell his patrimony, he had not even that poor privilege allowed him, without paying an exorbitant fine for a *license of alienation*.<sup>9</sup>

§ 103. (e) **Abolition of military tenures.**—A slavery so complicated, and so extensive as this, called aloud for a remedy in a nation that boasted of its freedom. Palliatives were from time to time applied by successive acts of parliament, which assuaged some temporary grievances. Till at length the humanity of King James I consented<sup>e</sup> for a proper equivalent to abolish them all; though the plan then [77] proceeded not to effect; in like manner as he had formed a scheme, and began to put it in execution, for removing the feudal grievance of heritable jurisdictions in Scotland,<sup>f</sup> which has since been pursued and effected by the statute 20 Geo. II, c. 43 (*Heritable Jurisdictions*, 1746).<sup>g</sup> King James' plan for exchanging our military tenures seems to have been nearly the same as that which has been since pursued; only with this difference, that, by way of compensation for the loss which the crown

<sup>d</sup> Commonw. l. 3. c. 5.

<sup>e</sup> 4 Inst. 202.

<sup>f</sup> Dalrymp. of Feuds. 292.

<sup>g</sup> By another statute of the same year (20 Geo. II. c. 50, *Tenures Abolition*, 1746) the tenure of *wardholding* (equivalent to the knight service of England) is forever abolished in Scotland.

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<sup>9</sup> See Pollock, *Land Laws*, 63.



and other lords would sustain, an annual fee-farm rent should be settled and inseparably annexed to the crown, and assured to the inferior lords, payable out of every knight's fee within their respective seignories. An expedient, seemingly much better than the hereditary excise, which was afterwards made the principal equivalent for these concessions. For at length the military tenures, with all their heavy appendages, were destroyed at one blow by the statute 12 Car. II, c. 24 (Military Tenures, 1660), which enacts, "that the court of wards and liveries, and all wardships, liveries, primer seisin, and *ouster le mains*, values and forfeitures of marriages, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienations, tenures by homage, knights service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage; save only tenures in frankalmoigne, copyholds, and the honorary services (without the slavish part) of grand serjeanty." A statute, which was a greater acquisition to the civil property of this kingdom than even *magna carta* itself: since that only pruned the luxuries that had grown out of the military tenures, and thereby preserved them in vigor; but the statute of King Charles extirpated the whole, and demolished both root and branches.

## OF THE MODERN ENGLISH TENURES.

§ 104. Tenures surviving act of 12 Charles II (1660).—Although, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feudal constitution was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside, and a new one introduced in its room: since by the statute 12 Car. II (1660) the tenures of socage and frankalmoigne, the honorary services of grand serjeanty, and the tenure by copy of court roll were reserved; nay, all tenures in general, except frankalmoigne, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called free and common socage. And this, being sprung from the same feudal original as the rest, demonstrates the necessity of fully contemplating that ancient system; since it is that alone to which we can recur to explain any seeming or real difficulties, that may arise in our present mode of tenure.

The military tenure, or that by knight service, consisted of what were reputed the most free and honorable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free socage*, consisted also of free and honorable services; but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the [79] statute of Charles the Second) almost every other species of tenure. And to this we are next to proceed.

§ 105. Meaning and character of socage.—Socage, in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers constantly put in opposition to chivalry, or knight service, where the render was precarious and uncertain. Thus Bracton,<sup>a</sup> if a man holds by a rent in money, without any escuage or serjeanty, "*id tenementum dici potest socagium* (that tenure

<sup>a</sup> 1. 2. c. 16. § 9.

may be called socage)”: but if you add thereto any royal service, or escuage to any, the smallest, amount, “*illud dici poterit feodum militare* (that shall be called military tenure).” So, too, the author of Fleta;<sup>b</sup> “*ex donationibus, servitia militaria vel magnæ serjantie non continentibus, oritur nobis quoddam nomen generale, quod est socagium* (the general name of socage arises from grants to which military service, or grand serjeanty, is not incident.)” Littleton also<sup>c</sup> defines it to be, where the tenant holds his tenement of the lord by any *certain* service, in lieu of all other services; so that they be not services of chivalry, or knight service. And therefore afterwards<sup>d</sup> he tells us, that whatsoever is not tenure in chivalry is tenure in socage: in like manner as it is defined by Finch,<sup>e</sup> a tenure to be done out of war. The service must therefore be certain, in order to denominate it socage; as to hold by fealty and 20s. rent; or, by homage, fealty, and 20s. rent; or, by homage and fealty without rent; or, by fealty and certain corporal service, as plowing the lord’s land for three days; or by fealty only without any other service: for all these are tenures in socage.<sup>f</sup>

§ 106. **Free and common socage.**—But socage, as was hinted in the last chapter, is of two sorts: *free* socage, where the services are not only certain, but honorable: and *villein socage*, where the services, though certain, are of a baser nature. Such as hold by the former tenure are called in Glanvill,<sup>g</sup> and other subsequent authors, by the name of *liberi sokemanni*, or tenants in free socage. Of this tenure we are first to speak; and this, both in the nature [80] of its service, and the fruits and consequences, appertaining thereto, was always by much the most free and independent species of any. And therefore I cannot but assent to Mr. Somner’s etymology of the word:<sup>h</sup> who derives it from the Saxon appellation, *soc*, which signifies liberty or privilege, and, being joined to a usual termination, is called *socage*, in Latin *socagium*; signifying

<sup>b</sup> 1. 3. c. 14. § 9.

<sup>c</sup> § 117.

<sup>d</sup> § 118.

<sup>e</sup> L. 147.

<sup>f</sup> Litt. §§ 117, 118, 119.

<sup>g</sup> 1. 3. c. 7.

<sup>h</sup> Gavelk. 138.

thereby a free or privileged tenure.<sup>1</sup> This etymology seems to be much more just than that of our common lawyers in general, who derive it from *soca*, an old Latin word denoting (as they tell us) a plow: for that in ancient time this socage tenure consisted in nothing else but services of husbandry, which the tenant was bound to do to his lord, as to plow, sow, or reap for him; but that in process of time, this service was changed into an annual rent by consent of all parties, and that, in memory of its original, it still retains the name of socage or plow service.<sup>k</sup> But this by no means agrees with what Littleton himself tells us,<sup>l</sup> that to hold by fealty only, without paying any rent, is tenure in socage; for here is plainly no commutation for plow service. Besides, even services, confessedly of a military nature and original (as escuage itself, which while it remained uncertain, was equivalent to knight service), the instant they were reduced to a certainty changed both their name and nature, and were called socage.<sup>m</sup> It was the *certainty*, therefore, that denominated it a socage tenure; and nothing sure could be a greater liberty or privilege than to have the service ascertained, and not left to the arbitrary calls of the lord, as in the tenures of chivalry. Wherefore also Britton, who describes socage tenure under the name of *fraunke ferme*,<sup>n</sup> tells us, that they are “lands and tenements, whereof the nature of the fee is changed by feoffment *out of chivalry* for *certain* yearly services, and in respect whereof neither homage, ward, marriage, nor relief can be demanded.” Which leads us also to another observation, that if socage tenures were of such base and servile <sup>[81]</sup> original, it is hard to account for the very great immunities which the tenants of them always enjoyed; so highly superior to those of the tenants by chivalry, that it was thought, in the reigns of both Edward I and Charles II, a point of the utmost importance and value to the tenants, to reduce the tenure by knight service to *fraunke ferme* or tenure by socage. We may therefore, I think, fairly conclude

<sup>1</sup> In like manner Skene in his exposition of the Scots’ law, title *socage*, tells us that it is “ane kind of holding of lands, quhen **ony** man is infeft *freely*,” etc.

<sup>k</sup> Litt. § 19.

<sup>l</sup> § 118.

<sup>m</sup> Litt. §§ 98, 120.

<sup>n</sup> C. 66.

in favor of Somner's etymology, and the liberal extraction of the tenure in free socage, against the authority even of Littleton himself.<sup>1</sup>

Taking this, then, to be the meaning of the word, it seems probable that the socage tenures were the relics of Saxon liberty; retained by such persons as had neither forfeited them to the king, nor been obliged to exchange their tenure for the more honorable, as it was called, but at the same time more burdensome, tenure of knight service. This is peculiarly remarkable in the tenure which prevails in Kent, called gavelkind, which is generally acknowledged to be a species of socage tenure;° the preservation whereof inviolate from the innovations of the Norman Conqueror is a fact universally known. And those who thus preserved their liberties were said to hold in *free and common socage*.

§ 107. 1. *Kinds of free and common socage*.—As, therefore, the grand criterion and distinguishing mark of these species of

° Wright, 211.

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<sup>1</sup> *Meaning of socage*.—The derivation of the word [socage] has given rise to much controversy. The generally accepted derivation is from "soc," an old word meaning a plowshare, the socage tenant being bound to agricultural service. But this was far from being universally the case; probably in early times it was the exception rather than the rule. There can be little question that the word is connected with *soca*, *soen*, "jurisdiction," from the Anglo-Saxon *secan*, "to seek." The free landholders had probably by the time of the Conquest been brought nearly universally into the condition of persons owing suit or attendance at the court of some great man. Thus the *sochemanni* are probably the free suitors or attendants (*secta*, *sequor*) of the lord's court, who came in process of time to be regarded as tenants holding in *socage*, by the tenure of such suit or service. These tenants were usually brought under the obligation of rendering some fixed rent or service, and hence the later conception of the essential characteristics of socage tenure. See Stubbs, *Const. Hist.*, i, p. 273. See further as to the position of these socmen, Vinogradoff, *Villeinage in England*, pp. 196–203.—Digby, *Hist. Real Prop.* (5th ed.), 45 n.

At the Conquest, many manors—especially manors of ancient demesne—had tenants known as socmen (*socmanni*), who were distinct from villeins, and were sometimes divided as free and bond socmen. But, while the free socmen may have given their name to tenure in socage, this arose also under other circumstances—by feoffments where fixed rents or services were reserved; by ancient tenure at fixed rents or services where no charter existed; and generally every free holding that was not in chivalry, or serjeanty, or frankalmoigne,



tenure are the having its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties: and, in particular, *petit serjeanty*, tenure in *burgage*, and *gavelkind*.

§ 108. a. *Petit serjeanty*.—We may remember, that by the statute 12 Car. II (1660), grand serjeanty is not itself totally abolished, but only the slavish appendages belonging to it; for the honorary services (such as carrying the king's sword or banner, officiating as his butler, carver, etc., at the coronation) are still reserved. Now *petit serjeanty* bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. [82] *Petit serjeanty*, as defined by Littleton,<sup>p</sup> consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like. This, he says,<sup>q</sup> is but socage in effect; for it is no personal service, but a certain rent: and, we may add, it is clearly no predial service, or service of the plow, but in all respects *liberum et commune socagium* (free and common socage); only being held of the king, it is by way of eminence dignified with the title of *parvum servitium regis*, or *petit serjeanty*. And *magna carta* respects it in this light, when it enacts,<sup>r</sup> that no wardship of the lands or body shall be claimed by the king in virtue of a tenure by *petit serjeanty*.

§ 109. b. *Burgage tenure*.—Tenure in *burgage* is described by Glanvill,<sup>s</sup> and is expressly said by Littleton<sup>t</sup> to be but tenure in socage: and it is where the king or other person is lord of an ancient

p § 159.

s Lib. 7. cap. 3.

q § 160.

t § 162.

r Cap. 27.

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was classed as socage. Since socage was not liable to uncertain escuage, wardship and marriage, there was doubtless a tendency for it to increase at the expense of military tenure by the gradual conversion into socage of holdings as to which the evidence of military tenure had been lost. See Littleton's *Tenures*, § 118; Vinogradoff, *Villeinage in England*, pp. 178–210; \*Pollock & Maitland, *History of English Law*, vol. 1, pp. 271–277, 343, vol. II, p. 268; Holdsworth, *History of English Law*, vol. I, pp. 10 et seq.—HALSBURY, 24 *Laws of England*, 142 n.

borough, in which the tenements are held by a rent certain.<sup>u</sup> It is indeed only a kind of town socage; as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament; and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is where houses, or lands which were formerly the site of houses, in an ancient borough, are held of some lord in common socage, by a certain established rent. And these seem to have withstood the shock of the Norman encroachments principally on account of their insignificance, which made it not worth while to compel them to an alteration of tenure; as an hundred of them put together would scarce have amounted to a knight's fee. Besides, the owners of them, being chiefly artificers and persons engaged in trade, could not with any tolerable propriety be put on such a military establishment, as the tenure in chivalry was. And here also we have again an instance, where a tenure is confessedly in socage, and yet could not possibly ever have been held by plow service; since the [83] tenants must have been citizens or burghers, the situation frequently a walled town, the tenement a single house; so that none of the owners was probably master of a plow, or was able to use one, if he had it.

§ 110. (1) Borough-English.—The free socage, therefore, in which these tenements are held, seems to be plainly a remnant of Saxon liberty; which may also account for the great variety of customs, affecting many of these tenements so held in ancient burgage: the principal and most remarkable of which is that called *borough-English*, so named in contradistinction, as it were, to the Norman customs, and which is taken notice of by Glanvill,<sup>w</sup> and by Littleton;<sup>x</sup> viz., that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father.<sup>2</sup> For

<sup>u</sup> Litt. §§ 162, 163.

<sup>x</sup> § 165.

<sup>w</sup> *Ubi supra*.

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<sup>2</sup> Origin of name "borough-English."—As to the name "borough-English," it is said that the custom was not confined to boroughs, and probably had no borough origin. It is suggested that it arose from this circumstance: At

which Littleton<sup>7</sup> gives this reason; because the younger son, by reason of his tender age, is not so capable as the rest of his brethren to help himself. Other authors<sup>8</sup> have indeed given a much stranger reason for this custom, as if the lord of the fee had anciently a right to break the seventh commandment with his tenant's wife on her wedding-night; and that therefore the tenement descended not to the eldest, but the youngest, son; who was more certainly the offspring of the tenant. But I cannot learn that ever this custom prevailed in England, though it certainly did in Scotland (under the name of *mercheta* or *marcheta*), till abolished by Malcolm III.<sup>a</sup> And perhaps a more rational account than either may be stretched (though at a sufficient distance) from the practice of the Tartars; among whom, according to Father Duhalde, this custom of descent to the youngest son also prevails. That nation is composed totally of shepherds and herdsmen; and the elder sons, as soon as they are capable of leading a pastoral life, migrate from their father with a certain allotment of cattle, and go to seek a new habitation. The youngest son, therefore, who continues latest with the father, is naturally the heir of his house, the rest being already provided for. And thus we find that, among many other northern nations, it was the custom for all the sons but one to migrate from the father, which one became [84] his heir.<sup>b</sup> So that possibly this custom, wherever it prevails, may be the remnant of that pastoral state of our British and German ancestors, which Cæsar and Tacitus describe. Other special customs there are in different burgage tenure; as that, in some, the wife shall be en-

<sup>7</sup> § 211.

<sup>8</sup> 3 Mod. Pref.

<sup>a</sup> Seld. Tit. of Hon. 2. 1. 47. Reg. Mag. 1. 4. c. 31.

<sup>b</sup> *Pater cunctos filios adultos a se pellebat, præter unum quem hæredem sui juris relinquebat.* (The father used to send away all his sons when grown up, excepting one who became his heir.) (Walsingham. Upodigm. Neustr. c. 1.)

Nottingham, in the days of the Conquest, a new French borough grew up beside the old English borough, and the customs of the *Burgus Franciscus* as to dower, inheritance and the like had to be distinguished from those of the *Burgus Anglicus*. Among the customs of the English borough was that of descent to the youngest son, and to this the lawyers gave the name of "borough-English." —POLL. & MAITL, 1 Hist. Eng. Law (2d ed.), 647.

As to burgage tenure, see *Ibid.* 295 and 645.

dowed of *all* her husband's tenements,<sup>c</sup> and not of the third part only, as at the common law: and that, in others, a man might dispose of his tenements by will,<sup>d</sup> which, in general, was not permitted after the Conquest till the reign of Henry the Eighth; though in the Saxon times it was allowable.<sup>e</sup> A pregnant proof that these liberties of socage tenure were fragments of Saxon liberty.

§ 111. *c. Gavelkind*.—The nature of the tenure in *gavelkind* affords us a still stronger argument.<sup>3</sup> It is universally known what struggles the Kentishmen made to preserve their ancient liberties, and with how much success those struggles were attended. And as it is principally here that we meet with the custom of *gavelkind* (though it was and is to be found in some other parts of the kingdom<sup>f</sup>), we may fairly conclude that this was a part of those liberties; agreeably to Mr. Selden's opinion, that *gavelkind* before the Norman Conquest was the general custom of the realm.<sup>g</sup> The distinguishing properties of this tenure are various: some of the principal are these; 1. The tenant is of age sufficient to alien his

<sup>c</sup> Litt. § 166.

<sup>d</sup> § 167.

<sup>e</sup> Wright, 172.

<sup>f</sup> Stat. 32 Hen. VIII. c. 29 (1540). Kitch. of Courts, 200.

<sup>g</sup> *In toto regno, ante ducis adventum, frequens et usitata fuit: postea cæteris adempta, sed privatis quorundam locorum consuetudinibus alibi postea regerminans: Cantianis solum integra et inviolata remansit.* (It was general and customary through the whole kingdom before the arrival of the Duke; afterwards this tenure was abolished with the rest, reviving only in the private customs of certain places: with the Kentish men alone it remained inviolate and entire.) (Analect. l. 2. c. 7.)

<sup>3</sup> Coke's etymological derivation of *gavelkind* was: "gave all kinde; for the custome giveth to all the sonnes alike." Co. Litt. 140 a. The word is said to be derived from *gafol* (rent), and so *gafolcund* or *gavelkind* lands meant originally rent-paying lands. Before the Conquest the equal partibility of land among sons was the general custom of the realm, and at first continued, after the Conquest, as to socage lands. Primogeniture was introduced to suit the supposed necessities of military tenure. 24 Halsbury, Laws of Eng. 151; Digby, Hist. Real Prop. (5th ed.), 47; 2 Poll. & Maitl., Hist. Eng. Law (2d ed.), 271. It is presumed that all land in Kent is subject to the custom of *gavelkind* unless the contrary is proved. Re *Chenoweth*, Ward v. *Dwelley*, [1902] 2 Ch. 488. *Gavelkind* land may be exchanged for land held in common socage. *Minet v. Leman*, 7 De Gex, M. & G. 340, 44 Eng. Reprint, 133.

estate by feoffment at the age of fifteen.<sup>b</sup> 4. 2. The estate does not escheat in case of an attainder and execution for felony; their maxim being, "the father to the bow, the son to the plow."<sup>15</sup> 3. In most places he had a power of devising land by will, before the statute for that purpose was made.<sup>k</sup> 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together;<sup>1</sup> which was indeed anciently the most [85] usual course of descent all over England,<sup>m</sup> though in particular places particular customs prevailed. These, among other properties, distinguished this tenure in a most remarkable manner: and yet it is said to be only a species of a socage tenure, modified by the custom of the country; the lands being holden by suit of court and fealty, which is a service in its nature certain.<sup>n</sup> Wherefore, by a charter of King John,<sup>o</sup> Hubert, Archbishop of Canterbury, was authorized to *exchange* the gavelkind tenures holden of the see of Canterbury into tenures by knight's service; and by statute 31 Hen. VIII, c. 3 (1539), for disgaveling the lands of divers lords and gentlemen in the county of Kent, they are directed to be descendible for the future *like other lands which were never holden by service of socage*. Now, the immunities which the tenants in gavelkind enjoyed were such, as we cannot conceive should be conferred upon mere plowmen and peasants: from all which I think it sufficiently clear, that tenures in free socage are in general of a nobler original than is assigned by Littleton, and after him by the bulk of our common lawyers.

§ 112. 2. **Free socage of feudal character.**—Having thus distributed and distinguished the several species of tenure in free socage, I proceed next to show that this also partakes very strongly of the feudal nature. Which may probably arise from its ancient Saxon original; since (as was before observed<sup>p</sup>) feuds were not

<sup>b</sup> Lamb. Peramb. 614.

<sup>m</sup> Glanvill. l. 7. c. 3.

<sup>1</sup> Lamb. 634.

<sup>n</sup> Wright. 211.

<sup>k</sup> F. N. B. 198. Cro. Car. 561.

<sup>o</sup> Spelm. *cod. vet. leg.* 355.

<sup>1</sup> Litt. § 210.

<sup>p</sup> Pag. 48.

4 In re Maskell and Goldfinch, [1895] 2 Ch. 525.

5 This custom has been rendered obsolete by the general abolition of forfeiture for felony by the Forfeiture Act of 1870.



unknown among the Saxons, though they did not form a part of their military policy, nor were drawn out into such arbitrary consequences as among the Normans. It seems, therefore, reasonable to imagine, that socage tenure existed in much the same state before the Conquest as after: that in Kent it was preserved with a high hand, as our histories inform us it was; and that the rest of the socage tenures dispersed through England escaped the general fate of other property, partly out of favor and affection to their particular owners, and partly from their own insignificance: since I do not apprehend the number of socage tenures soon after the Conquest to have been very considerable, nor their value by any means large: till by successive [86] charters of enfranchisement granted to the tenants, which are particularly mentioned by Britton,<sup>a</sup> their number and value began to swell so far as to make a distinct, and justly envied, part of our English system of tenures.

§ 113. a. Tokens of feudal character of free socage.—However this may be, the tokens of their feudal origin will evidently appear from a short comparison of the incidents and consequences of socage tenure with those of tenure in chivalry; remarking their agreement or difference as we go along.<sup>6</sup>

<sup>a</sup> C. 66.

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<sup>6</sup> Socage tenure not of feudal origin.—I have avoided all discussion of merely historical statements for reasons already stated; but this question is of such fundamental importance that the student should not be left to accept Blackstone's conclusions without knowing the grounds on which modern thought differs from them.

Socage tenure, like all other forms of tenure, is of feudal origin (see note 1, *ante*, p. \*59); but yet Blackstone's statement is misleading if it teaches that the relation between the *farmers* or tillers of the soil and their lords was formed on feudal models, and the example of other feudal states. In all the continental states the line between the feudal law and that of the commonalty, *lehnrecht* and *landrecht*, was so drawn as to exclude the tillers of the soil altogether, and confine the *chivalry*, the *gentry*, and their system, to those who were above all labor except that of military life. So far as feudalism is a system common to all European states, and distinct from primitive Germanic (or Roman) law, it is certain that these *roturiers*, *ceorlas* were excluded from it.

In England alone, by a remarkable exception, though not a solitary one, their lands came to be treated as fees, *feuda*, and subject to the same rules of law with those of the highest nobles. Instead of a *lehnrecht* for one class

§ 114. (1) **Held of a superior lord.**—In the first place, then, both were held of superior lords; of the king as lord paramount, and sometimes of a subject or mesne lord between the king and the tenant.

§ 115. (2) **Services.**—Both were subject to the feudal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the ten-

and *landrecht* for the other, such as we find in the *Sachsenspiegel* and other continental books, there was one law on real property for both classes. It is this more than aught else that has given to English law that permeating feudal character, which has been so often noticed by continental writers of late years, while comparing it with their own systems, and at the same time it is this which has saved England from the immense gulf between the nobility and commons, that intensified all the evils of feudalism, and finally brought on the French revolution of 1789. The restriction of the peerage or "nobility" as a rank to eldest sons; the union of knights of the shire and burgesses in the house of commons; even the persistent life and strength of the jury system can hardly be shown to have had more influence than this community of legal rights between the knight or baron and the yeoman or socman. In truth, no comparison or weighing of relative effects is of any value; all these phenomena are parts of a single movement, effects of a single cause.

But it would be misleading to think with Blackstone that this unity of military and socage tenures was a natural consequence of the feudal system. On the contrary, it was a marked exception to the rule, and our history shows it. The new light thrown by recent research on the obscure period of the early Norman and Angevin reigns confirms the inferences from Glanvill and Bracton. In the earlier writer the line of demarcation between the knight and socman is plain. Primogeniture is the privilege of the former. Gavelkind is not mentioned because it is the rule as to socmen all over England where no local customs prevented.

In the latter, less than a century after, the socman and knight are not yet subject to the same rules of descent and of estate, as in Littleton, but they are so nearly alike that the gavelkind tenure of Kent remains a marked exception to the *common law*. We see that in the interval of—say two generations—the feudalism introduced by the Red King, and his brother and nephew, has been greatly modified, and compelled to admit the socman to share its privileges; that the line has been drawn not between the gentleman and the *roturier*, shutting out the farmer, but between the freeman and the villein including the socmen in the privileged class; and that the *franklin* or *socman* has been admitted to feudal privileges, from which on the Continent he was jealously excluded. The rule that all feuds which were paid for, or based on mercenary considerations, were *improper* was characteristic of continental systems, but never was fully accepted in England.—HAMMOND.

ant. In the military tenure, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate (though perhaps nothing more than bare fealty), and so continues to this day.

§ 116. (3) Fealty.—Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant.<sup>r</sup> Which oath of fealty usually draws after it suit to the lord's court. And this oath every lord, of whom tenements are holden at this day, may and ought to call upon his tenants to take in his court-baron; if it be only for the reason given by Littleton,<sup>s</sup> that if it be neglected, it will by long continuance of time grow out of memory (as doubtless it frequently has) whether the land be holden of the lord or not; and so he may lose his seignior, and the profit which may accrue to him by escheats and other contingencies.<sup>t</sup>

§ 117. (4) Aids.—The tenure in socage was subject, of common right, to aids for knighting the son and marrying the eldest daughter:<sup>u</sup> [87] which were fixed by the statute Westm. 1, c. 36, at 20s. for every 20*l.* *per annum* so held; as in knight service. These aids, as in tenure by chivalry, were originally mere benevolences, though afterwards claimed as matter of right; but were all abolished by the statute 12 Car. II (1660).

§ 118. (5) Reliefs.—Relief is due upon socage tenure, as well as upon tenure in chivalry: but the manner of taking it is very different. The relief on a knight's fee was 5*l.* or one-quarter of the

<sup>r</sup> Litt. §§ 117. 131.

<sup>s</sup> § 130.

<sup>t</sup> *Eo maxime præstandum est, ne dubium reddatur jus domini et vetustate temporis obscuretur.* (It is chiefly to be taken, lest the right of the lord should be rendered doubtful and obscured by length of time.) (Corvin. *jus Feod.* l. 2. t. 7.)

<sup>u</sup> Co. Litt. 91.

<sup>7</sup> It is said that the oath of fealty can, in strictness of law, be exacted from the socage tenant at the present day; but it is usually "respired." See 1 Stephen's Comm. (16th ed.), 126.

supposed value of the land; but a socage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small: <sup>w</sup> and therefore Bracton <sup>x</sup> will not allow this to be properly a relief, but *quædam præstatio loco relevii in recognitionem domini* (a certain payment of money instead of a relief as an acknowledgment of the lord). So, too, the statute 28 Edw. I, c. 1 (Confirmation of Great Charter, 1300), declares, that a free sokeman shall give *no relief*, but shall double his rent after the death of his ancestor, according to that which he hath used to pay his lord, and shall not be grieved above measure. Reliefs in knight service were only payable, if the heir at the death of his ancestor was of full age: but in socage they were due, even though the heir was under age, because the lord has no wardship over him.<sup>y</sup> The statute of Charles II reserves the reliefs incident to socage tenures; and therefore, wherever lands in fee simple are holden by a rent, relief is still due of common right upon the death of a tenant.<sup>z</sup>

§ 119. (6) **Primer seisin.**—Primer seisin was incident to the king's socage tenants *in capite*, as well as those by knight service.<sup>a</sup> But tenancy *in capite* as well as primer seisins, are also, among the other feudal burdens, entirely abolished by the statute.

§ 120. (7) **Wardship.**—Wardship is also incident to tenure in socage; but of a nature very different from that incident to knight service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor never did, belong to the lord of the fee; because, in this tenure no military or <sup>[88]</sup> other personal service being required, there was no occasion for the lord to take the profits, in order to provide a proper substitute for his infant tenant: but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. The guardian must be such a one, to whom the inheritance by no possibility can descend; as was fully explained, together with the reasons for it, in the former book of these Commentaries.<sup>b</sup> At

<sup>w</sup> Litt. § 126.

<sup>x</sup> 1. 2. c. 37. § 8.

<sup>y</sup> Litt. § 127.

<sup>z</sup> 3 Lev. 145.

<sup>a</sup> Co. Litt. 77.

<sup>b</sup> Book I. page 461.

fourteen this wardship in socage ceases; and the heir may oust the guardian, and call him to account for the rents and profits:° for at this age the law supposes him capable of choosing a guardian for himself. It was in this particular, of wardship, as also in that of marriage, and in the certainty of the render or service, that the socage tenures had so much the advantage of the military ones. But as the wardship ceased at fourteen, there was this disadvantage attending it: that young heirs, being left at so tender an age to choose their own guardians till twenty-one, they might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute 12 Car. II, c. 24 (Military Tenures, 1660), enacted, that it should be in the power of any father by will to appoint a guardian, till his child should attain the age of twenty-one. And, if no such appointment be made, the court of chancery will frequently interpose, and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

§ 121. (8) Marriage.—Marriage, or the *valor maritagii* (value of the marriage), was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For, if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage.<sup>d</sup> For, the law, in favor of infants, is always jealous of guardians, and therefore in this case it made them account, not only for what they *did*, but also for what they *might*, receive on the infant's behalf; [89] lest by some collusion the guardian should have received the value, and not brought it to account; but, the statute having destroyed all values of marriages, this doctrine of course hath ceased with them. At fourteen years of age the ward might have disposed of himself in marriage, without any consent of his guardian, till the late act for preventing clandestine marriages. These doctrines of wardship and marriage in socage tenure were so diametrically opposite to those in knight service, and so entirely agree with those parts of King Edward's laws, that were restored

° Litt. § 123. Co. Litt. 89.

<sup>d</sup> Litt. § 123.



by Henry the First's charter, as might alone convince us that socage was of a higher original than the Norman Conquest.<sup>8</sup>

§ 122. (9) **Fines.**—Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight service: for the statutes that relate to this point, and Sir Edward Coke's comment on them,<sup>9</sup> speak generally of all tenants *in capite*, without making any distinction: though now all fines for alienation are demolished by the statute of Charles the Second.

§ 123. (10) **Escheat.**—Escheats are equally incident to tenure in socage, as they were to tenure by knight service; except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs.<sup>10</sup>

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the restoration in 1660, when the former was abolished and sunk into the latter: so that lands of both sorts are now holden by the one universal tenure of free and common socage.<sup>10</sup>

§ 124. **Villeinage tenure.**—The other grand division of tenure, mentioned by Bracton as cited in the preceding chapter, is that of *villeinage*, as contradistinguished from *liberum tenementum*, or frank tenure. And (this we may remember) he subdivides into two classes, *pure* and *privileged*, villeinage: from whence have arisen two other species of our modern tenures.<sup>11</sup>

\* 1 Inst. 43. 2 Inst. 65, 66, 67.

† Wright, 210.

<sup>8</sup> The statute of Charles II destroyed all values of marriages.

<sup>9</sup> **Disappearance of escheats.**—The occurrence of escheat is now said to be rare; owing, partly, to the complete power of testamentary disposition which is enjoyed by all adult owners of fee simple estates, and partly to the abolition, by the Forfeiture Act of 1870, of the artificial form of escheat on conviction for felony. See 1 Stephen's Comm. (16th ed.), 128.

<sup>10</sup> The better known name for such tenure is, to-day, *freehold*.

<sup>11</sup> On villeinage, tenure in villeinage, and copyhold, see the authoritative book of Paul Vinogradoff, *Villeinage in England*; also, Williams, *Real Property*, Part III; Poll. & Maitl. Hist. Eng. Law.

§ 125. 1. **Pure villeinage: copyhold.**—<sup>[90]</sup> From the tenure of pure villeinage have sprung our present *copyhold* tenures, or tenure by copy of court roll at the will of the lord: in order to obtain a clear idea of which it will be previously necessary to take a short view of the original and nature of manors.

§ 126. a. **Manors.**—Manors are in substance as ancient as the Saxon constitution, though perhaps differing a little, in some immaterial circumstances, from those that exist at this day: <sup>g</sup> just as we observed of fiefs, that they were partly known to our ancestors, even before the Norman Conquest.<sup>12</sup> A manor, *manerium*, *a manendo* (from remaining), because the usual residence of the owner, seems to have been a district of ground, held by lords or great personages; who kept in their own hands so much land as was necessary for the use of their families, which were called *terræ dominicales*, or *demesne* lands; being occupied by the lord, or *dominus manerii* (the lord of the manor), and his servants. The other, or *teneemental*, lands they distributed among their tenants: which from the different modes of tenure were called and distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents and free services, and in effect differed nothing from free socage lands: <sup>h</sup> and from hence have arisen most of the freehold tenants who hold of particular manors, and owe

<sup>g</sup> Co. Cop. § 2. and 10.

<sup>h</sup> Co. Cop. § 3.

<sup>12</sup> **Origin and definition of manors.**—Halsbury's Laws of England (VIII, 3) gives the following as the origin and definition of manors:

"Before the statute of 'Quia Emptores' (18 Edw. I, c. 1, 1290), when the king gave land to one of his subjects and his heirs to hold of the king and his heirs, and the subject, after selecting a portion thereof for his own particular occupation, parceled out the whole or the greater part of the residue to his subordinates to be held of him in return for certain services to be paid or rendered to him by such subordinates, the subject had what was subsequently called a manor. By the statute of 'Quia Emptores' the creation of new manors was rendered impossible, except by express statutory enactment or by the crown under a custom existing before the passing of that statute.

"The nearest approach to an authoritative definition of a manor, without being an exact definition, is, that it is the seisin of a defined district, with the power of subinfeudation therein, and the existence of freeholders holding of the manor, and the right to a court-baron, in which the feudatories are judges."

suit and service to the same. The other species was called *folkland*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord, and resumed at his discretion; being indeed land held in villeinage, which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads, and for common of pasture to the lord and his tenants. Manors were formerly called baronies, as they still are lordships: and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor, and for settling disputes of property among the tenants. This court is an inseparable ingredient of every manor; and if the number [91] of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at the least, the manor itself is lost.<sup>13</sup>

§ 127. b. **Subinfeudation.**—In the early times of our legal constitution, the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be held of themselves; which do, therefore, now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors: and his seigniorship is frequently termed an honor, not a manor, especially if it hath belonged to an ancient feudal baron, or hath been at any time in the hands of the crown. In imitation whereof, these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum* (without limit); till the superior lords observed, that by this method of subinfeudation they lost all their feudal profits, of wardships, marriages, and escheats, which fell into the hands of these mesne or middle lords, who were the imme-

<sup>13</sup> Private jurisdictions of lords of various degrees, from the king downwards, holding courts on their own lands at which their tenants were entitled to seek justice for themselves and bound to attend that justice might be done their fellows, were characteristic of feudalism. 1 Poll. & Maitl. Hist. Eng. Law (2d ed.), 43. As to such jurisdiction in detail, see *Ibid.* 571 ff. There was originally, perhaps, only one court for both free and unfree tenants; but subsequently there were two courts, the court-baron for the freeholders, and the customary court for the copyholders: *Ibid.* 593; Digby, Hist. Real Prop. (5th ed.), 52.

diate superiors of the *terre-tenant*, or him who occupied the land: and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their services to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *magna carta*, 9 Hen. III (1225), (which is not to be found in the first charter granted by that prince, nor in the great charter of King John<sup>14</sup>) that no man should either give or sell his land, without reserving sufficient to answer the demands of his lord; and, afterwards the statute of Westm. 3, or *quia emptores*, 18 Edw. I, c. 1 (1290), which directs, that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions, not extending to the king's own tenants *in capite*, the like law concerning them is declared by the statutes of *prerogativa regis*, 17 Edw. II, c. 6 (1324), and of 34 Edw. III, c. 15 (Land, 1360), by which last all subinfeudations, previous to the reign of King Edward I were confirmed: but all subsequent to that period were left open to the king's prerogative. And from hence it is clear, that all manors existing at this day, must have existed as early as King Edward the First: for it is essential to a manor that there be tenants who hold of the lord; and, by the operation of these statutes, no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

§ 128. c. Folkland.—Now with regard to the folkland, or estates held in villeinage, this was a species of tenure neither

<sup>1</sup> See the Oxford editions of the charters.

<sup>14</sup> Magna Carta (1217), c. 39, provided: "No freeman from henceforth shall give or sell any more of his land, but so that of the residue of the lands the lord of the fee may have the service due to him which belongeth to the fee." This was repeated in the charter of 9 Hen. III, c. 32 (1225), and amended by the statute *Quia Emptores* (1290). See Digby, *Hist. Real Prop.* (2d ed.), 133; Challis, *Law Real Prop.* (3d ed.), 19. Blackstone (289, *post*) is apparently right in considering that the words of the statute aim at subinfeudation, and not at alienation. Halsbury, 24 *Laws of Eng.* 143 n. On the inalienability of lands held of the king without his consent, see Digby, *Hist. Real Prop.* (5th ed.), 157; Poll & Maitl. 1 *Hist. Eng. Law* (2d ed.), 335 ff.

strictly feudal, Norman, or Saxon; but mixed and compounded of them all:<sup>k</sup> and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks,<sup>1</sup> a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children, and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folkland, from which they were removable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that they, who were strangers to any other than a feudal state, might give some sparks of enfranchisement to such wretched persons as fell to their share, by admitting them, as well as others, to the oath of fealty; which conferred a right of protection, and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition.<sup>m 15</sup> This they called villeinage, and the tenants villeins, either from the word *vilis* (vile), or else, as Sir Edward Coke tell us,<sup>n</sup> *a villa* (from a village); because they lived chiefly in villages, and were employed in rustic works of the most sordid kind: like the Spartan *helotes*, to whom alone the culture of the lands was consigned; their rugged masters, like our northern ancestors, esteeming war the only honorable employment of mankind.

§ 129. d. Villeins.—<sup>[93]</sup> These villeins, belonging principally to lords of manors, were either villeins *regardant*, that is, annexed to the manor or land: or else they were *in gross*, or at large, that is, annexed to the person of the lord, and transferable by deed from

<sup>k</sup> Wright, 215.

<sup>m</sup> Wright. 217.

<sup>1</sup> Introd. Hist. Eng. 59.

<sup>n</sup> 1 Inst. 116.

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<sup>15</sup> This, though still the legal theory of the origin of the relationship of copyholder, cannot now be accepted as more than a legal fiction. Modern historians are practically unanimous in the view that copyholds represent a form of land ownership far older than feudal tenure; and that the claims of the lord were imposed upon a class previously established on the soil. The important legal fact, from which the legal theory is probably derived is, that until the end of the fifteenth century, the estate of the copyholder was not protected in the king's courts, but only in the manorial courts, and was, therefore, much at the mercy of the lord.—STEPHEN, 1 Comm. (16th ed.), 132 n.



one owner to another.<sup>o</sup> They could not leave their lord without his permission; but, if they ran away, or were purloined from him, might be claimed and recovered by action like beasts or other chattels. They held, indeed, small portions of land by way of sustaining themselves and families; but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lords' demesnes, and any other the meanest offices:<sup>p</sup> and their services were not only base, but uncertain both as to their time and quantity.<sup>q</sup> A villein, in short, was in much the same state with us, as Lord Molesworth<sup>r</sup> describes to be that of the boors in Denmark, and Stiernhook<sup>s</sup> attributes also to the *traals* or slaves in Sweden; which confirms the probability of their being in some degree monuments of the Danish tyranny. A villein could acquire no property either in lands or goods: but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them; for the lord had then lost his opportunity.<sup>t</sup>

In many places, also, a fine was payable to the lord, if the villein presumed to marry his daughter to anyone without leave from the lord:<sup>u</sup> and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property.<sup>w</sup> For the children of villeins were also in the same state of bondage with their parents; [94] whence they were called in Latin, *nativi*, which gave rise to the female appellation of a villein, who was called a *neife*.<sup>x</sup> In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the

<sup>o</sup> Litt. § 181.

<sup>p</sup> *Ibid.* § 172.

<sup>q</sup> *Ille qui tenet in villenagio faciet quicquid ei præceptum fuerit, nec scire debet sero quid facere debet in crastino, et semper tenebitur ad incerta.* (He who holds in villeinage shall do whatsoever he is commanded, nor ought he to know on the evening of one day what he must do on the morrow, but shall always be held to an uncertain service.) (Bracton. l. 4. tr. 1. c. 28.)

<sup>r</sup> C. 8.

<sup>s</sup> *De Jure Sueonum.* l. 2. c. 4.

<sup>t</sup> Litt. § 177.

<sup>u</sup> Co. Litt. 140.

<sup>w</sup> Litt. § 202.

<sup>x</sup> Litt. § 187.

condition of the father, being free if he was free, and villein if he was villein; contrary to the maxim of the civil law, that *partus sequitur ventrem* (the offspring follows the condition of its mother). But no bastard could be born a villein, because by another maxim of our law he is *nullius filius* (the son of nobody); and as he can gain nothing by inheritance, it were hard that he should lose his natural freedom by it.<sup>7</sup> The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord: for he might not kill or maim his villein;<sup>8</sup> though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor, or the maim of his own person. Neifes indeed had also an appeal of rape, in case the lord violated them by force.<sup>9</sup>

§ 130. (1) **Enfranchisement of villeins.**—Villeins might be enfranchised by manumission, which is either express or implied: express, as where a man granted to the villein a deed of manumission:<sup>b</sup> implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee, for life or years;<sup>c</sup> for this was dealing with his villein on the footing of a freeman, it was in some of the instances giving him an action against his lord, and in others, vesting an ownership in him entirely inconsistent with his former state of bondage. So, also, if the lord brought an action against his villein, this enfranchised him;<sup>d</sup> for, as the lord might have a short remedy against his villein, by seizing his goods (which was more than equivalent to any damages he could recover) the law, which is always ready to catch at anything in favor of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied [95] manumission. But, in case the lord indicted him for felony, it was otherwise; for the lord could not inflict a capital punishment on his villein, without calling in the assistance of the law.

§ 131. (2) **Emergence of copyhold tenure.**—Villeins, by this and many other means, in process of time gained considerable

<sup>7</sup> *Ibid.* § 187. 188.

<sup>8</sup> *Ibid.* § 189. 194.

<sup>9</sup> *Ibid.* § 190.

<sup>b</sup> *Ibid.* § 204.

<sup>c</sup> § 204, 5, 6.

<sup>d</sup> § 208.

ground on their lords; and in particular strengthened the tenure of their estates to that degree, that they came to have in them an interest in many places full as good, in others better than their lords. For the good nature and benevolence of many lords of manors having, time out of mind, permitted their villeins and their children to enjoy their possessions without interruption, in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords; and, on performance of the same services, to hold their lands in spite of any determination of the lord's will. For, though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor; which customs are preserved and evidenced by the rolls of the several courts-baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie. And, as such tenants had nothing to show for their estates, but these customs and admissions in pursuance of them, entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called *tenants by copy of court roll*, and their tenure itself a *copyhold*.\*

§ 132. (3) Disappearance of villeins.—Thus copyhold tenures, as Sir Edward Coke observes,<sup>f</sup> although very meanly descended, yet come of an ancient house; for, from what has been premised, it appears that copyholders are in truth no other but villeins, who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates, which before were held absolutely at the lord's will.<sup>16</sup> Which affords [96] a very

\* F. N. B. 12.

<sup>f</sup> Cop. § 32.

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<sup>16</sup> History of copyholds.—It is not very difficult to form a reasonable conception of the early history of copyholds. Positive proof we can hardly expect, as our authorities are very scanty for the first century after Domesday, and we have hardly any detailed records in the shape of court rolls and accounts for another century after that. Unfortunately the whole subject has in modern times been confused by the ambiguous use of words. The meaning of the old *villanus*, which was at first no less honorable a name than our yeoman, became degraded after the Conquest, and both in Latin and in the French form *villein* it was used to stand for *nativus*, with which it properly had nothing to do. The old customary tenure by labor-rents was still called villeinage, and thus

substantial reason for the great variety of customs that prevail in different manors, with regard both to the descent of the estates and the privileges belonging to the tenants. And these encroachments grew to be so universal, that when tenure in villeinage was virtually abolished (though copyholds were reserved), by the statute of Charles II, there was hardly a pure villein left in the nation. For Sir Thomas Smith<sup>g</sup> testifies that in all his time (and he was secretary to Edward VI) he never knew any villein in gross throughout the realm; and the few villeins regardant that were then remaining were such only as had belonged to bishops, monasteries, or other ecclesiastical corporations, in the preceding times

<sup>g</sup> Commonwealth, b. 3. c. 10.

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the customary tenants and the bondmen became completely mixed up in the apprehension of modern text-writers. Mediæval lawyers, no doubt, strove to be accurate with this awkward nomenclature. When they meant *nativus*, they spoke in express terms of a 'villein by blood.' They were careful to distinguish the old or privileged villeinage, which was really a free though more or less onerous tenure, from the villeinage of base and uncertain tenure, and again to distinguish the service due in respect of the land from the personal condition of the holder. But in later times these things were overlooked, and the result was the popular account of copyholds: namely, that (in Blackstone's language) 'copyholders are in truth no other than villeins, who by a long series of immemorial encroachments on the lord have at last established a customary right to those estates which before were held absolutely at the lord's will': villeins being understood as villeins by blood or *nativi*. It would be nearer the truth to say that by a long series of encroachments and fictions the lords, and lawyers acting in the interest of the lords, got people to believe that the lord's will was the origin of those ancient customary rights which before were absolute. When we have once shaken off the false theory of Blackstone (I say of Blackstone, for I cannot find that anybody stated it so positively before him), the nature of existing copyhold customs is really enough by itself to carry conviction of their great antiquity. Of this kind is the custom of "borough-English," or, as it is more expressively called in some parts, "cradle-holding," by which the course of descent is neither to the eldest son as at common law, nor to all equally as in the old tenure of gavelkind which still subsists in Kent, but to the youngest son exclusively. Such a rule of descent is very difficult to account for. But the difficulty we now have in understanding it is some proof that it comes down from a forgotten condition of society; and the fact that it was so deeply rooted as to survive the Norman Conquest seems to show that it was ancient then. Similar customs are found in various parts of Europe, and in some cases have been kept up in modern times in spite of the modern law taking no account of them. Probably the explanation is that there

of popery. For he tells us that "the holy fathers, monks and friars had in their confessions, and especially in their extreme and deadly sickness, convinced the laity how dangerous a practice it was for one Christian man to hold another in bondage; so that temporal men by little and little, by reason of that terror in their consciences, were glad to manumit all their villeins. But the said holy fathers, with the abbots and priors, did not in like sort by theirs; for they also had a scruple in conscience to impoverish and despoil the church so much as to manumit such as were bond to their churches, or to the manors which the church had gotten; and so kept their villeins still." By these several means the generality of villeins in the kingdom have long ago sprouted up into copyholders; their persons being enfranchised by manumission or long acquiescence; but their estates, in strictness, remaining subject to the same servile conditions and forfeitures as before; though, in general, the villein services are usually commuted for a small pecuniary quit-rent.<sup>a</sup>

§ 133. e. Incidents of copyhold.—[97] As a further consequence of what has been premised, we may collect these two main

<sup>a</sup> In some manors the copyholders were bound to perform the most servile offices, as to hedge and ditch the lord's grounds, to lop his trees and reap his corn, and the like; the lord usually finding them meat and drink, and sometimes (as is still the use in the highlands of Scotland) a minstrel or piper for their diversion. (Rot. Maner. de Edgware Com. Midd.) As in the kingdom of Whidah, on the slave coast of Africa, the people are bound to cut and carry in the king's corn from off his demesne lands, and are attended by music during all the time of their labor. (Mod. Un. Hist. xvi. 429.)

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was a time when each son of a family as he came of age was entitled to an allotment out of common land. Thus the sons in turn parted off from the family and were provided for, and the homestead was left for the youngest. Such a state of things is actually recorded in the old Welsh laws. It might be inferred that the custom as found in England is of Welsh origin, and is in fact a primitive usage which has survived not only the Norman but the English Conquest. In that case, however, we should expect to find it prevalent not in the south and center, but in the west and southwest of England. Whatever account may be given of particular customs, we need have no fear in saying that the modern copyholders are the historical successors of the Old English free landholders who had inheritable titles according to local custom, evidenced not by writing but by the witness of the neighbors, and paid dues and services originally to the state or community, and afterwards to a lord.—POLLOCK, *Land Laws*, 46.



principles which are held<sup>1</sup> to be the supporters of the copyhold tenure, and without which it cannot exist; 1. That the lands be parcel of, and situate within that manor, under which it is held. 2. That they have been demised, or demisable, by copy of court roll immemorially. For immemorial custom is the life of all tenures by copy; so that no new copyhold can, strictly speaking, be granted at this day.<sup>17</sup>

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only; for the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death; nor in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

The fruits and appendages of a copyhold tenure, that it hath in common with free tenures, are fealty, services (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance; the former to those for life also. But besides these, copyholds have also heriots, wardship, and fines. Heriots, which I think are agreed to be a Danish custom, and of which we shall say more hereafter, are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. This is plainly a relic of villein tenure; there being originally less hardship in it, when all the goods and chattels belonged to the lord, and he might have seized them even in the villein's lifetime. These are incident to both species of copyhold; but wardship and fines to those of inheritance only. Wardship, [181] in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian;

<sup>1</sup> Co. Litt. 58.

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<sup>17</sup> Copyhold Act of 1894.—Under the Copyhold Act of 1894, section 81, when a custom of the manor allows the grant of new copyholds, such grant cannot now be made without the consent of the Board of Agriculture; and when so made, the land ceases to be of copyhold tenure, and is vested in the grantee as in free and common socage.

who usually assigns some relation of the infant tenant to act in his stead: and he, like guardian in socage, is accountable to his ward for the profits. Of fines, some are in the nature of primer seisins, due on the death of each tenant, others are mere fines for alienation of the lands; in some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but, even when arbitrary, the courts of law, in favor of the liberty of copyholders have tied them down to be *reasonable* in their extent; otherwise they might amount to a disherison of the estate. No fine, therefore, is allowed to be taken upon descents and alienations (unless in particular circumstances) of more than two years improved value of the estate.<sup>k 18</sup> From this instance we may judge of the favorable disposition that the law of England (which is a law of liberty) hath always shown to this species of tenants; by removing, as far as possible, every real badge of slavery from them, however some nominal ones may continue. It suffered custom very early to get the better of the express terms upon which they held their lands; by declaring that the will of the lord was to be interpreted by the custom of the manor; and where no custom has been suffered to grow up to the prejudice of the lord, as in this case of arbitrary fines, the law itself interposes in an equitable method, and will not suffer the lord to extend his power so far as to disinherit the tenant.

Thus much for the ancient tenure of *pure* villeinage, and the modern one of *copyhold at the will of the lord*, which is lineally descended from it.

§ 134. 2. Privileged villeinage, or villeinage socage.—There is yet a fourth species of tenure, described by Bracton under the name sometimes of *privileged* villeinage, and sometimes of *villein socage*. This he tells us,<sup>1</sup> is such as has been held of the kings of England from the Conquest [99] downwards; that the tenants

<sup>k</sup> 2 Ch. Rep. 134.

<sup>1</sup> l. 4. tr. 1. c. 28.

<sup>18</sup> In *Fraser v. Mason*, [1883] 10 Q. B. D. 398, it was held that a lord, who is entitled by the custom of the manor to a reasonable fine upon admission to a copyhold tenement may demand and recover such fine by the description of three years' improved annual value of the tenement.

herein “*villana faciunt servitia, sed certa et determinata* (they perform villein services, but certain and fixed); that they cannot alien or transfer their tenements by grant or feoffment, any more than pure villeins can; but must surrender them to the lord or his steward, to be again granted out and held in villeinage. And from these circumstances we may collect, that what he here describes is no other than an exalted species of copyhold, subsisting at this day, viz., the tenure in *ancient demesne*; to which, as partaking of the baseness of villeinage in the nature of its services, and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.

§ 135. a. *Ancient demesne*.—Ancient demesne consists of those lands or manors, which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor, or William the Conqueror; and so appear to have been by the great survey in the exchequer called Domesday-book.<sup>m</sup> The tenants of these lands, under the crown, were not all of the same order or degree. Some of them, as Britton testifies,<sup>n</sup> continued for a long time pure and absolute villeins, dependent on the will of the lord: and those who have succeeded them in their tenures now differ from common copyholders in only a few points.<sup>o</sup> Others were in great measure enfranchised by the royal favor: being only bound in respect of their lands to perform some of the better sort of villein services, but those determinate and certain; as, to plow the king’s land for so many days, to supply his court with such a quantity of provisions, and the like; all of which are now changed into pecuniary rents: and in consideration hereof they had many immunities and privileges granted to them;<sup>p</sup> as, to try the right of their property in a peculiar court of their own, called a court of ancient demesne, by a peculiar process denominated a writ of *right close*:<sup>q</sup> not to pay toll or taxes;<sup>19</sup> not to con-

<sup>m</sup> F. N. B. 14. 16.

<sup>p</sup> 4 Inst. 269.

<sup>n</sup> C. 66.

<sup>q</sup> F. N. B. 11.

<sup>o</sup> F. N. B. 228.

<sup>19</sup> Queen v. Aylesford, [1860] 2 E. & E. 538, 121 Eng. Reprint, 202.

tribute to the expenses of knights of the shire; not to be put on juries, and the like.<sup>r20</sup>

§ 136. b. **Services of the tenants.**—<sup>[100]</sup> These tenants, therefore, though their *tenure* be absolutely copyhold, yet have an *interest* equivalent to a freehold: for, though their services were of a base and villeinous original,<sup>s</sup> yet the tenants were esteemed in all other respects to be highly privileged villeins; and especially for that their services were fixed and determinate, and that they could not be compelled (like pure villeins) to relinquish these tenements at the lord's will, or to hold them against their own: "*et ideo*, says Bracton, *dicuntur liberi* (and therefore they are called free)."<sup>21</sup> Britton also, from such their freedom, calls them absolutely *sokemans*, and their tenure *sokemanries*; which he describes<sup>t</sup> to be "lands and tenements, which are not held by knight service, nor by grand serjeanty, nor by petit, but by simple services, being as it were lands enfranchised by the king or his predecessors from their ancient demesne." And the same name is also given them in Fleta.<sup>u</sup> Hence Fitzherbert observes,<sup>w</sup> that no lands are ancient demesne, but lands holden in socage: that is, not in free and common socage, but in this amphibious, subordinate class, of villein

<sup>r</sup> *Ibid.* 14.

<sup>u</sup> l. 1. c. 8.

<sup>s</sup> Gilb. Hist. of Exch. 16 & 30.

<sup>w</sup> N. B. 13.

<sup>t</sup> C. 66.

<sup>20</sup> **Ancient demesne.**—Manors of ancient demesne, that is, manors which belonged to the crown in the time of Edward the Confessor or William I, may include freehold, customary freehold, and copyhold tenants. The freehold tenants are known as tenants in ancient demesne, and formerly they were entitled to certain immunities, and they could only sue and be sued in respect of their tenements by action in the lord's court—the court of ancient demesne—commenced by writ of right close. But the immunities are obsolete, and this local procedure has been abolished. Consequently tenure in ancient demesne has ceased to be of practical importance, though in ancient demesne manors, as elsewhere, it may still be necessary to distinguish between freeholds and customary freeholds or privileged copyholds, and to ascertain the customs affecting either kind of holding.—HALSBURY, 24 Laws of England, 150.

<sup>21</sup> In *Merttens v. Hill*, [1901] 1 Ch. 842, it was held that in the case of tenants in ancient demesne, the freehold is in the tenant, not in the lord. The tenants in question represented soemen mentioned in the Domesday Book, who were called free tenants in very early documents.

socage. And it is possible, that as this species of socage tenure is plainly founded upon predial services, or services of the plow, it may have given cause to imagine that all socage tenures arose from the same original for want of distinguishing, with Bracton, between free socage or socage of frank-tenure, and villein socage or socage of ancient demesne.

§ 137. c. *Character of the tenure.*—Lands holden by this tenure are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. Yet they differ from common copyholds, principally in the privileges before mentioned, as also they differ from freeholders by one especial mark and tincture of villeinage, noted by Bracton and remaining to this day; viz., that they cannot be conveyed from man to man by the general common-law conveyances of feoffment, and the rest; but must pass by surrender to the lord or his steward, in the manner of common copyholds: [\*101] yet with this difference,\* that, in the surrender of these lands in ancient demesne, it is not used to say “*to hold at the will of the lord*” in their copies, but only “*to hold according to the custom of the manor.*”<sup>22</sup>

Thus have we taken a compendious view of the principal and fundamental points of the doctrine of tenures, both ancient and modern, in which we cannot but remark the mutual connection and dependence that all of them have upon each other. And upon the whole it appears that, whatever changes and alterations these tenures have in process of time undergone, from the Saxon era to the 12 Car. II (1660), all lay tenures are now in effect reduced to two species; *free tenure in common socage*, and *base tenure by copy of court roll*.

I mentioned *lay tenures* only; because there is still behind one other species of tenure, reserved by the statute of Charles II, which is of a *spiritual* nature, and called the tenure in frankalmoigne.

\* Kitchen on Courts. 194.

<sup>22</sup> This “privileged copyhold” or “villein socage” seems to have been regarded by Coke as “copyhold of frank tenure,” that is to say, of freehold tenure. This was contested by Blackstone (Law Tracts, 220), and in accordance with his argument the view has since prevailed that, while there is a freehold interest in the tenant, he has no freehold tenure.—HALSBURY, 24 Laws of England, 149 n.



§ 138. *Tenure in frankalmoigne*.—Tenure in *frankalmoigne*, *in libera elemosyna*, or free alms, is that, whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever.<sup>7</sup> The service which they were bound to render for these lands was not certainly defined: but only in general to pray for the souls of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this<sup>2</sup>) because this divine service was of a higher and more exalted nature.<sup>3</sup> This is the tenure, by which almost all the ancient monasteries and religious houses held their lands; and by which the parochial clergy, and very many ecclesiastical and eleemosynary foundations, hold them at this day;<sup>b</sup> the nature of the service being upon the Reformation altered, and made conformable to the purer doctrines [<sup>102</sup>] of the church of England. It was an old Saxon tenure; and continued under the Norman revolution, through the great respect that was shown to religion and religious men in ancient times. Which is also the reason that tenants in *frankalmoigne* were discharged of all other services, except the *trinoda necessitas* (threefold necessity), of repairing the highways, building castles, and repelling invasions:<sup>c</sup> just as the Druids, among the ancient Britons, had *omnium rerum immunitatem* (exemption from all offices).<sup>d</sup> And, even at present, this is a tenure of a nature very distinct from all others; being not in the least feudal, but merely spiritual. For if the service be neglected, the law gives no remedy by distress or otherwise to the lord of whom the lands are holden; but merely a complaint to the ordinary or visitor to correct it.<sup>e</sup> Wherein it materially differs from what was called *tenure by divine service*: in which the tenants were obliged to do some special divine services in certain; as to sing so many masses, to distribute such a sum in alms, and the like; which, being expressly defined and prescribed, could with no kind of propriety be called *free* alms; especially as for this, if unperformed, the lord might distrain, without any complaint to the visitor.<sup>f</sup> All such donations are indeed now out of use: for, since the statute of *quia*

<sup>7</sup> Litt. § 133.<sup>2</sup> *Ibid.* 131.<sup>3</sup> *Ibid.* 135.<sup>b</sup> Bracton, l. 4. tr. 1. c. 28. § 1.<sup>c</sup> Seld. Jan. 1. 42.<sup>d</sup> Cæsar de bell. Gall. l. 6. c. 13.<sup>e</sup> Litt. § 136.<sup>f</sup> *Ibid.* 137.

*emptores*, 18 Edw. I (1290), none but the king can give lands to be holden by this tenure.<sup>§</sup> So that I only mention them, because *frankalmoigne* is excepted by name in the statute of Charles II, and therefore subsists in many instances at this day. Which is all that shall be remarked concerning it; herewith concluding our observations on the nature of tenures.

§ *Ibid.* 140.

§ 139. **Estates.**—The next objects of our disquisitions are the nature and properties of *estates*. An estate in lands, tenements and hereditaments, signifies such interest as the tenant hath therein; so that if a man grants all *his estate* in Dale to A and his heirs, everything that he can possibly grant shall pass thereby.<sup>a</sup> It is called in Latin, *status*; it signifying the condition, or circumstance, in which the owner stands, with regard to his property.<sup>1</sup> And, to ascertain this with proper precision and accuracy, estates may be considered in a threefold view: first, with regard to the *quantity of interest* which the tenant has in the tenement: secondly, with regard to the *time* at which that quantity of interest is to be enjoyed: and, thirdly, with regard to the *number and connections* of the tenants.<sup>2</sup>

<sup>a</sup> Co. Litt. 345.

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1 **Conception of "estate."**—The conception of an "estate" in lands is a peculiar characteristic of English law. It is regarded, as has been seen, as an interest falling short of complete ownership, but capable of differences in extent or duration. Thus where an interest is given to A for life, and after his death to B for life, and after his death to C in fee, all these interests are regarded as *estates*, varying in duration or extent, and in the time of their coming into possession or enjoyment. The interest or right passes at once to the successive grantees. The grantor is regarded, not as parting with the whole ownership to A, with a proviso that after A's death it is to go to B, and after B's death to C, but as carving out of his estate two smaller interests or estates, and then as having still the fee simple or inheritance to give away, the grant of which exhausts all the interest in the lands which he has to bestow, which yet does not amount to the complete ownership of the land. Thus the fee simple is regarded as the largest estate—the nearest approach to absolute ownership—which the law recognizes; an estate-tail, an estate for life, an estate for years are regarded as smaller or shorter interests, which cannot exist without the fee simple at the same time residing in some person other than him who has the smaller or "particular" estate.—DIGBY, Hist. Real Prop. (5th ed.), 309.

2 **Meaning and kinds of estates.**—It must therefore be carefully distinguished from the modern use of the term by which "estate" is made to signify the property itself, the object of ownership. It is in this colloquial sense that we speak of real estate and personal. Lands, tenements, and hereditaments are real estate. Personal estate is also a general term consisting of two species,

First, with regard to the *quantity of interest* which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life, or the life of another man; to determine at his own decease, or to remain to his descendants after him: or it is circumscribed within a certain number of years, months, or days: or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. And this occasions the primary division of [<sup>104</sup>] estates, into such as are *freehold*, and such as are *less than freehold*.

chattels real and chattels personal. The species "chattel real" is so called, not because it is a real estate, but because it has a real extraction. The word "estate" thus comprehends both freehold and chattel, as well real as personal. (Countess of Bridgewater v. Duke of Bolton, 6 Mod. 107, 87 Eng. Reprint, 866.) Strictly taken, "estate importeth the interest which a man has in lands." (Comyn.) It is his right to the land in a concrete form. In the older books it is sometimes defined as "time in the land, or land for a time." (Walsingham's Case, Plow. 555; 1 Cruise, tit. 1, § 11; Wharton on Conveyancing, pp. 8, 11.) But that is only because the time for which property is to be enjoyed furnishes a convenient measure or mark of the quantity or extent of right which the party enjoys in it. For as a man who owns the fee simple may do as he pleases with the land, not only for his own life, but also during that practically unlimited period, during which by legal presumption the lives of heirs may extend, to the remotest generation, he must necessarily have the power to do many acts which are forbidden to him who holds for life only, and is therefore bound, at no distant day, to hand over the property to the next owner in as good condition as he received it. This is very plainly seen in the English books, where the rights which the holder of any estate may exercise over the property are distinctly enumerated, and are seen to increase or diminish in exact proportion to the length of time during which the estate may possibly last: e. g., Wharton on Conveyancing. Here in the United States we have practically reduced the number of estates to three or four, but the powers of different holders are as truly measured by the same rule as ever.

An estate in land, therefore, may be described as the sum or legal measure of the rights which each owner of property, whether his ownership be complete or partial, may exercise over the close in question. Now, it is evident that these rights will depend on several independent circumstances, and consequently, estates may be classified in several different ways, beside the three enumerated by Blackstone.

The most important of these are as follows:—

*First.* The *quantity* of estates is another name for their duration, or the time during which they may possibly last, not only in itself, but as measuring

§ 140. 1. Estates of freehold.—An estate of freehold, *liberum tenementum*, or frank-tenement, is defined by Britton<sup>b</sup> to be “the possession of the soil by a freeman.” And St. Germyn<sup>c</sup> tells us, that “the possession of the land is called in the law of England the frank-tenement or freehold.” Such estate, therefore, and no other, as requires actual possession of the land, is, legally speaking, *freehold*: which actual possession can, by the course of the

<sup>b</sup> C. 32.

<sup>c</sup> Dr. & Stud. b. 2. d. 22.

the present amount of power which may be exercised over it. The division of estates in quantity is given by Blackstone in this chapter.

For our purposes the only classes deserving special attention are (a) fee simple; (b) estate for life, of one's self or of another; these two being both included under the term “freehold”; (c) estate for years; (d) estate at will, or from year to year, or by the month, week, etc.

*Secondly.* The *quality* of an estate is a term used by some writers to designate two different elements of the right, which Blackstone and others treat separately, viz., the time of enjoyment, and number of tenants.

The *time of enjoyment* is to be carefully distinguished from the time of duration or quantity. It denotes the time at which the enjoyment is to commence, and the only natural division is, of course, between estates already in possession, and estates still in expectancy. But as these last differ in some respects as to the manner of their creation, we have here three; (a) estates in possession (the normal form); (b) estates in remainder; (c) estates in reversion (b and c being in expectancy).

*Thirdly.* A man may have an estate either in the whole of a close, or in any undivided fraction of it. This of itself we now regard as naturally a distinction rather in the object of the right, than in the nature of the right. But the common law had a peculiar view of joint tenancy, and generally of this subject, derived from its doctrine of seisin, etc. All the co-owners of a close were regarded as constituting, so to speak, a single owner of a peculiar kind, and as the circumstances of the co-ownership varied, there were several kinds of it, with important distinctions in their mutual rights. You will find these enumerated in chapter 12, as known to the common law.

The only ones of importance to us are (a) severalty, the usual and normal form; (b) joint tenancy, including that in entirety; (c) tenancy in common, with which coparcenary is now identified; (d) tenancy in partnership. This last is entirely unknown to the common law, where it was in common, but is rapidly becoming a well-recognized distinct estate, especially in equity.

*Fourthly.* Any estate may be made to commence or to terminate, or to be enlarged upon the happening of a contingent event, and we have a division of estates into (a) absolute (the normal form); (b) conditional.

*Fifthly.* The distinction of law and equity has led to a classification peculiar to our law, between the estates which are recognized alike by all courts and



common law, be only given by the ceremony called livery of seisin, which is the same as the feudal investiture.<sup>3</sup> And from these principles we may extract this description of a freehold; that it is such an estate in lands as is conveyed by livery of seisin; or, in tenements of an incorporeal nature, by what is equivalent thereto. And accordingly it is laid down by Littleton,<sup>d</sup> that where a freehold shall pass, it behooveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates.

<sup>d</sup> § 59.

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in all kinds of action, and those which lack the formalities of a legal estate, and are recognized only in equity. Thus the purchaser of property who has not yet got his deed, but has gone into possession, or acquired in any way specific rights, is regarded in equity as being already possessed of just such an estate as he will have at law when the transaction is complete. This distinction is of much less importance with us than in England, because nearly all our courts take notice of equitable as well as legal titles, and because under our codes an equitable title may usually be set up even in an action at law. Still it has many important applications, and estates are therefore divided into (a) legal; (b) equitable.

There is also a distinction in the books between executed and executory estates, but it belongs more to title than it does to estate, and so far as it has any importance here, it is equivalent to the distinction between legal and equitable estates. (See 1 Washburn, c. 1, pl. 41.)

The five classes above given are independent of each other. No one of them is a subdivision of any other. Every estate must belong to each of the five classes, so that they are *not* mutually exclusive, but the divisions under each class *are* mutually exclusive; i. e., any estate found in one division under a given class will not be found in any other division of the same class.

As these classes are independent of each other, the position in one will not determine the position in another. This is so legally, though practically there are reasons why certain combinations do not exist.—HAMMOND.

<sup>3</sup> **Livery of seisin and grant.**—In the United States, the delivery of a deed of conveyance is regarded now as equivalent to livery of seisin, and vests the estate conveyed in the grantee without other solemnity. It also estops the grantor, and all claiming under him, or by subsequent grant from him, to deny the former grantee's title, which of itself would be sufficient to make actual delivery of possession needless. (Parsons, C. J., in *Proprietor of Kennebeck Purchase v. Springer*, 4 Mass. 416, 3 Am. Dec. 227; *Gilliam v. Bird*, 30 N. C. 280, 49 Am. Dec. 379; 3 Washburn on Real Property, 160 or \*494; Schwall-

§ 141. a. **Estates of inheritance.**—Estates of freehold, then, are divisible into estates *of inheritance*, and estates *not of inheritance*. The former are again divided into inheritances *absolute* or fee simple; and inheritances *limited*, one species of which we usually call fee-tail.

§ 142. (1) **Fee-simple estates.**—Tenant in fee simple (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments, to hold to him and his heirs forever;<sup>e</sup> generally, absolutely, and simply; without mentioning *what* heirs, but referring that to his own pleasure, or to the disposition of the law.<sup>4</sup> The true meaning of the word “fee” (*feodum*) is the same with that of feud or fief, and in its original sense it is [105] taken in contradistinction to *allodium*;<sup>f</sup> which latter the writers on this

• Litt. § 1.

† See pag. 45. 47.

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back v. Chicago, M. & St. P. Ry. Co., 69 Wis. 292, 2 Am. St. Rep. 740, 34 N. W. 128.)

In England, since 1845, by statute 8 & 9 Vict. c. 106, section 2, the common form of conveyance is a grant which conveys the seisin without the help of livery; depending for its effect on the provision of that statute, which enacted that after October 1, 1845, all corporeal tenements and hereditaments should, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as livery. The reference to the freehold is not a limitation of the effect, since reversions and remainders always passed by grant. But the word “grant” is not necessary for either corporeal or incorporeal; “convey” or other words of same meaning do as well. (Conveyancing Act of 1881, § 49.)

If we say that by general custom in the United States the same is true here, *semble*, that it will state the law more accurately than any amount of learned speculation on the operation of our deeds, either by the common law of England or by the statute of uses.—HAMMOND.

4 **Tenant in fee simple.**—Fee simple is an estate of perpetuity, and confers unlimited power of alienation, and no person is capable of having a greater estate or interest in the land. Every restraint upon alienation is inconsistent with the nature of a fee simple; and if a partial restraint be annexed to a fee, as a condition not to alien for a limited time, or not to a particular person, it ceases to be a fee simple and becomes a fee subject to a condition. (4 Kent, 5; 1 Washburn, c. 3, pl. 45–47.) A condition absolutely prohibiting alienation of an estate in fee simple is held to be repugnant to the grant, and therefore void. (Large’s Case, 2 Leon. 82, 74 Eng. Reprint, 376; *Ide v. Ide*, 5 Mass. 500; *Blackstone Bank v. Davis*, 21 Pick. (Mass.) 42, 32 Am. Dec. 241; *Hall v. Tufts*, 18 Pick. (Mass.) 455; *Attwater v. Attwater*, 18 Beav. 330, 52

subject define to be every man's own land, which he possesseth merely in his own right, without owing any rent or service to any superior. This is property in its highest degree; and the owner thereof hath *absolutum et directum dominium* (the absolute and direct ownership), and therefore is said to be seised thereof absolutely in *dominico suo*, in his own demesne. But *feodum* or fee, is that which is held of some superior, on condition of rendering him service; in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman<sup>c</sup> defines a feud or fee to be the right which the vassal or tenant hath in lands, to *use* the same, and take the profits thereof to him and his heirs, rendering to the lord his due services; the mere allodial *propriety* of the soil always remaining in the lord: This allodial property no subject in England has;<sup>h</sup> it being a received, and now undeniable, principle

<sup>c</sup> Of Feuds, c. 1.

<sup>h</sup> Co. Litt. 1.

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Eng. Reprint, 130, overruling *Doe v. Pearson*, 6 East, 173, 102 Eng. Reprint, 1253; and fullest of all, J. C. Gray, *Restraints on the Alienation of Property*, Boston, 1883.)

Although the owner in fee simple has an absolute power of controlling his property, and can do what he pleases with it, generally speaking, there is one very important limitation upon this power.

He cannot change the state's law of descent, e. g., he cannot make it descend to sons only. All he can do is to give it, or rather to give particular estates in it, to specified individuals during a limited period. He can give it to whom he pleases for life, or for years, with a remainder over to the grantee's oldest son, or to any other individual, whether existing or not, if properly specified and limited.

In this case, of course, no person can change the disposition made of it, until the last remainderman entitled to take comes into being and into possession of the estate.

Formerly many attempts were made by ingenious limitations to keep the property in this condition for many generations. (4 Kent, 271-281; Deane, 224, 225, and *post* as to remainders.) It is evident that this would change the law of the state so far as this particular property was concerned, by substituting for a fee simple an endless succession of life estates. To prevent the evils growing out of such settlements, statutes in regard to perpetuities have been passed. The main object of all of them is to secure the falling back of the property into the hands of an owner in fee simple within a reasonable time, which varies in the different states.—HAMMOND.

Blackstone's explanation of an estate in fee simple is that a tenant in fee simple holds to him and his heirs forever, generally, absolutely and simply,

in the law, that all the lands in England are holden mediately or immediately of the king. The king, therefore, only hath *absolutum et directum dominium*:<sup>1</sup> but all subjects' lands are in the nature of *feodum* or fee; whether derived to them by descent from their ancestors, or purchased for a valuable consideration: for they cannot come to any man by either of those ways, unless accompanied with those feudal clogs, which were laid upon the first feudatory when it was originally granted. A subject, therefore, hath only the usufruct, and not the absolute property of the soil; or, as Sir Edward Coke expresses it,<sup>k</sup> he hath *dominium utile*, but not *dominium directum*. And hence it is that, in the most solemn acts of law, we express the strongest and highest estate that any subject can have, by these words; "he is seised thereof *in his demesne, as of fee*." It is a man's demesne, *dominicum*, or property, since it belongs to him and his heirs forever: yet this *dominicum*, property, or demesne, is strictly not absolute or allodial, but qualified or feudal: it is his demesne, *as of fee*; that is, it is not purely and simply his own, since it is held of a superior lord, in whom the ultimate property resides.

[106] This is the primary sense and acceptation of the word "*fee*." But (as Sir Martin Wright very justly observes<sup>1</sup>) the doctrine, "that all lands are holden," having been for so many

<sup>1</sup> *Prædium domini regis est directum dominium, cujus nullus est author nisi Deus*. (The estate of the king is direct ownership, of which God alone is the author.) *Ibid*.

<sup>k</sup> *Ibid*.

<sup>1</sup> Of Ten. 148.

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without mentioning *what* heirs, but referring that to his own pleasure, or the disposition of the law (2 Bl. Comm. 104. See, however, 3 Bl. Comm. 224. where the correct account is given). But the idea of nominating an heir to succeed to the inheritance has no place in the English law, however it might have obtained in the Roman jurisprudence. The heir is always appointed by the law, the maxim being *Solus Deus hæredem facere potest, non homo* (1 Reeve's Hist. Eng. Law, 105; Co. Litt. 191 a, n. (1), vi, 3); and all other persons, whom a tenant in fee simple may please to appoint as his successors, are not his *heirs* but his *assigns*. Thus, a purchaser from him in his lifetime, and a devisee under his will, are alike *assigns* in law, claiming in opposition to and in exclusion of the *heir* who would otherwise have become entitled (Hogan v. Jackson, 1 Cowp. 305 [98 Eng Reprint, 1096]; Co. Litt. 191 a, n. (1), vi, 10).—WILLIAMS, Real Prop. (21st ed.), 75.

ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word “*fee*” in this its primary original sense, in contradistinction to *allodium* or absolute property, with which they have no concern; but generally use it to express the continuance or quantity of estate. A *fee*, therefore, in general, signifies an estate of inheritance; being the highest and most extensive interest that a man can have in a feud: and, when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a *fee*, or a *fee simple*) it is used in contradistinction to a *fee conditional* at the common law, or a *fee-tail* by the statute; importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in *fee*, he being the feudatory of no man.<sup>m</sup>

Taking, therefore, *fee* for the future, unless where otherwise explained, in this its secondary sense, as a state of inheritance, it is applicable to, and may be had in, any kind of hereditaments either corporeal or incorporeal.<sup>n</sup> But there is this distinction between the two species of hereditaments; that, of a corporeal inheritance a man shall be said to be seised *in his demesne, as of fee*; of an incorporeal one he shall only be said to be seised *as of fee*, and not in his demesne.<sup>o</sup> For, as incorporeal hereditaments are in

<sup>m</sup> Co. Litt. 1.

<sup>n</sup> *Feodum est quod quis tenet sibi et hæredibus suis, sive sit tenementum, sive redditus, etc.* (A *fee* is that estate which a man holds to himself and his heirs, whether it be a tenement or a rent.) Flet. 1. 5. c. 5. § 7.

<sup>o</sup> Litt. § 10.

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<sup>5</sup> **Demesne and dominion.**—The distinction here made is more accurate than that upon page 105, where the king’s *dominium* is opposed to the subject’s *dominium* or demesne. Closely as the two words are connected in origin and etymology, they have quite different meanings in English law. To say that the owner of property “hath *absolutum et directum dominium*, and therefore is said to be seised thereof absolutely *in dominico suo* in his own demesne,” is to confound these different meanings. Blackstone and Houard both make this mistake; but a glance at Bracton or Fleta should have saved them from it. These always use *dominium* in the Roman sense, which is appropriate to the king’s ownership: but *dominicum* in one characteristic of the tenant rather than the lord—*pro repugnantia inter dominicum et dominium quæ sese non*



their nature collateral to, and issue out of, lands and houses,<sup>p</sup> their owner hath no property, *dominium*, or demesne, in the *thing* itself, but hath only something derived out of it; resembling the *servitudes*, or services, of the civil law.<sup>q</sup> The *dominium* or property is frequently [107] in one man, while the appendage or service is in another. Thus Gaius may be seised *as of fee*, of a way going over the land, of which Titius is seised *in his demesne as of fee*.

<sup>p</sup> See page 20.

<sup>q</sup> *Servitus est jus, quo res mea alterius rei vel personæ servit.* (Service is that right by which my estate is answerable to the estate or person of another.) Ff. 8. 1. 1.

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*compatiantur; homagium enim expellit dominium quia nullus simul et semel debet esse dominus et tenens.* (Fleta, v. 6, § 60, fol. 305.)

The distinction of *dominium* and *dominium* is brought out very clearly here, and also the connection of *dominium* and *homagium*. The lord has *dominium* over the land of which others are tenants, and takes homage from them. Such lands may fall to him by escheat, but never as heir, for the latter would suppose him to be in the same estate with his tenant—a legal absurdity. But *dominium* is the land which he occupies by himself—or through base tenants who have no distinct estate—*cum homagium expellat dominium et retineat servitium* (Bracton, fol. 24 a); i. e., the reception of homage is a recognition of the fact that the lord has not the freehold or *demesne*, but only a seignior, to which service is incident. Even if he had previously held the land *in dominico*, this would be true. The homage accepted is equivalent to an investiture, and places it in the hands of the tenant.

The absence of investiture and the creation of tenancy by a mutual act of lord and tenant is one of the most significant points of difference between the feudal law of England and that of the Continent. In some of the forms, the tenant in the very act of performing homage, informs the lord of his claim, and implies that he has received seisin already by the preceding tenant, his feoffor. This would be impossible under continental feudalism, or with an English copyhold tenant. The *dominium* or demesne of our early law is a term peculiar, I believe, to English law. It denotes primarily that land which the thane or lord held in his own hands and cultivated for the support of his own household, usually by the labor of unfree tenants. It was gradually extended to embrace all land of which the freehold was in him; but never to land held by free tenants of which he only had the services. The freehold or *demesne* of these lands was in the free tenants themselves. Hence the limitation of the word to corporeal hereditaments, as here stated by Blackstone. Incorporeal, like easements, rents, seignior, are mere *jura in re*, and the denial to these of *seisin in demesne* is correctly explained here by Blackstone. See, also, the instructive definition in *Termes de la Ley*, verb. *Demaines*.—HAMMOND.

§ 143. (a) **Different interests in the same land.**—The fee simple or inheritance of lands and tenements is generally vested and resides in some person or other; though divers inferior estates may be carved out of it. As if one grants a lease for twenty-one years, or for one or two lives, the fee simple remains vested in him and his heirs; and after the determination of those years or lives, the land reverts to the grantor or his heirs, who shall hold it again in fee simple. Yet sometimes the fee may be in *abeyance*, that is (as the word signifies) in expectation, remembrance, and contemplation in law; there being no person in *esse* (being), in whom it can vest and abide: though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est hæres viventis* (for no one is heir of a living person): it remains, therefore, in waiting, or abeyance, during the life of Richard.<sup>r</sup> This is likewise always the case of a parson of a church, who hath only an estate therein for the term of his life; and the inheritance remains in abeyance.<sup>s</sup> And not only the fee, but the freehold also, may be in abeyance; as, when a parson dies, the freehold of his glebe is in abeyance, until a successor be named, and then it vests in the successor.<sup>t</sup>

§ 144. (b) **The word “heirs” necessary in feoffments.**—The word “heirs” is necessary in the grant or donation in order to make a fee, or inheritance. For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life.<sup>u</sup> This very great nicety about the insertion of the word “heirs” in all feoffments and grants, in order to vest a fee, is plainly a relic of the feudal strictness: by which we may remember<sup>w</sup> it was required [108] that the form of the donation should be punctually pursued; or that as Crag<sup>x</sup> expresses it in the words of Baldus “*donationes sint stricti juris, ne quis plus donasse præsumatur quam in donatione expresserit*” (donations should be con-

<sup>r</sup> Co. Litt. 342.

<sup>s</sup> Litt. § 646.

<sup>t</sup> *Ibid.* § 647.

<sup>u</sup> *Ibid.* § 1.

<sup>w</sup> See page 56.

<sup>x</sup> l. 1. t. 9. § 17.

strued strictly, lest anyone be presumed to have given more than is expressed in the donation)." And therefore, as the personal abilities of the donee were originally supposed to be the only inducements to the gift, the donee's estate in the land extended only to his own person, and subsisted no longer than his life; unless the donor by an express provision in the grant, gave it a longer continuance, and extended it also to his heirs. But this rule is now softened by many exceptions.<sup>7</sup>

§ 145. (c) When word "heirs" not necessary.—For, 1. It does not extend to devises by will; in which as they were introduced at the time when the feudal rigor was apace wearing out, a more liberal construction is allowed: and therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee simple, the devisee hath an estate of inheritance; for the intention of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devisee shall take only an estate for life; for it does not appear that the devisor intended any more. 2. Neither does this rule extend to fines or recoveries, considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs": as it does also for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed.<sup>8</sup> 3. In creations of nobility by writ, the peer so created hath an inheritance in his title, without expressing the word "heirs"; for they are implied in the creation, unless it be otherwise specially provided: but in creations by patent, which are *stricti juris* (of strict right), the word "heirs" must be inserted, otherwise there is no inheritance. 4. In grants of lands to sole corporations and their successors, the word "successors" supplies the place of "heirs"; for as heirs take from the ancestor, so doth the successor from the predecessor. Nay, in [109] a grant to a bishop, or other sole spiritual corporation, in *frankalmoigne*; the word "*frankalmoigne*" supplies the place of "successors" (as the word "successors" supplies the place of "heirs") *ex vi termini* (by force

<sup>7</sup> Co. Litt. 9. 10.

<sup>8</sup> *Ibid.* 9.

of the term); and in all these cases a fee simple vests in such sole corporation. But in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted: for, albeit such simple grant be strictly only an estate for life, yet, as that corporation never dies, such estate for life is perpetual, or equivalent to a fee simple, and therefore the law allows it to be one.<sup>a</sup> Lastly, in the case of the king, a fee simple will vest in him, without the word "heirs" or "successors" in the grant; partly from prerogative royal and partly from a reason similar to the last, because the king in judgment of law, never dies.<sup>b</sup> But the general rule is, that the word "heirs" is necessary to create an estate of inheritance.<sup>6</sup>

§ 146. (2) **Limited fees.**—We are next to consider limited fees, or such estates of inheritance as are clogged and confined with conditions, or qualifications, of any sort. And these we may divide into two sorts: 1. *Qualified*, or *base* fees: and 2. Fees *conditional*, so called at the common law; and afterwards fees-*tail*, in consequence of the statute *de donis* (of gifts).

§ 147. (a) **Base or qualified fees.**—A base, or qualified, fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end.<sup>7</sup> As, in the case of a grant to A and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A cease

<sup>a</sup> See Vol. I. pag. 484.

<sup>b</sup> *Ibid.* 249.

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<sup>6</sup> It is no longer necessary in a conveyance of a fee simple by deed to use the exact words "and his heirs." It may be expressed "in fee simple." Conveyancing Act, 1881. And in wills, by the Wills Act, 1837, it is a presumption of law that every devise of real estate passes the whole interest of the testator.

<sup>7</sup> **Base fees.**—The commonest case of a base fee is that which arises where a tenant in tail in remainder executes and enrolls a disentailing deed in conformity with the provisions of the Fines and Recoveries Act, 3 & 4 Will. IV, c. 74, but without getting the consent of the tenant for life in possession, the "protector" of the settlement. The deed operates to bar the rights of the issue of the tenant in tail, but not those of the remaindermen, and the grantee under the deed thus gets a fee simple determinable upon the failure of heritable issue of the former tenant in tail. This base fee may be enlarged by the former tenant in tail into a fee simple by the same method by which an estate-tail is

to be tenants of that manor, the grant is entirely defeated. So, when Henry VI granted to John Talbot, lord of the manor of Kingston Lisle in Berks. that he and his heirs, lords of the said manor, should be peers of the realm, by the title of Barons of Lisle; here John Talbot had a base or qualified fee in that dignity;<sup>c</sup> and the instant he or his heirs quitted the seignior of this manor, the dignity was at an end. This [110] estate is a fee, because by possibility it may endure forever in a man and his heirs; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee.

§ 148. (b) **Conditional fees: estates-tail.**—A conditional fee at the common law was a fee restrained to some particular heirs, exclusive of others; “*donatio stricta et coarctata*;<sup>d</sup> *sicut certis*

<sup>c</sup> Co. Litt. 27.

<sup>d</sup> Flet. 1. 3. c. 3. § 5.

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barred, the consent of the “protector” (if any) being requisite.—2 Ency. Laws of England, 129.

The curious kind of estate created by the conveyance in fee simple of a tenant in tail not in possession, without the concurrence of the owners of estates preceding his own, is called a *base fee*. Though uncommon, it is not unknown in practice; and it has been used by George Eliot in *Felix Holt*, with great effect and with perfect correctness, as part of the machinery of the plot; in-somuch that conveyancers reading the novel have been known to lament seriously, as if the thing had happened to one of their own clients, that the parties did not take better advice.—POLLOCK, Land Laws, 110 n.

“It is true, the estate here may not endure forever; it may be terminated by the failure to use and employ the rights and easements granted in the manner prescribed in the grant; but if they shall be so used and employed the grant is forever. And this seems to meet Blackstone’s definition of a *qualified* or *base fee*.” *Wiggins Ferry Co. v. Ohio & M. Ry. Co.*, 94 Ill. 83, 93.

“The estate created by the conveyance in this case is not properly an estate on condition either precedent or subsequent. It is not an estate on a condition precedent, upon the performance of which the estate would become absolute and indefeasible. Nor is it an estate on condition subsequent, by the nonperformance of which the estate already vested may be defeated. But it is a base or qualified fee. This estate is a fee, because by possibility it may endure forever; yet as that duration depends upon the concurrence of collateral circumstances, which qualify and debase the purity of the donation, it is therefore a qualified or base fee. 2 Bl. Comm. 109.” *Kilpatrick v. Graves*, 51 Miss. 432, 443.



*hæredibus quibusdam a successione exclusis* (a strict and limited donation; as to certain heirs, others being excluded from the succession)”: as to the heirs of a man’s body, by which only his lineal descendants were admitted in exclusion of collateral heirs; or, to the heirs male of his body, in exclusion both of collaterals and lineal females also. It was called a conditional fee, by reason of the condition expressed or implied in the donation of it, that if the donee died without such particular heirs, the land should revert to the donor. For this was a condition annexed by law to all grants whatsoever, that on failure of the heirs specified in the grant, the grant should be at an end, and the land return to its ancient proprietor.\* Such conditional fees were strictly agreeable to the nature of feuds, when they first ceased to be mere estates for life, and were not yet arrived to be absolute estates in fee simple. And we find strong traces of these limited, conditional fees, which could not be alienated from the lineage of the first purchaser in our earliest Saxon laws.<sup>†</sup>

§ 149. (i) The old law of conditional fees.—Now, with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor, if the donee had no heirs of his body; but if he had, it should then remain to the donee. They therefore called it a fee simple, on condition

\* Plowd. 241.

† *Si quis terram hæreditariam habeat, eam non vendat a cognatis hæredibus suis, si illi viro prohibitum sit, qui eam ab initio acquisivit, ut ita facere nequeat.* (He who possesses an hereditary estate may not, by sale, deprive his heirs by consanguinity of it, if he be prohibited from so doing by him who first acquired the land.) LL. Ælfred. c. 37.

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<sup>8</sup> Fees conditional.—There is no doubt much resemblance between fees-tail and the “boeland” of the Saxon period, when limited to the kin of the first taker, as in the law of Alfred here cited: c. 41 of the A. S. texts, cited as c. 37 of the Latin version in note *f* of the author.

But the resemblance must not be mistaken for identity. The “fee” of the later common law is entirely a different institution from any of the earlier forms of hereditary land, *alod*, *erbeigen*, *yrfe*, *hæreditas*, *proprium*, or however it might be called, on the Continent or in England. Only error and fallacies result from confusing them or supposing any genetic relation between them.—HAMMOND.

that he had issue. Now, we must observe that when any condition is performed, it is thenceforth entirely gone; and the thing to which it was before annexed, becomes absolute <sup>[111]</sup> and wholly unconditional. So that, as soon as the grantee had any issue born, his estate was supposed to become absolute by the performance of the condition; at least, for these three purposes: 1. To enable the tenant to alien the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion.<sup>g</sup> 2. To subject him to forfeit it for treason: which he could not do, till issue born, longer than for his own life; lest thereby the inheritance of the issue, and reversion of the donor, might have been defeated.<sup>h</sup> 3. To empower him to charge the land with rents, commons, and certain other encumbrances, so as to bind his issue.<sup>i</sup> And this was thought the more reasonable because, by the birth of issue, the possibility of the donor's reversion was rendered more distant and precarious; and *his* interest seems to have been the only one which the law, as it then stood, was solicitous to protect; without much regard to the right of succession intended to be vested in the issue. However, if the tenant did not in fact alien the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died, without making any alienation; the land, by the terms of the donation, could descend to none but the heirs of *his body*, and, therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee simples took care to alien as soon as they had performed the condition by having issue; and afterwards repurchased the lands, which gave them a fee-simple absolute, that would descend to the heirs general, according to the course of the common law. And thus stood the old law with regard to conditional fees; which things, says Sir Edward Coke,<sup>k</sup> though they seem ancient, are yet necessary to be known; as well for the declaring how the common law stood in such cases, as for the sake of annuities, and such like inheritances, as are not within the statutes of entail, and therefore remain as at the common law.

<sup>g</sup> Co. Litt. 19. 2 Inst. 233.

<sup>h</sup> Co. Litt. *Ibid.* 2 Inst. 234.

<sup>i</sup> Co. Litt. 19.

<sup>k</sup> 1 Inst. 19.

§ 150. (ii) **The statute de donis.**—<sup>[112]</sup> The inconveniences, which attended these limited and fettered inheritances, were probably what induced the judges to give way to this subtle finesse of construction (for such it undoubtedly was), in order to shorten the duration of these conditional estates. But, on the other hand, the nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice, procured the statute of Westminster the Second<sup>1</sup> (commonly called the statute *de donis conditionalibus*—of conditional gifts) to be made; which paid a greater regard to the private will and intentions of the donor, than to the propriety of such intentions, or any public considerations whatsoever. This statute revived in some sort the ancient feudal restraints which were originally laid on alienations, by enacting, that from thenceforth the will of the donor be observed; and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any; or, if none, should revert to the donor.

§ 151. (iii) **Fee-tail and reversion.**—Upon the construction of this act of parliament, the judges determined that the donee had no longer a conditional fee simple, which became absolute and at his own disposal, the instant any issue was born; but they divided the estate into two parts, leaving in the donee a new kind of particular estate, which they denominated a *fee-tail*;<sup>m</sup> and vesting in the donor the ultimate fee simple of the land, expectant on the failure of issue; which expectant estate is what we now call a reversion.<sup>n</sup> And hence it is that Littleton tells us,<sup>o</sup> that tenant in fee-tail is by virtue of the statute of Westminster the Second.

§ 152. (iv) **What may be entailed.**—Having thus shown the *original* of estates-tail, I now proceed to consider, *what things* may, or may not, be entailed <sup>[113]</sup> under the statute *de donis*. *Tene-*

<sup>1</sup> 13 Edw. I. c. 1 (De Donis, 1285).

<sup>m</sup> The expression, *fee-tail*, or *feodum talliatum*, was borrowed from the feudists (See Crag. l. 1. t. 10. § 24, 25); among whom it signified any mutilated or truncated inheritance, from which the heirs general were cut off; being derived from the barbarous verb *taliare*, to cut: from which the French *tailler* and the Italian *tagliare* are formed. (Spelm. Gloss. 531.)

<sup>n</sup> 2 Inst. 335.

<sup>o</sup> § 13.

*ments* is the only word used in the statute: and this Sir Edward Coke<sup>p</sup> expounds to comprehend all corporeal hereditaments whatsoever; and also all incorporeal hereditaments which savor of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same; as, rents, estovers, commons, and the like. Also offices and dignities, which concern lands, or have relation to fixed and certain places, may be entailed.<sup>q</sup> But mere personal chattels, which savor not at all of the realty, cannot be entailed. Neither can an office, which merely relates to such personal chattels; nor an annuity, which charges only the person, and not the lands, of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute: and by his alienation may bar the heir or reversioner.<sup>r</sup> An estate to a man and his heirs for another's life cannot be entailed;<sup>s</sup> for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis*. Neither can a copyhold estate be entailed by virtue of the *statute*; for that would tend to encroach upon and restrain the will of the lord: but, by the *special custom* of the manor, a copyhold may be limited to the heirs of the body;<sup>t</sup> for here the custom ascertains and interprets the lord's will.

§ 153. (v) *Species of estates-tail*.—Next, as to the several *species* of estates-tail, and how they are respectively created. Estates-tail are either *general*, or *special*.

§ 154. (aa) *Tail-general*.—Tail-general is where lands and tenements are given to one, and the *heirs of his body begotten*; which is called tail-general, because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate-tail, *per formam doni* (by the form of the gift).<sup>u</sup>

§ 155. (bb) *Tail-special*.—Tenant in tail-special is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen [114] several

<sup>p</sup> 1 Inst. 19, 20.

<sup>q</sup> 7 Rep. 33.

<sup>r</sup> Co. Litt. 19, 20.

<sup>s</sup> 2 Vern. 225.

<sup>t</sup> 3 Rep. 8.

<sup>u</sup> Litt. § 14, 15.

ways.<sup>w</sup> I shall instance in only one; as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten*: here no issue can inherit, but such special issue as is engendered between them two; not such as the husband may have by another wife: and therefore it is called special tail. And here we may observe, that the words of inheritance (to him and his *heirs*) give him an estate in fee; but they being *heirs to be by him begotten*, this makes it a fee-tail; and the person being also limited, on whom such heirs shall be begotten (*viz., Mary his present wife*), this makes it a fee-tail special.

§ 156. (cc) Tail male and tail female.—Estates, in general and special tail, are further diversified by the distinction of sexes in such entails; for both of them may either be in tail *male* or tail *female*. As if lands be given to a man, and his *heirs male of his body begotten*, this is an estate in tail male general; but if to a man and the *heirs female of his body on his present wife begotten*, this is an estate in tail female special. And, in case of an entail male, the heirs female shall never inherit, nor any derived from them; nor *e converso* (on the other hand), the heirs male, in case of a gift in tail female.<sup>x</sup> Thus, if the donee in tail male hath a daughter, who dies leaving a son, such grandson in this case cannot inherit the estate-tail; for he cannot deduce his descent wholly by heirs male.<sup>y</sup> And as the heir male must convey his descent wholly by males, so must the heir female wholly by females. And therefore if a man hath two estates-tail, the one in tail male, the other in tail female; and he hath issue a daughter, which daughter hath issue a son; this grandson can succeed to neither of the estates: for he cannot convey his descent wholly either in the male or female line.<sup>z</sup><sup>9</sup>

<sup>w</sup> Litt. § 16, 26, 27, 28, 29.

<sup>y</sup> *Ibid.* § 24.

<sup>x</sup> *Ibid.* § 21, 22.

<sup>z</sup> Co. Litt. 25.

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<sup>9</sup> It should be particularly noticed by the student that it is not possible to limit an estate in *fee simple* to the heirs of a particular sex. Thus, a conveyance by deed to A “and his heirs male” would give A an ordinary fee simple, descendible to all his heirs in due order. And though, doubtless, such an expression in a will would not be entirely ineffective, effect would only be given to it by assuming that the testator meant to devise, not a fee simple restricted to male heirs, but an estate in tail male.—STEPHEN, 1 Comm. (16th ed.), 153.



§ 157. (vi) **Words necessary to make an entail.**—As the word “*heirs*” is necessary to create a fee, so in further imitation of the strictness of the feudal donation, the word *body*, or some other words of procreation, are necessary to make it a fee-tail, and ascertain to what heirs in particular <sup>[115]</sup> the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. As, if the grant be to a man and his *issue of his body*, to a man and his *seed*, to a man and his *children*, or *offspring*; all these are only estates for life, there wanting the words of inheritance, his heirs.<sup>a</sup> So, on the other hand, a gift to a man, and his *heirs male*, or *female*, is an estate in fee simple, and not in fee-tail; for there are no words to ascertain the body out of which they shall issue.<sup>b</sup> Indeed, in last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*; or by other irregular modes of expression.<sup>c</sup> <sup>10</sup>

§ 158. (vii) **Frank-marriage.**—There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law; which are estates *in libero maritagio*, or *frank-marriage*. These are defined<sup>d</sup> to be, where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frank-marriage. Now, by such gift, though nothing but the word “*frank-marriage*” is expressed, the donees shall have the tenements to them, and the heirs of their two bodies begotten; that is, they are tenants in special tail. For this one word, *frank-marriage*, does *ex vi termini* (by force of the term) not only create an inheritance, like the word *frankalmoigne*, but likewise limits that inheritance; supplying not only words of descent, but of procreation also. Such donees in frank-marriage are liable to no service but fealty; for a rent reserved thereon is

<sup>a</sup> Co. Litt. 20.

<sup>c</sup> Co. Litt. 9. 27.

<sup>b</sup> Litt. § 31. Co. Litt. 27.

<sup>d</sup> Litt. § 17.

<sup>10</sup> By the Conveyancing Act of 1881 it is no longer necessary for the creation of an estate-tail, even by deed, to use the words “heirs of the body,” it being sufficient to say “in tail” with or without the word “male” or “female,” as the case may be.

void, until the fourth degree of consanguinity be past between the issues of the donor and donee.<sup>e</sup> <sup>11</sup>

§ 159. (viii) **Incidents of tenancy in tail.**—The *incidents* to a tenancy in tail, under the statute Westm. 2, are chiefly these.<sup>f</sup> 1. That a tenant in tail may commit *waste* on the estate-tail, by selling timber, pulling [<sup>116</sup>] down houses, or the like, without being impeached, or called to account, for the same. 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail. 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail. 4. That an estate may be *barred*, or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir. All which will hereafter be explained at large.

§ 160. (ix) **Evils of estates-tail.**—Thus much for the nature of estates-tail: the establishment of which family law (as it is properly styled by Pigott<sup>g</sup>) occasioned infinite difficulties and disputes.<sup>h</sup> Children grew disobedient when they knew they could not be set aside: farmers were ousted of their leases made by tenants in tail; for, if such leases had been valid, then under color of long leases the issue might have been virtually disinherited: creditors were defrauded of their debts; for, if tenant in tail could have charged his estate with their payment, he might also have defeated his issue, by mortgaging it for as much as it was worth: innumerable latent entails were produced to deprive purchasers of the lands they had fairly bought; of suits in consequence of which our ancient books are full: and treasons were encouraged; as estates-tail were not liable to forfeiture, longer than for the tenant's life. So that they were justly branded, as the source of new contentions, and mischiefs unknown to the common law; and almost universally considered as the common grievance of the realm.<sup>i</sup> But as the nobility were always fond of this statute (De

<sup>e</sup> *Ibid.* § 19, 20.

<sup>h</sup> 1 Rep. 131.

<sup>f</sup> Co. Litt. 224.

<sup>i</sup> Co. Litt. 19. Moor. 56. 10 Rep. 38.

<sup>g</sup> Com. Recov. 5.

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<sup>11</sup> Interesting remarks on the origin of gifts in frank-marriage may be found in 2 Poll. & Maitl., Hist. Eng. Law (2d ed.), 15–17.

Donis), because it preserved their family estates from forfeiture, there was little hope of procuring a repeal by the legislature; and therefore, by the connivance of an active and politic prince, a method was devised to evade it.

§ 161. (x) Common recoveries.—About two hundred years intervened between the making of the statute *de donis* (1285), and the application of common recoveries to this intent, in the twelfth year of Edward IV (1472): which were then openly declared by the judges to be a sufficient <sup>[117]</sup> bar of an estate-tail.\* For though the courts had, so long before as the reign of Edward III (1326–1377), very frequently hinted their opinion that a bar might be effected upon these principles,<sup>1</sup> yet it never was carried into execution; till Edward IV observing<sup>m</sup> (in the disputes between the houses of York and Lancaster) how little effect attainders for treason had on families, whose estates were protected by the sanctuary of entails, gave his countenance to this proceeding, and suffered Taltarum's case to be brought before the court:<sup>n</sup> wherein, in consequence of the principles then laid down, it was in effect determined, that a common recovery suffered by tenant in tail should be an effectual destruction thereof.<sup>12</sup> What common recoveries are, both in their nature and consequences, and why they are allowed to be a bar to the estate-tail, must be reserved to a subsequent inquiry. At present I shall only say, that they are fictitious proceedings, introduced by a kind of *pia fraud* (pious fraud), to elude the statute *de donis*, which was found so intolerably mischievous, and which yet one branch of the legislature would not then consent to repeal: and, that these recoveries, however clandestinely begun, are now become by long use and acqui-

\* 1 Rep. 131. 6 Rep. 40.

<sup>1</sup> 10 Rep. 37, 38.

<sup>m</sup> Pigott. 8.

<sup>n</sup> Year-Book, 12 Edw. IV. 14. 19. (1472). Fitzh. Abr. tit. Faux. Recov. 20 Bro. Abr. *Ibid.* 30; tit. Recov. in Value. 19 tit. Taile. 36.

<sup>12</sup> For the pleadings in Taltarum's case, and important comments thereon, see Digby, Hist. Real Prop. (5th ed.), 255 ff. For a fuller account of the proceedings in a common recovery, see 2 Bl. Comm. \*358, *post*, and for form of judgment, *Ibid.*, Appendix, V.

escence a most common assurance of lands; and are looked upon as the legal mode of conveyance, by which tenant in tail may dispose of his lands and tenements: so that no court will suffer them to be shaken or reflected on, and even acts of parliament<sup>o</sup> have by a sidewind countenanced and established them.<sup>13</sup>

§ 162. (xi) Statute of treason (1534).—This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was their freedom from forfeitures for treason. For, notwithstanding the large advances made by recoveries, in the compass of about threescore years, towards unfettering these inheritances, and thereby subjecting the lands to forfeiture, the rapacious prince then reigning, finding them frequently [118] resettled in a similar manner to suit the convenience of families, had address enough to procure a statute,<sup>p</sup> whereby all estates of inheritance (under which general words estates-tail were covertly included) are declared to be forfeited to the king upon any conviction of high treason.

§ 163. (xii) Statutes of leases (1540) and fines (1540).—The next attack which they suffered in order of time was by the statute 32 Hen. VIII, c. 28 (Leaseholds, 1540), whereby certain leases made by tenants in tail, which do not tend to the prejudice of the issue, were allowed to be good in law, and to bind the issue in tail. But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines,<sup>q</sup> by the statute 32 Hen. VIII, c. 36 (Fines, 1540), which declares

<sup>o</sup> 11 Hen. VII. c. 20 (Bar of Entail, 1495). 7 Hen. VIII. c. 4 (Avowries, 1515). 34 & 35 Hen. VIII. c. 20 (Fines and Recoveries, 1543). 41 Eliz. c. 8 (1598). 4 & 5 Ann. c. 16 (1705). 14 Geo. II. c. 20 (Common Recoveries, 1740).

<sup>p</sup> 26 Hen. VIII. c. 13 (Treason, 1534).

<sup>q</sup> 4 Hen. VII. c. 24 (Fines, 1488).

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<sup>13</sup> The forms of the common recovery were abolished by the Fines and Recoveries Act of 1833; nevertheless the rules of law established by the use of them and the kindred conveyance, known as a *fine*, are carefully preserved, and, in fact govern the alienation of estates tail at the present day.—STEPHEN, 1 Comm. (16th ed.), 156.

a fine duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons, claiming under such entail. This was evidently agreeable to the intention of Henry VII, whose policy it was (before common recoveries had obtained their full strength and authority) to lay the road as open as possible to the alienation of landed property, in order to weaken the overgrown power of his nobles. But as they, from the opposite reasons, were not easily brought to consent to such a provision, it was therefore couched, in his act, under covert and obscure expressions. And the judges, though willing to construe that statute as favorably as possible for the defeating of entailed estates, yet hesitated at giving fines so extensive a power by mere implication, when the statute *de donis* had expressly declared, that they should *not* be a bar to estates-tail. But the statute of Henry VIII, when the doctrine of alienation was better received, and the will of the prince more implicitly obeyed than before, avowed and established that intention.

§ 164. (xiii) **Exceptions in favor of the crown.**—Yet, in order to preserve the property of the crown from any danger of infringement, all estates-tail created by the crown, and of which the crown has the reversion, are excepted out of this statute. And the same was done with regard to common recoveries, by the statute 34 and 35 Hen. VIII, c. 20 (Fines and Recoveries, 1542), which enacts that no feigned recovery had against tenants in tail where the estate was created by the [119] crown,<sup>r</sup> and the remainder or reversion continues still in the crown, shall be of any force and effect. Which is allowing, indirectly and collaterally, their full force and effect with respect to ordinary estates-tail, where the royal prerogative is not concerned.

Lastly, by a statute of the succeeding year,<sup>s</sup> all estates-tail are rendered liable to be charged for payment of debts due to the king by record or special contract; as since, by the bankrupt laws,<sup>t</sup> they are also subjected to be sold for the debts contracted by a bankrupt. And, by the construction put on the statute 43 Eliz., c. 4

<sup>r</sup> Co. Litt. 372.

<sup>s</sup> 33 Hen. VIII. c. 39. § 75 (Exchequer, 1542).

<sup>t</sup> Stat. 21. Jac. I. c. 19 (Bankruptcy, 1623).



(Charitable Uses, 1601), an appointment<sup>u</sup> by tenant in tail of the lands entailed, to a charitable use, is good without fine or recovery.

§ 165. (xiv) **Resulting condition of estates-tail.**—Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law, after the condition was performed, by the birth of issue. For, first, the tenant in tail is now enabled to alien his lands and tenements by fine, by recovery, or by certain other means; and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown: secondly, he is now liable to forfeit them for high treason: and, lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.<sup>14</sup>

<sup>u</sup> 2 Vern. 453. Chan. Proc. 16.

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<sup>14</sup> **Distinction between conditional estates and estates upon condition.**—The chief differences between an estate-tail and an estate in fee simple are in fact only these, that the tenant in tail cannot dispose of any interest by will, and that, in order to bind his issue and the remainderman, he must use the forms provided by the Fines and Recoveries Act, 1833, hereafter to be explained.

In conclusion, the student must be warned against confusing the conditional estates treated of in this chapter with the *estates upon condition* dealt with in a later chapter of this work. The difference between the two classes of interests may appear to him arbitrary and technical. But at one time it was of great importance; and even now it is not without practical results. A *conditional estate* is regarded as being, in its origin, of a more limited character than an absolute or unqualified interest. Consequently, it comes to an end of itself on the happening of the condition. An *estate upon condition*, on the other hand, is regarded as being absolute in its creation, but liable to be suddenly terminated by an external event which occasions a forfeiture. And, inasmuch as no one *need* enforce a forfeiture, and only certain persons *can* enforce it, the consequence of a breach of condition is not always, as we shall see, the termination of the estate. (For recent examples of the importance of the distinction between a conditional estate (or limitation) and an estate upon condition, see *Re Wagstaff*, [1908] 1 Ch. 162; and *Re Leach*, [1912] 2 Ch. 422, where a conditional fee simple, determinable on the bankruptcy of the donee, was apparently held to be good.)—STEPHEN, 1 Comm. (16th ed.), 157.

## CHAPTER THE EIGHTH.

[120]

### OF FREEHOLDS, NOT OF INHERITANCE.

§ 166. Two kinds of estates for life.—We are next to discourse of such estates of freehold as are not of inheritance, but *for life* only. And of these estates for life, some are *conventional*, or expressly created by the acts of the parties; others merely *legal*, or created by construction and operation of law.<sup>a</sup> We will consider them both in their order.

§ 167. 1. *Conventional estates for life*.—Estates for life, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man, to hold for the term of his own life, or for that of any other person, or for more lives than one: in any of which cases he is styled tenant for life; only, when he holds the estate by the life of another, he is usually called tenant *pur autre vie* (for the life of another).<sup>b</sup> These estates for life are, like inheritances, of a feudal nature; and were, for some time, the highest estate that any man could have in a feud, which (as we have before seen<sup>c</sup>) was not in its original hereditary. They are given or conferred by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on.

§ 168. a. *Estates for life created by general grant*.—[121] Estates for life may be created, not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. As, if one grants to A B the manor of Dale, this makes him tenant for life.<sup>d</sup> For though, as there are no words of inheritance, or *heirs*, mentioned in the grant, it cannot be construed to be a fee, it shall, however, be construed to be as large an estate as the words of the donation will bear, and therefore an estate for life. Also such a grant at large, or a grant for term of life generally, shall be construed to be an estate for the

<sup>a</sup> Wright. 190.

<sup>c</sup> Pag. 55.

<sup>b</sup> Litt. § 56.

<sup>d</sup> Co. Litt. 42.

life of *the grantee*;<sup>e</sup> in case the grantor hath authority to make such a grant: for an estate for a man's own life is more beneficial and of a higher nature than for any other life; and the rule of law is, that all grants are to be taken most strongly against the grantor,<sup>f</sup> unless in the case of the king.

§ 169. **b. Conditional life estates.**—Such estates for life will, generally speaking, endure as long as the life for which they are granted: but there are some estates for life, which may determine upon future contingencies, before the life, for which they are created, expires. As, if an estate be granted to a woman during her widowhood, or to a man until he be promoted to a benefice; in these, and similar cases, whenever the contingency happens, when the widow marries, or when the grantee obtains a benefice, the respective estates are absolutely determined and gone.<sup>g</sup> Yet, while they subsist, they are reckoned estates for life; because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen. And, moreover, in case an estate be granted to a man for his life, generally, it may also determine by his *civil* death: as if he enters into a monastery, whereby he is dead in law:<sup>h</sup> for which reason in conveyances the grant is usually made “for the term of a man's *natural* life”; which can only determine by his *natural* death.<sup>i</sup>

§ 170. **c. Incidents of estates for life.**—[122] The *incidents* to an estate for life are principally the following; which are applicable not only to that species of tenants for life, which are expressly created by deed; but also to those, which are created by act and operation of law.

§ 171. (1) **Estovers or botes.**—Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable *estovers*<sup>k</sup> or *botes*.<sup>1 1</sup> For

<sup>e</sup> *Ibid.*

<sup>i</sup> See Book I. pag. 132.

<sup>f</sup> *Ibid.* 36.

<sup>k</sup> See pag. 35.

<sup>g</sup> Co. Litt. 42. 3 Rep. 20.

<sup>1</sup> Co. Litt. 41.

<sup>h</sup> 2 Rep. 48.

<sup>1</sup> The varieties of *estovers* or *botes* are enumerated, p. \*35 *ante*.

he hath a right to the full enjoyment and use of the land, and all its profits, during his estate therein. But he is not permitted to cut down timber or do other waste upon the premises:<sup>m</sup> for the destruction of such things, as are not the temporary profits of the tenement, is not necessary for the tenant's complete enjoyment of his estate; but tends to the permanent and lasting loss of the person entitled to the inheritance.<sup>2</sup>

§ 172. (2) *Emblements*.—Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate, because such a determination is contingent and uncertain.<sup>n</sup> Therefore, if a tenant for his own life sows the lands, and dies before harvest, his executors shall have the *emblements*, or profits of the crop: for the estate was determined by the *act of God*; and it is a maxim in the law, that *actus Dei nemini facit injuriam* (the

<sup>m</sup> *Ibid.* 53.

<sup>n</sup> *Ibid.* 55.

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2 *Liability for waste*.—But every tenant for life is, in the absence of authority, answerable for *waste*, that is, for any spoil or destruction which he does to the premises during his tenancy, to the injury of the person entitled to the inheritance in reversion or in remainder. There are two kinds of waste, *voluntary* and *permissive*; the former by the tenant's voluntary act, as where he pulls down a wall, or cuts down timber, the latter by his default, as by suffering a wall to fall down for want of repairs. The ordinary tenant for life is not responsible for permissive waste. But the person on whom the enjoyment of a leasehold interest is settled for his life must, probably, as between himself and the persons entitled to the capital, submit to bear the cost of performing the covenants of the lease; though, unless the lease is legally vested in him, he can be under no personal liability to the lessor. Estates for life are sometimes limited, however, with a clause expressing that the tenant shall hold the land *without impeachment of waste*; the effect of which formerly was, that he was not liable to an action for waste of either kind, whether voluntary or permissive. But, even in such a case, a court of equity would, formerly, have interfered to restrain the felling of ornamental timber or other like unwarrantable and gratuitous injury to the inheritance; although such acts might not be legal waste at all. And now, by the Judicature Act, 1873, it is expressly provided that an estate for life, without impeachment of waste, shall not confer on the tenant for life any legal right to commit waste of the description known as "equitable waste"; unless an intention to confer such right shall expressly appear by the instrument creating the estate. Such a tenant, and, *a fortiori*, an ordinary tenant for life, is, therefore, presumably liable to an action for damages if he commits equitable waste.—STEPHEN, 1 Comm. (16th ed.), 161.

act of God injures no man). The representatives, therefore, of the tenant for life shall have the emblements, to compensate for the labor and expense of tilling, manuring, and sowing the lands; and also for the encouragement of husbandry, which being a public benefit, tending to the increase and plenty of provisions, ought to have the utmost security and privilege that the law can give it. Wherefore by the feudal law, if a tenant for life died between the beginning of September and the end of February, the lord, who was entitled to the reversion, was also entitled to the profits of the whole year: but, if he died between the beginning of March and the end [123] of August, the heirs of the tenant received the whole.<sup>o</sup> From hence our law of emblements seems to have been derived, but with very considerable improvements. So it is also, if a man be tenant for the life of another, and *cestui que vie*, or he on whose life the land is held, dies after the corn sown, the tenant *pur auter vie* (for the life of another) shall have the emblements. The same is also the rule, if a life estate be determined by the *act of law*. Therefore, if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii* (from the bond of matrimony), the husband shall have the emblements in this case; for the sentence of divorce is the act of law.<sup>p</sup> But if an estate for life be determined by the tenants *own act* (as, by forfeiture for waste committed; or, if a tenant during widowhood thinks proper to marry), in these, and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements.<sup>q</sup> The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit, but it is otherwise of fruit-trees, grass, and the like; which are not planted annually at the expense and labor of the tenant, but are either a permanent, or natural, profit of the earth.<sup>r</sup> For even when a man plants a tree, he cannot be presumed to plant it in contemplation of any present profit; but merely with a prospect of its being useful to future successions of tenants. The advantages also of emblements are particularly extended to the parochial clergy by the statute

<sup>o</sup> Feud. l. 2. t. 28.

<sup>q</sup> Co. Litt. 55.

<sup>p</sup> 5 Rep. 116.

<sup>r</sup> Co. Litt. 55, 56. 1 Roll. Abr. 728.



23 Hen. VIII, c. 11 (First-fruits, 1536). For all persons, who are presented to any ecclesiastical benefice, or to any civil office, are considered as tenants for their own lives, unless the contrary be expressed in the form of donation.

§ 173. (3) Rights of subtenants.—A third incident to estates for life relates to the under-tenants or lessees. For they have the same, nay greater indulgences than their lessors, the original tenants for life. The same; for the law of estovers and emblements, with (124) regard to the tenant for life, is also law with regard to his under-tenant, who represents him and stands in his place:<sup>a</sup> and greater; for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee who is a third person. As in the case of a woman who holds *durante viduitate* (during widowhood); her taking husband is her own act, and therefore deprives her of the emblements: but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her.<sup>t</sup> The lessees of tenants for life had also at the common law another most unreasonable advantage; for, at the death of their lessors the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter day, or other day assigned for payment of rent.<sup>u</sup> To remedy which it is now enacted,<sup>v</sup> that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent, from the last day of payment to the death of such lessor.<sup>3</sup>

§ 174. 2. Legal estates for life—a. Estate in tail after possibility of issue extinct.—The next estate for life is of the legal

<sup>a</sup> Co. Litt. 55.

<sup>t</sup> Cro. Eliz. 461. 1 Roll. Abr. 727.

<sup>u</sup> 10 Rep. 127.

<sup>v</sup> Stat. 11 Geo. II. c. 19, § 15 (Distress for Rent, 1737).

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<sup>3</sup> The whole subject of emblements, as regards subtenants, is now governed by the Landlord and Tenant Act of 1851.

kind, as contradistinguished from conventional; viz., that of tenant *in tail after possibility of issue extinct*. This happens, where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue; or, having left issue, that issue becomes extinct: in either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. As, where one has an estate to him and his heirs on the body of his present wife to be begotten, and the wife dies without issue: <sup>w</sup> in this case the man has an estate-tail, which cannot possibly descend to anyone; and therefore the law makes use of this long periphrasis, as absolutely necessary to give an adequate idea of his estate. For if it had called him barely *tenant in fee-tail special*, that [125] would not have distinguished him from others; and besides he has no longer an estate of inheritance, or fee,<sup>x</sup> for he can have no heirs, capable of taking *per formam doni* (by the form of the gift). Had it called him *tenant in tail without issue*, this had only related to the present fact, and would not have excluded the possibility of future issue. Had he been styled *tenant in tail without possibility of issue*, this would exclude time past as well as present, and he might under this description never have had any possibility of issue. No definition, therefore, could so exactly mark him out, as this of tenant *in tail after possibility of issue extinct*, which (with a precision peculiar to our own law) not only takes in the possibility of issue in tail which he once had, but also states that this possibility is now extinguished and gone.

This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring; for no limitation, conveyance, or other human act can make it. For, if land be given to a man and his wife, and the heirs of their two bodies begotten, and they are divorced, *a vinculo matrimonii*, they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them.<sup>4</sup>

<sup>w</sup> Litt. § 32.

<sup>y</sup> Co. Litt. 28.

<sup>x</sup> 1 Roll. Rep. 184. 11 Rep. 80.

<sup>4</sup> "In Coke's time there could have been no legal issue of such a marriage; for an alleged marriage could only be dissolved on the ground of nullity. Probably now, if there were issue begotten before the divorce, the divorcee would have no effect on the estate-tail." Edward Jenks, Esq., in Stephen, 1 Comm. (16th ed.), 166 n.

A possibility of issue is always supposed to exist, in law, unless extinguished by the death of the parties; even though the donees be each of them an hundred years old.<sup>a</sup>

This estate is of an amphibious nature, partaking partly of an estate-tail, and partly of an estate for life. The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail, as, not to be punishable for waste, etc.:<sup>a</sup> or, he is tenant in tail, with many of the restrictions of a tenant for life; as, to forfeit his estate if he aliens it in fee simple:<sup>b</sup> whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner: who is not concerned in interest, [126] till all possibility of issue be extinct. But, in general, the law looks upon this estate as equivalent to an estate for life only; and, as such, will permit this tenant to exchange his estate with a tenant for life; which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.<sup>5</sup>

§ 175. *b. Tenancy by the curtesy.*—Tenant *by the curtesy of England* is where a man marries a woman seised of lands and tenements in fee simple or fee-tail; that is, of an estate of inheritance; and has by her issue, born alive, which was capable of inheriting her estate. In this case, he shall on the death of his wife, hold the lands for his life, as tenant by the curtesy of England.<sup>c</sup>

This estate, according to Littleton, has its denomination, because it is used within the realm of England only; and it is said in the Mirror<sup>d</sup> to have been introduced by King Henry the First; but it appears also to have been the established law of Scotland, wherein it was called *curialitas*:<sup>e</sup> so that probably our word “*curtesy*” was

<sup>a</sup> Litt. § 34. Co. Litt. 28.

<sup>a</sup> Co. Litt. 27.

<sup>b</sup> *Ibid.* 28.

<sup>c</sup> Litt. § 35. 52.

<sup>d</sup> C. 1. § 3.

<sup>e</sup> Crag. 1. 2. t. 19. § 4.

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<sup>5</sup> Tenants in tail after possibility of issue extinct were prohibited from suffering common recoveries by a statute of the reign of Elizabeth, and a similar prohibition is contained in the Fines and Recoveries Act. But tenancies in special tail are not now common. In modern times, when it is intended to make a provision for the children of a particular marriage, estates are given directly to the unborn children, which take effect as they come into existence: whereas in ancient times, it was not lawful to give any estate directly to an unborn child.—WILLIAMS, *Real Prop.* (21st ed.), 106.

understood to signify rather an attendance upon the lord's *court* or *curtis* (that is, being his vassal or tenant), than to denote any peculiar favor belonging to this island. And therefore it is laid down<sup>f</sup> that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone: whereas, before issue had, they must both have done it together.<sup>g</sup> It is likewise used in Ireland, by virtue of an ordinance of King Henry III.<sup>h</sup> It also appears<sup>i</sup> to have obtained in Normandy; and was likewise used among the ancient Almaines or Germans.<sup>j</sup> And yet it is not generally apprehended to have been a consequence of feudal tenure,<sup>k</sup> though I think some substantial feudal reasons may be given for its introduction. For, if a woman seised of lands have issue by her husband, and dies, the husband is the natural guardian of

<sup>f</sup> Litt. § 90. Co. Litt. 30. 67.

<sup>g</sup> Pat. 11 H. III. m. 30 (1226) in 2 Bac. Abr. 659.

<sup>h</sup> Grand Coustum. c. 119.

<sup>i</sup> Lindenbrog. LL. Alman. t. 92.

<sup>k</sup> Wright, 294.

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<sup>6</sup> **Origin of curtesy.**—An ingenious modern theory would teach us that curtesy or *curialitas* “was understood to signify rather an attendance upon the lord's *court* or *curtis* (that is, being his vassal or tenant), than to denote any peculiar favor belonging to this island. And therefore it is laid down that by having issue, the husband shall be entitled to do homage to the lord, for the wife's lands, alone; whereas, before issue had, they must both have done it together.” This explanation seems more ingenious than satisfactory. The rule about homage that is here laid down flatly contradicts Glanvill's text, and it is with Glanvill, as the oldest representative of English feudal theory, that we have here to reckon. He says that a woman never does homage; he says that when an heiress is married—not when she has issue—her husband is bound to do homage; he says that no homage is done for the wife's marriage portion (*maritagium*), and yet of this marriage portion the husband on the birth of issue becomes tenant by the law of England. Again, we have never seen in any record any suggestion that before issue had been born of the marriage the husband was not entitled and bound to do suit to the lord's court; nor can we easily suppose that the lord went without a suitor where there was a childless marriage. Lastly, we have never seen the word *curialitas* or *courtesie* used to signify a right or a duty of going to court, unless it is so used in the phrase that is before us. It is a common enough word, and means “civility,” “good breeding,” “a favor,” “a concession.”—Poll. & Maitl., 2 Hist. Eng. Law (2d ed.), 414. The same authors (*Ibid.* 415–417) draw a contrast between the English law of curtesy and similar doctrines of Norman law.

the child, and as such is in reason entitled to the profits of the lands in order to maintain it; and, [127] therefore, the heir apparent of a tenant by the curtesy could not be in ward to the lord of the fee, during the life of such tenant.<sup>1</sup> As soon, therefore, as any child was born, the father began to have a permanent interest in the lands; he became one of the *pares curtis* (peers of the court), and was called tenant by the curtesy *initiate*; and this estate being once vested in him by the birth of the child, was not liable to be determined by the subsequent death or coming of age of the infant.

§ 176. (1) **Requisites to make a tenancy by the curtesy.**—There are four requisites necessary to make a tenancy by the curtesy; marriage, seisin of the wife, issue, and death of the wife.<sup>m</sup> 1. The marriage must be canonical and legal. 2. The seisin of the wife must be an actual seisin, or possession of the lands; not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the curtesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife: as in case of an advowson, where the church has not become void in the lifetime of the wife; which a man may hold by the curtesy, because it is impossible to have had actual seisin of it, and *impotentia excusat legem* (want of power excuses the law).<sup>n</sup> If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands;<sup>7</sup> for the king by prerogative is entitled to them, the instant she herself has any title: and since she could never be rightfully seised of the lands, and the husband's title depends entirely upon her seisin, the husband can have no title as tenant by the curtesy.<sup>o</sup><sup>8</sup> 3. The

<sup>1</sup> F. N. B. 143.

<sup>n</sup> *Ibid.* 29.

<sup>m</sup> Co. Litt. 30.

<sup>o</sup> Co. Litt. 30. Plowd. 263.

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<sup>7</sup> **Idiocy of wife.**—If the wife be such an idiot as to be incapable of seisin—even of actual seisin—it is hard to see how a valid marriage with her could exist. (Bishop on Married Women, § 483.) Any degree of idiocy short of this could hardly prevent title from being vested in her by descent, if not by gift; and in most American states this would be enough to give curtesy. Nowhere in this country is there such a conflicting seisin as the king has by his prerogative in England.—HAMMOND.

<sup>8</sup> **Seisin requisite to dower or curtesy.**—The difference between this requirement and that for a wife's dower, when "seisin in law of the husband



issue must be born alive. Some have had a notion that it must be heard to cry; but that is a mistake. Crying, indeed, is the *strongest* evidence of its being born alive; but it is not the *only* evidence.<sup>p</sup> The issue also must be born during the life of the mother; for, if the mother dies in labor, and the Cæsarean operation is performed, the husband in this case shall not be tenant by the <sup>[128]</sup>curtesy: because, at the instant of the mother's death, he was clearly not entitled, as having had no issue born, but the land descended to the child, while he was yet in his mother's womb; and the estate being once so vested, shall not afterwards be taken from him.<sup>q</sup> In gavelkind lands, a husband may be tenant by the curtesy without having any issue.<sup>r</sup> But in general there must be issue born; and such issue must also be capable of inheriting the mother's estate.<sup>s</sup> Therefore, if a woman be a tenant in tail *male*, and hath only a *daughter* born, the husband is not thereby entitled to be tenant by the curtesy; because such issue female can never inherit the estate in tail-male.<sup>t</sup> And this seems to be the true reason why the husband cannot be tenant by the curtesy of any lands of which the wife was not actually seised: because, in order to entitle himself to such estate, he must have begotten issue that may be heir to the wife; but no one by the standing rule of law can be heir to the ancestor of any land whereof the ancestor was not actually seised; and therefore as the husband hath never begotten any issue that can be heir to those lands, he shall not be tenant of them by the curtesy.<sup>u</sup> And hence we may observe with how much nicety and consideration the old rules of law were

<sup>p</sup> Dyer. 25. 8 Rep. 34.

<sup>q</sup> Co. Litt. 29.

<sup>r</sup> *Ibid.* 30.

<sup>s</sup> Litt. § 56.

<sup>t</sup> Co. Litt. 29.

<sup>u</sup> *Ibid.* 40.

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will be as effectual as a seisin in deed" (p. \*132), has often been spoken of as one of the arbitrary and technical rules of the ancient law. It is, on the contrary, a proof of its equitable character. It was in the husband's power, not in the wife's, to reduce the seisin in law to an actual seisin. It was his duty to do this for his wife's sake and interest. If he neglected it, he was justly made to take the consequence by losing curtesy. But to cut off his wife's dower, if the husband omitted to take actual seisin where he had seisin in law, would not only punish her for his neglect, but would give him a chance to rob her of her dower for the benefit of his own heirs. This is the meaning of Blackstone's remark, page \*132, on the "power" of each spouse.—HAMMOND.

framed; and how closely they are connected and interwoven together, supporting, illustrating, and demonstrating one another. The time when the issue was born is immaterial, provided it were during the coverture: for, whether it were born before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin, or at the time of the wife's decease, the husband shall be tenant by the curtesy.<sup>w</sup> 9 The husband by the birth of

<sup>w</sup> *Ibid.* 29.

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9 Tenancy by curtesy.—The distinction between the husband's enjoyment of the *wife's* freehold before the birth of an heir, and his own freehold in her lands after that event, is clearly marked in the old books; but has often been overlooked of late, especially in reasoning from the common law to the effect of recent statutes taking away the husband's powers over the wife's property; e. g., *Hatfield v. Sneden*, 54 N. Y. 280. It was the birth of issue, not the death of the wife, that vested the husband's estate for his own life. Thus, after such birth the lord accepted his homage, which he could not safely do before that time, when the husband's interest might terminate before his own death. (F. N. B. 257.)—HAMMOND.

"To adopt the language of Hosmer, C. J., in *Heath v. White*, 5 Conn. 228, 236, 'the system of tenure by the curtesy is, at least, pretty artificial, and is what it is because *ita lex scripta est*.' Its origin is not very well known, nor is there any principle to which, by common consent, it is referable. But the counsel for the defendant contend that the reason for requiring actual seisin in the wife is to be found in the fact that the common law confined inheritance to the stock of actual seisin. If it clearly appeared that this was the sole reason, the defendant would be entitled to the benefit of the rule 'that when the reason of any particular law ceases, so does the law itself.' The citation from 2 Bl. Comm. 128, and from 1 Greenl. Cruise, tit. 'Curtesy,' § 23, to the effect that the rule as to seisin in curtesy probably arose from the rule as to inheritance, at first impressed us as furnishing strong support for this position. But, on turning to Williams' able treatise on Real Property (4th ed., App. E, \*491-502), we found an exhaustive discussion of this question, in which he clearly shows, by many citations from Coke, Littleton, and Blackstone, as well as by other reasons, that this supposition is not true; and his conclusion is 'that the reason why an actual seisin was required to entitle the husband to curtesy was that his wife may not suffer by his neglect to take possession of her lands, and, in order to induce him to do so, the law allowed him curtesy of all lands of which an actual seisin had been obtained, but refused him his curtesy out of such lands as he had taken no pains to obtain possession of.' In 2 Bl. Comm. 131, under the head of 'Dower,' it is said: 'A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title

the child becomes (as was before observed) tenant by the curtesy *initiate*,<sup>x</sup> and may do many acts to charge the lands: but his estate is not *consummate* till the death of the wife; which is the fourth and last requisite to make a complete tenant by the curtesy.<sup>r</sup><sup>10</sup>

§ 177. c. Tenancy in dower.—[129] Tenant in *dower* is where the husband of a woman is seised of an estate of inheritance, and dies; in this case, the wife shall have the third part of all the lands

x *Ibid.* 30.

r *Ibid.*

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to an actual seisin, as it is in the husband's power to do with regard to the wife's lands, which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself, in her right, was actually seised in deed.' Lord Coke also has a statement to the same effect. Bishop, in his treatise on the 'Law of Married Women,' argues that curtesy does not depend solely on the right of issue to inherit, but upon the nature of the wife's estate, as well—that it was one that might have been made to yield sustenance to the married parties during coverture. After an able review of all the leading authorities, he says (section 499): 'The result of this reasoning seems to be that, while the possibility of the issue inheriting is essential to curtesy, actual possession of the hereditaments by the wife is also essential—curtesy not arising except where the two concur. In this respect the analogy of curtesy to dower is complete. If we suppose that dower was given to assist the widow in her own maintenance, and curtesy to assist the husband in maintaining the children, the analogy ought to be complete; and the law is not unreasonable in declining to give, after death, the use of what was not in use during life.' These considerations would seem to be ample to show that the abolition of the common-law maxim, requiring seisin for the stock of inheritance, does not logically determine the right of the husband to curtesy in a remainder which could not by possibility have vested in possession during coverture. And, finally, the fact that nearly or quite all the states in this country, and England also, have abolished the maxim referred to, and now distribute the estates of intestates among the heirs without any reference or regard to the actual seisin of the ancestors, and yet, at the same time, hold firmly to the doctrine that either actual or legal seisin is an indispensable requisite to title by the curtesy, affords the strongest presumption against the correctness of the defendant's position." *Todd v. Oviatt*, 58 Conn. 174, 7 L. R. A. 693, 20 Atl. 440, 441.

<sup>10</sup> For the law on tenancy by the curtesy, see Williams, *Real Prop.* (21st ed.), 306 ff; 2 Poll. & Maitl., *Hist. Eng. Law* (2d ed.), 414-420; Digby, *Hist. Real Prop.* (5th ed.), 174-176.

and tenements whereof he was seised during the coverture, to hold to herself for the term of her natural life.<sup>2 11</sup>

Dower is called in Latin by the foreign jurists *doarium*, but by Bracton and our English writers *dos*; which among the Romans signified the marriage portion, which the wife brought to her husband; but with us is applied to signify this kind of estate, to which the civil law, in its original state, had nothing that bore a resemblance: nor, indeed, is there anything in general more different than the regulation of landed property according to the English and Roman laws. Dower out of lands seems also to have been unknown in the early part of our Saxon constitution; for, in the laws of King Edmond,<sup>a</sup> the wife is directed to be supported wholly

<sup>a</sup> Litt. § 36.

<sup>a</sup> Wilk. 75.

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<sup>11</sup> **Dower in the United States.**—In most, if not all, the United States dower and curtesy no longer depend on the common law, but are regulated by statute. (1 Washburn, c. 6, § 1, pl. 5.)

Where, as in most western states, the statute makes no reference to the common-law rules, but gives the widow or surviving husband a certain share of the decedent's real estate, precisely as other shares are given to his children or other heirs, it becomes a nice question whether the common-law principles relative to the estate of dower and curtesy have any application to such shares, or whether they are to be regarded as merely distributive shares of the real property, governed by the same principles with other inheritance; e. g., is dower to be favored in such cases?

The supreme court of Indiana has carried the tendency of recent law to its logical extent by holding that the wife takes like any other heir.

"Tenancies in dower, having been abolished by statute, no longer exist in this state. The rights of a surviving wife in the real estate of her husband are those created by statute alone." (Gaylord v. Dodge, 31 Ind. 41.)

"The widow takes her interest as such under our statute, in the lands of her deceased husband, not as dowress, but as an heir takes, by descent from her husband." (Fletcher v. Holmes, 32 Ind. 497; Mock v. Watson, 41 Iowa, 241.)

But, on the whole, the late cases seem to regard this as essentially the same estate with common-law dower, except so far as modified by express statutory provisions.

The inchoate right of dower is so vested in the wife *as against the husband*, immediately on the marriage (or acquisition of the property afterwards), that no conveyance or other act of the husband can deprive her of it. In some states, however, a judicial sale, whether founded on a general judgment against the husband, or on a mortgage or trust deed made by him, will cut off her right of dower. And a sale by advertisement or statutory foreclosure will be

out of the personal estate. Afterwards, as may be seen in gavelkind tenure, the widow became entitled to a conditional estate in one-half of the lands; with a proviso that she remained chaste and unmarried;<sup>b</sup> as is usual also in copyhold dowers, or free-bench. Yet some<sup>c</sup> have ascribed the introduction of dower to the Normans, as a branch of *their* local tenures; though we cannot expect any feudal reason for its invention, since it was not a part of the pure, primitive, simple law of feuds, but was first of all introduced into that system (wherein it was called *triens tertia* (the third part),<sup>d</sup> and *dotalitium*—dower) by the Emperor Frederick the Second;\*

<sup>b</sup> Somner, Gavelk. 51. Co. Litt. 33. Bro. Dower. 70.

<sup>c</sup> Wright. 192.

<sup>d</sup> Crag. 1. 2. t. 22, § 9.

\* *Ibid.*

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equivalent in this respect to a judicial sale. And if the mortgage is foreclosed in the husband's lifetime, it will make no difference whether the wife joined in it or not. (*Sturdevant v. Norris*, 30 Iowa, 65.) But if the mortgage is not completely foreclosed and the property sold in the husband's life, then the wife's dower will attach to the entire property, or to the surplus over the mortgage, as the mortgage is executed by husband alone, or by husband and wife.

Where the wife unites with the husband in the mortgage of his real estate, and the property is sold under foreclosure, she is entitled to dower in the surplus only (*Smith v. Jackson*, 2 Edw. Ch. (N. Y.) 28; *Titus v. Neilson*, 5 Johns. Ch. (N. Y.) 452; *Tabele v. Tabele*, 1 Johns. Ch. (N. Y.) 45; *Jennison v. Hapgood*, 14 Pick. (Mass.) 345; *Hartshorne v. Hartshorne*, 2 N. J. Eq. 349; *Harrow v. Johnson*, 3 Met. (Ky.) 578; *Bank of Commerce v. Owens*, 31 Md. 320, 1 Am. Rep. 60.) And where the holder of the equity of redemption redeems, the widow can have dower only by contributing her portion of the mortgage debt. (*Swaine v. Perine*, 5 Johns. Ch. (N. Y.) 482, 9 Am. Dec. 318.) Though she unites in the mortgage only as surety for her husband's debt, the inchoate right of dower is not her separate property in such a sense as to entitle her to have the mortgage redeemed by her husband's estate for her benefit, so as to leave her dower clear. (*Hawley v. Bradford*, 9 Paige (N. Y.), 200, 37 Am. Dec. 390; *Hinchman v. Stiles*, 9 N. J. Eq. 454; *Bank of Commerce v. Owens*, *supra*.)

A wife cannot relinquish her contingent right of dower directly to her husband, nor a husband his corresponding right to the wife. Either may relinquish by joining with the other in a conveyance to a third party; and probably by a separate release to the purchaser, made after the sale (though such separate releases were formerly held invalid in some cases). But the wife cannot disannex or dissociate her contingent dower from the real estate to which it



who was contemporary with our King Henry III. It is possible, therefore, that it might be with us the relic of a Danish custom: since, according to the historians of that country, dower was introduced into Denmark by Swein, the father of our Canute the Great, out of gratitude to the Danish ladies, who sold all their [130] jewels to ransom him when taken prisoner by the Vandals.<sup>f</sup> However this be, the reason, which our law gives for adopting it, is a very plain and sensible one; for the sustenance of the wife, and the nurture and education of the younger children.<sup>g</sup>

<sup>f</sup> Mod. Un. Hist. xxxii. 91.

<sup>g</sup> Bract. l. 2. c. 39. Co. Litt. 30.

attaches, and bargain and sell and convey it as a separate and independent interest to a third person, or to her husband. (2 Scribner on Dower, 290; Carson v. Murray, 3 Paige (N. Y.), 483; White v. Wager, 25 N. Y. 328; Winans v. Peebles, 32 N. Y. 423; Simms v. Hervey, 19 Iowa, 273.)

The law does not recognize the right of husband and wife during coverture to make valid and binding contracts to convey or release the dower right of one to the other. By this we do not mean to say that if such contracts are fairly made and acted on, equity will not in some instances treat them as valid, or estop the husband and wife from contesting them; especially when connected with an agreement to separate. (Per Dillon, C. J., in McKee v. Reynolds, 26 Iowa, 578, explaining Blake v. Blake, 7 Iowa, 46.)

Where married women have obtained by statute enlarged powers of dealing with their own property, a distinction has been made between such powers in respect to property held in her own right, and in respect to her interest in her husband's property (e. g., in matters of dower, homestead, etc.), it being held that with respect to the last the statutes have no effect, but she remains under common-law disabilities.

In Ring v. Burt (1869), 17 Mich. 465, 97 Am. Dec. 200, this distinction was very clearly expressed, and it was held that a wife could not convey, encumber, or in any way affect by contract her interest in the homestead except by joining in a deed with her husband. Her agreement in respect to such property is simply void.

But the right to dower is not vested until the husband's death, as against the power of the legislature to abridge or take it away. "In measuring her rights we look to the law in force at the time of the husband's death, for it is this event which ripens or makes consummate the prior right, which so long as it is vested upon the marriage and seisin, was inchoate only. If there was no law in force at that time giving her the right, then it is extinguished. She cannot take under a law repealed prior to that time. And taking under the law then existing, she must take it with its restrictions and limitations." (Per Wright, C. J., in Lucas v. Sawyer, 17 Iowa, 517; Noel v. Ewing, 9 Ind. 37-39, where cases are collected.) The doctrine of Lucas v. Sawyer is followed in

§ 178. (1) Who may be endowed.—In treating of this estate, let us first consider *who* may be endowed; secondly, of *what* she may be endowed; thirdly, the manner *how* she shall be endowed; and fourthly, how dower may be *barred* or prevented.

Who may be endowed. She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii* (from the bond of matrimony), she shall not be endowed; for *ubi nullum matrimonium, ibi nulla dos* (where there is no marriage, there is no dower due).<sup>h</sup> But a divorce *mensa et thoro* (from bed and board) only doth not destroy the dower;<sup>i</sup> no, not even

<sup>h</sup> Bract. 1. 2. c. 39. § 4.

<sup>i</sup> Co. Litt. 32.

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Randall v. Kreiger, Fed. Cas. No. 11,554, 2 Dill. 444, a case on the constitutional power to validate a sale of husband and wife, by attorney. (See, also, Frantz v. Harrow, 13 Ind. 507; Galbreath v. Gray, 20 Ind. 290.)

The chief difficulties arise in cases where the husband has conveyed away the property during coverture, but the wife has not released her right to dower. Here it is held that the wife can claim only the dower allowed by law at the time of death, although a larger dower right may have been allowed by law at the time of conveyance.

But the rule does not work both ways, as the purchaser in such cases has vested rights from the time of conveyance. The wife cannot claim a larger dower than was then allowed by law, although the legislature may have enlarged the dower right between the conveyance and the husband's death.

Such a statute cannot have a retrospective operation so as to lessen the estate actually purchased by the vendee. (Davis v. O'Ferrall, 4 G. Greene (Iowa), 168.) And so when land was sold on judicial sale, at a time when such a sale did not cut off the wife's dower, but subsequently and before the husband's death the law was changed, taking away dower in such cases, it was held that the wife could claim no dower. (Sturdevant v. Norris, 30 Iowa, 65.)

Another question is, in such cases, whether the wife is to have one-third of the value at the time of sale or one-third also of any increased value that may have accrued at the time of the husband's death.

In some states, as New York and Virginia, the widow is confined strictly to the value at the time of alienation. But in most states it is held that she can have the benefit of any general rise in the value of property, even if derived from surrounding improvements, but not of any improvements made by the alienee himself on that property. (See Tyler on Coverture, p. 538; 1 Washburn on Real Property, c. 7, § 5, pl. 22.)

At common law, dower attached only to legal estates. Many questions which arose respecting the precise interest in which dower could be claimed are done away with by statutes giving the wife dower in equitable as well as legal estates.—HAMMOND.

for adultery itself by the common law.<sup>k</sup> Yet now by the statute Westm. 2,<sup>l</sup> if a woman elopes from her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly held, that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy:<sup>m</sup> but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place. By the ancient law the wife of a person attainted of treason or felony could not be endowed; to the intent, says Staunforde,<sup>n</sup> that if the love of a man's own life cannot restrain him from such atrocious acts, the love of his wife and children may: though Britton<sup>o</sup> gives it another turn: viz., that it is presumed the wife was privy to her husband's crime. However, the statute 1 Edw. VI, c. 12 (Criminal Law, 1547), abated the rigor of the common law in this particular, and allowed [131] the wife her dower. But a subsequent statute<sup>p</sup> revived this severity against the widows of traitors, who are now barred of their dower (except in the case of certain modern treasons relating to the coin<sup>q</sup>), but not the widows of felons.<sup>12</sup> An alien, also, cannot be endowed, unless she be queen consort; for no alien is capable of holding lands.<sup>r</sup> The wife must be above nine years old at her husband's death, otherwise she shall not be endowed:<sup>s</sup> though in

<sup>k</sup> Yet, among the ancient Goths, an adulteress was punished by the loss of her *dotalitii et trientis ex bonis mobilibus viri* (of her dower and thirds from the movable goods of her husband). (Stiernh. l. 3. c. 2.)

<sup>l</sup> 13 Edw. I. c. 34 (Rape, 1285).

<sup>m</sup> Co. Litt. 31.

<sup>n</sup> P. C. b. 3. c. 3.

<sup>o</sup> C. 110.

<sup>p</sup> 5 & 6 Edw. VI. c. 11 (Treason, 1551).

<sup>q</sup> Stat. 5 Eliz. c. 11 (Clipping Coin, 1562). 18 Eliz. c. 1 (Coin, 1575). 3 & 9 W. III. c. 26 (Coin, 1696). 15 & 16 Geo. II. c. 28 (Counterfeiting Coin, 1741).

<sup>r</sup> Co. Litt. 31.

<sup>s</sup> Litt. § 36.

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<sup>12</sup> Presumably, since the passing of the Forfeiture Act of 1870, no widow can be deprived of her dower by conviction of her husband for felony or treason.

Braeton's time the age was indefinite, and dower was then only due "*si uxor possit dotem promereri, et virum sustinere* (if the wife be entitled to dower and be marriageable).<sup>t</sup>

§ 179. (2) Of what endowed.—We are next to inquire, of what a wife may be endowed. And she is now by law entitled to be endowed of all lands and tenements, of which her husband was seised in fee simple or fee-tail at any time during the coverture; and of which any issue, which she might have had, might by possibility have been heir.<sup>u</sup> Therefore, if a man, seised in fee simple, hath a son by his first wife, and after marries a second wife, she shall be endowed of his lands; for her issue might by possibility have been heir, on the death of the son by the former wife. But, if there be a donee in special tail, who holds lands to him and the heirs of his body begotten on Jane, his wife; though Jane may be endowed of these lands, yet if Jane dies, and he marries a second wife, that second wife shall never be endowed of the lands entailed; for no issue, that she could have, could by any possibility inherit them.<sup>v</sup> A seisin in law of the husband will be as effectual as a seisin in deed, in order to render the wife dowable; for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands: which is one reason why he shall not be tenant by the curtesy, but of such lands whereof the wife, or he himself in her right, was actually seised in deed.<sup>w</sup> The seisin of the husband, for a transitory instant [<sup>132</sup>] only, when the same act which gives him the estate conveys it also out of him again (as where by a fine land is granted to a man, and he immediately renders it back by the same fine), such a seisin will not entitle the wife to dower;<sup>x</sup> for the land was merely *in transitu* (passing through his hands), and never rested in the husband. But, if the land abides in him for a single moment, it seems that the wife shall be endowed thereof.<sup>y</sup> And, in short, a widow may be endowed of all her hus-

<sup>t</sup> 1. 2. c. 9. § 3.

<sup>u</sup> Litt. § 36. 53.

<sup>v</sup> *Ibid.* § 53.

<sup>w</sup> Co. Litt. 31.

<sup>x</sup> Cro. Jac. 615. 2 Rep. 67. Co. Litt. 31.

<sup>y</sup> This doctrine was extended very far by a jury in Wales, where the father and son were both hanged in one cart, but the son was supposed to have sur-

band's lands, tenements, and hereditaments, corporeal or incorporeal, under the restrictions before mentioned; unless there be some special reason to the contrary. Thus, a woman shall not be endowed of a castle, built for defense of the realm:<sup>z</sup> nor of a common without stint; for, as the heir would then have one portion of this common, and the widow another, and both without stint, the common would be doubly stocked.<sup>a</sup> Copyhold estates are also not liable to dower, being only estates at the lord's will; unless by the special custom of the manor, in which case it is usually called the widow's free-bench.<sup>b</sup> But, where dower is allowable, it matters not, though the husband alien the lands during the coverture; for he aliens them liable to dower.<sup>c</sup> <sup>13</sup>

§ 180. (3) How dower attaches.—Next, as to the manner in which a woman is to be endowed. There are now subsisting four species of dower: the fifth, mentioned by Littleton,<sup>d</sup> *de la plus belle* (of the fairest portion),<sup>14</sup> having been abolished together with the military tenures, of which it was a consequence. 1. Dower by the *common law*; or that which is before described. 2. Dower by particular *custom*;<sup>e</sup> as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. Dower *ad ostium ecclesiæ* (at the church door):<sup>f</sup> which is where tenant in fee simple [133] of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made and (Sir Edward Coke in his translation adds) troth plighted be-

lived the father, by appearing to struggle longest; whereby he became seised of an estate by survivorship, in consequence of which seisin his widow had a verdict for her dower. (Cro. Eliz. 503.)

<sup>z</sup> Co. Litt. 31. 3 Lev. 401.

<sup>a</sup> Co. Litt. 32. 1 Jon. 315.

<sup>b</sup> 4 Rep. 22.

<sup>c</sup> Co. Litt. 32.

<sup>d</sup> § 48, 49.

<sup>e</sup> Litt. § 37.

<sup>f</sup> *Ibid.* § 39.

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<sup>13</sup> A widow's position is now greatly altered by the provisions of the Dower Act of 1833.

<sup>14</sup> **Dower de la plus belle.**—Dower *de la plus belle* was where the widow on suing the guardian in chivalry for dower was required by him to endow herself of the fairest portion of any lands she might hold as guardian in socage, and



tween them, doth endow his wife with the whole, or such quantity as he shall please, of his lands; at the same time specifying and ascertaining the same: on which the wife, after her husband's death, may enter without further ceremony. 4. Dower *ex assensu patris* (by assent of the father);<sup>g</sup> which is only a species of dower *ad ostium ecclesiæ*, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands. In either of these cases, they must (to prevent frauds) be made<sup>h</sup> *in facie ecclesiæ et ad ostium ecclesiæ; non enim valent facta in lecto mortali nec in camera, aut alibi ubi clandestina fuere conjugia* (in the face of the church, and at the church door; for those made on a death-bed, in a chamber or elsewhere, where the nuptials have been private, are not valid).<sup>15</sup>

§ 181. (4) History of dower.—It is curious to observe the several revolutions which the doctrine of dower has undergone, since its introduction into England. It seems first to have been of the nature of the dower in gavelkind, before mentioned; viz., a moiety of the husband's lands, but forfeitable by incontinency or a second marriage. By the famous charter of Henry I this condition, of widowhood and chastity, was only required in case the husband left any issue:<sup>i</sup> and afterwards we hear no more of it. Under Henry the Second, according to Glanvill,<sup>k</sup> the *dower ad ostium ecclesiæ* (at the church door) was the most usual species

<sup>g</sup> Litt. § 40.

<sup>h</sup> Bracton. l. a. c. 39. § 4.

<sup>i</sup> *Si mortuo viro uxor ejus remanserit, et sine liberis fuerit, dotem suam habebit;—si vero uxor cum liberis remanserit, dotem quidem habebit, dum corpus suum legitime servaverit.* (If the wife survive her husband and there be no children she shall have her dower—but if there be children she shall have her dower only so long as she lives chastely.) (Cart. Hen. I. A. D. 1101. Introd. to great charter. edit. Oxon. pag. iv.)

<sup>k</sup> l. 6. c. 1. & 2.

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thus release from dower the lands of her husband held in chivalry. This was abolished along with the military tenures, of which it was a consequence.—1 Bouvier's Law Dict. (Rawle's 3d Rev.), 932.

<sup>15</sup> The special forms of dower *ad ostium ecclesiæ* and dower *ex assensu patris* (Digby, Hist. Real Prop. (5th ed.), 128) were abolished by the Dower Act of 1833.

of dower; and here as well as in Normandy,<sup>1</sup> it was binding upon the wife, if by her consented to at the time of marriage. Neither, in those days of feudal rigor, was the husband allowed to endow her *ad ostium ecclesiæ* with more than the third part of the lands whereof he was seised, though he might endow her with less; lest by such liberal endowments the lord should be defrauded of his wardships and other feudal profits.<sup>m</sup> But if no specific dotation was made [<sup>134</sup>] at the church porch, then she was endowed by the common law of the third part (which was called her *dos rationabilis*—reasonable dower) of such lands and tenements, as the husband was seised of at the time of the espousals, and no other; unless he specially engaged before the priest to endow her of his future acquisitions:<sup>n</sup> and, if the husband had no lands, an endowment in goods, chattels, or money, at the time of espousals, was a bar of any dower<sup>o</sup> in lands which he afterwards acquired.<sup>p</sup> In

<sup>1</sup> Gr. Coustum. c. 101.

<sup>m</sup> Bract. l. 2. c. 39. § 6.

<sup>n</sup> *De questu suo* (Glanv. *Ibid.*) *de terris acquisitis et acquirendis* (of his lands already in possession, and which may be acquired hereafter) (Bract. *Ibid.*)

<sup>o</sup> Glanv. c. 2.

<sup>p</sup> When special endowments were made *ad ostium ecclesiæ*, the husband, after affiance made, and troth plighted, used to declare with what specific lands he meant to endow his wife, *quod dotat cum de tali manerio cum pertinentijs, etc.* (that I will endow her of such a manor with its appurtenances). Bract. *Ibid.* and therefore in the old York ritual (Seld. Ux. Hebr. l. 2. c. 27) there is, at this part of the matrimonial service, the following rubric: "*sacerdos interroget dotem mulieris; et, si terra et in dotem detur, tunc dicatur psalmus iste, etc.* (the priest shall ask what is the woman's dower; and if land be given to her for her dower, then let that psalm be read)." When the wife was endowed generally (*ubi quis uxorem suam dotaverit in generali, de omnibus terris et tenementis* (when anyone shall have endowed his wife generally, with all his lands and tenements); Bract. *Ibid.*) the husband seems to have said, "with all my lands and tenements I thee endow"; and then they all became liable to her dower. When he endowed her with personalty only, he used to say, "with all my worldly goods (or, as the Salisbury ritual has it, *with all my worldly chattel*), I thee endow"; which entitled the wife to her thirds, or *pars rationabilis* (reasonable portion) of his personal estate, which is provided for by *magna carta*, cap. 26, and will be further treated of in the concluding chapter of this book; though the retaining this last expression in our modern liturgy, if of any meaning at all, can now refer only to the right of maintenance, which she acquires during coverture, out of her husband's personalty.

King John's *magna carta*, and the first charter of Henry III,<sup>a</sup> no mention is made of any alteration of the common law, in respect of the lands subject to dower: but in those of 1217, and 1224, it is particularly provided, that a widow shall be entitled for her dower to the third part of *all* such lands as the husband had held in his lifetime:<sup>r</sup> yet, in case of a specific endowment of less *ad ostium ecclesiæ*, the widow had still no power to waive it after her husband's death. And this continued to be law, during the reigns of Henry III and Edward I.<sup>s</sup> In Henry IV's time it was denied to be law, that a woman can be endowed of her husband's goods and chattels:<sup>t</sup> and, under Edward IV, Littleton lays it down [<sup>135</sup>] expressly, that a woman may be endowed *ad ostium ecclesiæ* with more than a third part;<sup>u</sup> and shall have her election, after her husband's death, to accept such dower, or refuse it, and betake herself to her dower at common law.<sup>w</sup> Which state of uncertainty was probably the reason, that these specific dowers, *ad ostium ecclesiæ* (at the church door) and *ex assensu patris* (by assent of the father) have since fallen into total disuse.

§ 182. (5) Assignment of dower.—I proceed therefore, to consider the method of endowment, or assigning dower, by the common law, which is now the only usual species. By the old law, grounded on the feudal exactions, a woman could not be endowed without a fine paid to the lord; neither could she marry again without his license; lest she should contract herself, and so convey part of the feud to the lord's enemy.<sup>x</sup> This license the lords took care to be well paid for; and, as it seems, would sometimes force the dowager to a second marriage, in order to gain the fine. But, to remedy these oppressions, it was provided, first by the

<sup>a</sup> A. D. 1216. c. 7. edit. Oxon.

<sup>r</sup> *Assignetur autem ei pro dote sua tertia pars totius terræ mariti sui quæ sua fuit in vita sua, nisi de minori dotata fuerit ad ostium ecclesiæ*, c. 7. (But the third part of all the lands of which her husband was possessed in his lifetime shall be assigned to her for her dower, except she has been endowed with less at the church door). (*Ibid.*)

<sup>s</sup> Bract. *ubi supr.* Britton. c. 101, 102. Flet. l. 5. c. 23. § 11, 12.

<sup>t</sup> P. 7 Hen. IV. 13, 14 (1405).

<sup>u</sup> § 39. F. N. B. 150.

<sup>w</sup> § 41.

<sup>x</sup> Mirr. c. 1. § 3.

charter of Henry I,<sup>y</sup> and afterwards by *magna carta*,<sup>z</sup> that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh, if she chooses to live without a husband; but shall not, however, marry against the consent of the lord: and further, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called the widow's *quarantine*; a term made use of in law to signify the number of forty days, whether applied to this occasion or any other.<sup>a</sup> The particular lands to be held in dower, must be assigned<sup>b</sup> by the heir of the husband or his guardian; not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant [136] thereof to the lord, and the widow is immediate tenant to the heir, by a kind of subinfeudation, or under-tenancy, completed by this investiture or assignment; which tenure may still be created, notwithstanding the statute of *quia emptores* (18 Edw. I, st. 1, 1290), because the heir parts not with the fee simple, but only with an estate for life. If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her remedy at law, and the sheriff is appointed to assign it.<sup>c</sup> Or if the heir (being under age) or his guardian assign, more than she ought to have, it may be afterwards remedied by writ of *admeasurement* of dower.<sup>d</sup> If the thing of which she is endowed be divisible, her dower must be set out by metes and bounds; but, if it be indivisible, she must be endowed specially; as, of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.\*

<sup>y</sup> *Ubi supra*.

<sup>z</sup> Cap. 7.

<sup>a</sup> It signifies, in particular, the forty days, which persons coming from infected countries are obliged to wait, before they are permitted to land in England.

<sup>b</sup> Co. Litt. 34, 35.

<sup>c</sup> Co. Litt. 34, 35.

<sup>d</sup> F. N. B. 148. Finch. L. 314. Stat. Westm. 2. 13 Edw. I. c. 7 (Dower, 1285).

• Co. Litt. 32.

Upon preconcerted marriages, and in estates of considerable consequence, tenancy in dower happens very seldom: for, the claim of the wife to her dower at the common law diffusing itself so extensively, it became a great clog to alienations, and was otherwise inconvenient to families. Wherefore, since the alteration of the ancient law respecting dower *ad ostium ecclesie*, which hath occasioned the entire disuse of that species of dower, jointures have been introduced in their stead, as a bar to the claim at common law. Which leads me to inquire, lastly,

§ 183. (6) **Barring dower.**—How dower may be *barred* or prevented. A widow may be barred of her dower not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title deeds, or evidences of the estate from the heir; until she restores them:<sup>f</sup> and, by the statute of Gloucester,<sup>g</sup> if a dowager aliens the land assigned her for dower, she forfeits it *ipso* [137] *facto*, and the heir may recover it by action. A woman also may be barred of her dower, by levying a fine or suffering a recovery of the lands, during her coverture.<sup>h</sup> But the most usual method of barring dowers is by jointures, as regulated by the statute 27 Hen. VIII, c. 10 (Statute of Uses, 1535).

§ 184. (a) **Jointures.**—A jointure, which, strictly speaking, signifies a joint estate, limited to both husband and wife, but in common acceptation extends also to a sole estate, limited to the wife only, is thus defined by Sir Edward Coke;<sup>i</sup> “a competent livelihood of freehold for the wife, of lands and tenements; to take effect, in profit or possession, presently after the death of the husband; for the life of the wife at least.” This description is framed from the purview of the statute 27 Hen. VIII, c. 10 (1535), before mentioned; commonly called the statute of *uses*, of which we shall speak fully hereafter. At present I have only to observe, that before the making of that statute, the greatest part of the land of England was conveyed to uses; the property or possession of the

<sup>f</sup> *Ibid.* 39.

<sup>g</sup> 6 Edw. I. c. 7 (1278).

<sup>h</sup> *Pig. of Recov.* 66.

<sup>i</sup> 1 *Inst.* 36.



soil being vested in one man, and the *use*, or profits thereof, in another; whose directions, with regard to the disposition thereof, the former was in conscience obliged to follow, and might be compelled by a court of equity to observe. Now, though a husband had the *use* of lands in absolute fee simple, yet the wife was not entitled to any dower therein; he not being *seised* thereof: wherefore it became usual, on marriage, to settle by express deed some special estate to the use of the husband and his wife, for their lives, in joint tenancy or jointure; which settlement would be a provision for the wife in case she survived her husband. At length the statute of uses ordained, that such as had the *use* of lands, should, to all intents and purposes, be reputed and taken to be absolutely *seised* and possessed of the soil itself. In consequence of which legal seisin, all wives would have become dowable of such lands as were held to the use of their husbands, and also entitled at the same time to any special lands that might be settled in jointure: had not the same statute provided, that [138] upon making such an estate in jointure to the wife before marriage, she shall be forever precluded from her dower.<sup>k</sup>

§ 185. (i) *Requisites of a jointure.*—But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. 2. It must be for her own life at least, and not *pur autre vie* (for the life of another), or for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be, in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiæ*, and may either accept it, or refuse it and betake herself to her dower at common law; for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted, or turned out of possession, she shall then (by the pro-

<sup>k</sup> 4 Rep. 1, 2.

visions of the same statute) have her dower *pro tanto* (to that amount) at the common law.<sup>16</sup>

§ 186. (b) **Relative advantages of dower and jointure.**—There are some advantages attending tenants in dower that do not

<sup>1</sup> These settlements, previous to marriage, seem to have been in use among the ancient Germans, and their kindred nation the Gauls. Of the former Tacitus gives us this account. "*Dotem non uxor marito, sed uxori maritus affert: intersunt parentes et propinqui, et munera probant* (the wife does not bring the portion to the husband, but the husband to the wife; the parents and relations are present and approve of the gifts)." (De Mor. Germ. c. 18.) and Cæsar (de Bello Gallico, l. 6. c. 18) has given us the terms of a marriage settlement among the Gauls, as nicely calculated as any modern jointure, "*Viri, quantas pecunias ab uxoribus dotis nomine acceperunt, tantas ex suis bonis, æstimatione facta, cum dotibus communicant. Hujus omnis pecunæ conjunctim ratio habetur, fructusque servantur. Uter eorum vita superavit, ad eum pars utriusque cum fructibus superiorum temporum pervenit* (Whatever portion a wife has brought to her husband, an estimate being made, he adds as much from his own goods. An account is taken of all this money jointly, and the produce laid by. The share of both, with all the profits that have accrued, falls to the survivor)." The dauphin's commentator on Cæsar supposes that this Gaulish custom was the ground of the new regulations made by Justinian (Nov. 97.) with regard to the provision for widows among the Romans; but surely there is as much reason to suppose, that it gave the hint for our statutable jointures.

<sup>16</sup> **Modern law of jointures.**—The use of jointures is not so common now in England as formerly, nor are they frequently met with in the United States. The word "jointure," it is said, signifies an estate or property settled on a woman in consideration of marriage, to be enjoyed by her after her husband's death, and such is its use in the statutes of Nebraska. *Fellers v. Fellers*, 54 Neb. 694, 74 N. W. 1077. A jointure that bars dower is a provision made for the wife whereby an estate may pass to her presently after the death of her husband. *Chaffee v. Chaffee*, 70 Vt. 231, 40 Atl. 247. A statute of Ohio provided that, if any estate be conveyed to a woman as jointure, in lieu of her dower, to take effect immediately after the death of her husband, and to continue during her life, such conveyance should bar her dower. The section was the adoption of a similar provision in 27 Hen. VIII, which enacted that, where lands were settled to the use of the wife, every woman having such jointure should not have title to any dower in the residue. This act of parliament was enacted to prevent a woman from having both dower and jointure, since before its passage a jointure was not a bar. It was held by the court that an estate to be conveyed as jointure in Ohio must possess the requisites enumerated by Blackstone and the estate must be such a one as to certainty

extend to jointresses; and so, *vice versa*, jointresses are in some respects more privileged than tenants in dower. Tenant in dower by the old common law is subject to no tolls or taxes; and hers is almost the only estate on which, when derived from the king's debtor, the king cannot distrain for his debt; if contracted during the coverture.<sup>m</sup> But, on the other [139] hand, a widow may enter at once, without any formal process, on her jointure land; as she also might have done on dower *ad ostium ecclesiæ*, which a jointure in many points resembles; and the resemblance was still greater, while that species of dower continued in its primitive state; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower.<sup>n</sup> And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.<sup>o</sup> Wherefore, Sir Edward Coke very justly gives it the preference, as being more sure and safe to the widow, than even dower *ad ostium ecclesiæ*, the most eligible species of any.<sup>17</sup>

<sup>m</sup> Co. Litt. 31. a. F. N. B. 150.

• *Ibid.* 37.

<sup>n</sup> Co. Litt. 36.

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and kind that the wife on the death of her husband may take possession of, and hold in severalty, and not in common with others. *Grogan v. Garrison*, 27 Ohio St. 50. The bar arises not by operation of law, but from the express or implied intention of the husband. *Morgan v. Sparks*, 32 Ky. Law Rep. 1196, 108 S. W. 233.

<sup>17</sup> For the law of dower, see Williams, *Real Prop.* (21st ed.), 322 ff; 2 Poll. & Maitl., *Hist. Eng. Law* (2d ed.), 420-428; Digby, *Hist. Real Prop.* (5th ed.), 127-129.

## OF ESTATES LESS THAN FREEHOLD.

§ 187. **Kinds of estates less than freehold.**—Of estates, that are less than freehold, there are three sorts: 1. Estates for years: 2. Estates at will: 3. Estates by sufferance.<sup>1</sup>

<sup>1</sup> **Leasehold interests as chattels real.**—These leasehold interests are commonly called “chattels real.” The following account of the development of the doctrine under which such interests came to be called chattels or chattels real is given by Pollock & Maitland, *Hist. Eng. Law* (2d ed.), vol. II, p. 115.

“Some compensation was made to the termor, and at the same time the gulf that divided him from the freeholder was widened, by the evolution of another doctrine. In the first half of the thirteenth century lawyers were already beginning to say that his interest in the land is a *quasi* chattel; soon they were saying boldly that it is a chattel. The main import of this doctrine is that he has something to bequeath by his will. There was a writ in common use which prohibited the ecclesiastical courts from meddling with lay fee (*laicum feodum*), but the termor’s interest was no ‘lay fee,’ and, if he bequeathed it by his will, the spiritual tribunal would not be prevented from enforcing the bequest. On the other hand, the time had not yet come when the term would be treated as a chattel by the law of intestate succession. It was common to make the lease for years to the lessee “and his heirs,” and, at all events if this were done, the term would pass to the heir if it were not bequeathed by the lessee’s will. However, he was able to bequeath it. We can see the analogy between the term and the chattel at work in another quarter; if the termor commits a felony, his interest does not escheat to his lord; it is forfeited to the king *quasi catallum*. Indeed, the analogy was beginning to work in many quarters. This is not a purely English peculiarity. In Normandy, also, the term of years is accounted a movable; it is *firma mobilis*, as contrasted with fee farm (*feodi firma*).

“At first sight, it is strange that the termor should be able to do what the tenant in fee cannot do, namely, to give his right by testament. We cannot explain this by painting him as a despised creature for whom the feudal land law can find no proper place, for he is thus being put into one category with those who are exercising the most distinctively feudal of all rights in land. To a modern Englishman the phrase ‘chattel real’ suggests at once the ‘leasehold interest,’ and probably it suggests nothing else. But in the middle ages the phrase covers a whole group of rights, and the most prominent member of that group is, not the leasehold interest, but the seignorial right of marriage and wardship. When a wardship falls to the lord, this seems to be treated as a windfall; it is an eminently vendible right, and he who has it can bequeath it by his will. At all events in the hands of a purchaser, the wardship soon becomes a bequeathable chattel: already in John’s reign this is so. The analogy

§ 188. 1. **Estates for years.**—An estate for *years* is a contract for the possession of lands or tenements, for some determinate period: and it takes place where a man letteth them to another for the term of a certain number of years, agreed upon between the lessor and the lessee,<sup>a</sup> and the lessee enters thereon.<sup>b</sup> If the lease be but for half a year, or a quarter, or any less time, this lessee is respected as a tenant for years and is styled so in some legal proceedings; a year being the shortest term which the law in this case

<sup>a</sup> We may here remark, once for all, that the terminations of “—or” and “—ee” obtain, in law, the one an active, the other a passive signification; the former usually denoted the doer of any act, the latter him to whom it is done. The feoffor is he that maketh a feoffment; the feoffee is he to whom it is made: the donor is one that giveth lands in tail; the donee is he who receiveth it: he that granteth a lease is denominated the lessor; and he to whom it is granted the lessee. (Litt. § 57.)

<sup>b</sup> *Ibid.* 58.

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between his right and that of the termor is very close. The purchaser of the wardship, though he is in occupation of the land, has no seisin of free tenement; he can bring no assize. On the other hand, he obtains possessory protection by the writ *Quare eiecit de custodia*, which is a parallel writ to the termor's *Quare eiecit infra terminum*. What, then, we must ask, have these two cases in common? Is there any economic reason for this assimilation of a term of years to a wardship, and for the treatment of both of them as bequeathable chattels? We believe that there is, namely, the investment of capital, and by the way we will remark that the word ‘*catallum*,’ if often it must be translated by our *chattel*, must at others be rendered by our *capital*. Already in the year 1200 sums of money that we must call enormous were being invested in the purchase of wardships and marriages. There was a speculative traffic in these things at a time when few other articles were being bought and sold on a large scale. Now, it is very natural that a man who invests a round sum should wish for a power of bequest. The invested sum is an utterly different thing from the landed estate which he would desire to keep in his family. And then, as to the term of years, we believe that in the twelfth century and yet later, this stands often, if not generally, in the same economic category. It is a beneficial lease bought for a sum of ready money; it is an investment of capital, and therefore for testamentary purposes it is *quasi catallum*. If this explanation be thought untrue—and perhaps it runs counter to some traditional theories—we must once more ask attention to the close similarity that there is between our law's treatment of the termor and its treatment of one who has purchased a wardship. Such a purchaser was no despised ‘husbandman,’ no ‘mere bailiff’; in John's day an archbishop who had been chief justiciar invested four thousand marks in a wardship.”



takes notice of.<sup>c</sup> And this may, not improperly, lead us into a short explanation of the division and calculation of time by the English law.

§ 189. **Computation of time.**—The space of a year is a determinate and well-known period, consisting commonly of 365 days: for, though in [141] bissextile or leap-years it consists properly of 366, yet by the statute 21 Hen. III (1236) the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. That of a month is more ambiguous: there being, in common use, two ways of calculating months; either as lunar, consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year: or, as calendar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. A month in law is a lunar month, or twenty-eight days, unless otherwise expressed; not only because it is always one uniform period, but because it falls naturally into a quarterly division by weeks. Therefore, a lease for “twelve months” is only for forty-eight weeks; but if it be for “a twelvemonth” in the singular number, it is good for the whole year.<sup>a</sup> For herein the law recedes from its usual calculation, because the ambiguity between the two methods of computation ceases; it being generally understood that by the space of time called thus, in the singular number, a twelvemonth, is meant the whole year consisting of one solar revolution. In the space of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes.<sup>e</sup> Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before 12 o’clock at night; after which the following day commences.<sup>2</sup> But to return to estates for years.

<sup>c</sup> *Ibid.* 67.

• Co. Litt. 135.

<sup>a</sup> 6 Rep. 61.

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<sup>2</sup> Year.—The Julian calendar was used in England and the colonies of that country prior to 1752. By statute 24 Geo. III, c. 23 (Calendar (New Style) 1750), the Gregorian calendar was adopted. According to the Julian calendar the year began on March 25th. The term “year” when used in any statute means a calendar year, unless a contrary intention be shown. It means,

§ 190. a. **Estates for years originally precarious.**—These estates were originally granted to mere farmers or husbandmen, who every year rendered some equivalent in money, provisions, or other rent to the lessors or landlords; but, in order to encourage them to manure and cultivate the ground, they had a permanent interest granted them, not determinable at the will of the lord. And yet their possession was esteemed of so little consequence, that they were rather considered as the bailiffs or servants of the lord, who were to [142] receive and account for the profits at a settled price, than as having any property of their own. And therefore they were not allowed to have a freehold estate: but their interest (such as it was) vested after their deaths in their executors, who were to make up the accounts of their testator with the lord, and his other creditors, and were entitled to the stock upon the farm. The lessee's estate might also, by the ancient law, be at any time defeated, by a common recovery suffered by the tenant of the freehold;<sup>f</sup> which annihilated all leases for years then subsisting, unless after-

<sup>f</sup> Co. Litt. 46.

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likewise, twelve calendar months. *Muse v. London Assur. Corp.*, 108 N. C. 240, 13 S. E. 94. It means 365 calendar days. *Erwin v. Benton*, 120 Ky. 536, 9 Ann. Cas. 264, 87 S. W. 291. It may, according to context, mean fiscal year, political year, solar year, leap-year, school year, etc. *Reusch v. Lincoln*, 78 Neb. 828, 112 N. W. 377; *Williams v. Bagnelle*, 138 Cal. 699, 72 Pac. 408.

**Month.**—At common law the word "month," when used without qualification, meant a lunar month. This rule was abolished by statute in England, 1850, and a month declared to mean a calendar month. In the United States the common-law rule was followed in some of the earlier cases. *Loring v. Halling*, 15 Johns. (N. Y.) 119. But the holdings now seem to be uniform that the word, in whatever connection it is used, signifies a calendar month, unless a contrary intent is shown, and in many states this rule has been fixed by statute.

**Day.**—In a computation of time within which legal obligations must be performed, a day is the entire twenty-four hours, beginning at 12 o'clock noon, and extending to 12 o'clock the next night. Fractions of a day in statutes or legal proceedings, or in contracts, are not generally considered. However, when the rights of parties depend on the precedence of time in the same day, or upon the given hour or fraction of a day, it may be alleged or proved as any other fact. *Towell v. Hollweg*, 81 Ind. 154; Cal. Pol. Code, § 3259; *City of Eureka v. Diaz*, 89 Cal. 467, 26 Pac. 961.

wards renewed by the recoverer, whose title was supposed superior to his by whom those leases were granted.<sup>3</sup>

§ 191. **b. Duration of estates for years.**—While estates for years were thus precarious, it is no wonder that they were usually very short, like our modern leases upon rack-rent; and indeed we are told<sup>ε</sup> that by the ancient law no leases for more than forty years were allowable, because any longer possession (especially when given without any livery declaring the nature and duration of the estate) might tend to defeat the inheritance. Yet this law, if ever it existed, was soon antiquated; for we may observe, in Madox's collection of ancient instruments, some leases for years of a pretty early date, which considerably exceed that period;<sup>η</sup>

<sup>ε</sup> Mirror. c. 2. § 27. Co. Litt. 45, 46.

<sup>η</sup> Madox Formulæ Anglicanæ. No. 239. fol. 140. Demise for eighty years, 21 Ric. II. . . . *Ibid.* No. 245. fol. 146, for the like term, A. D. 1429. . . . *Ibid.* No. 248, fol. 148. for fifty years, 7 Edw. IV.

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<sup>3</sup> **Seisin of termor.**—Such a recovery by one “whose title was supposed superior to his by whom those leases were granted” (as Blackstone adds), would of course annul the leases of the party recovered against, and thus render nugatory his right to recover possession by a writ of entry which supposed such a lease. The recovery, therefore, would be resorted to whenever an undesirable lease was to be got rid of. It was probably due to this that the tenant's right to his term and possession under it continued to be “little better than tenancies at the will of the landlord” (p. 143) down to the reign of Edward IV, or later, in spite of the clear statement of the law in their favor, and provision of a writ to help them, in the time of Bracton. (Lib. 4, c. 36, fol. 220.) See further on this point Book III of these Commentaries, page \*200.

It is remarkable how persistent in the minds of English lawyers this conviction of the primitive feebleness of terms for years has been. Mr. Challis, the latest writer who has given original thought to the entire doctrine of real property—his very able little work was published in 1885—has stated it even more sweepingly than Blackstone did a century ago.

“But terms of years were by the common law liable to destruction at the will of the reversioner having the freehold. If the latter suffered judgment to go against him by default in a collusive action of recovery, a lease previously granted by him for years had no validity as against the recoverer, who claimed and obtained judgment upon a supposed title paramount to the title of the reversioner; and this destruction of his estate could not be hindered by the termor, because having no freehold, he had no *locus standi* to intervene in an action of recovery. This hardship was partly remedied by the stat-

and long terms, for three hundred years or a thousand, were certainly in use in the time of Edward III,<sup>1</sup> and probably of Edward I.<sup>k</sup> But certainly, when by the statute 21 Hen. VIII, c. 15 (Tenants for Years, 1529), the termor (that is, he who is entitled to the term of years) was protected against these fictitious recoveries, and his interest rendered secure and permanent, long terms began to be more frequent than before; and were afterwards extensively introduced, being found extremely convenient for family settlements and mortgages: continuing subject, however, to the same rules of succession, <sup>[143]</sup> and with the same inferiority

<sup>1</sup> 32 Ass. pl. 6. Bro. Abr. t. Mordauncestor. 42. Spoliation. 6.

<sup>k</sup> Stat. of Mortmain, 7 Edw. I (1279).

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ute of Gloucester, 6 Edw. I, and completely remedied by the 21 Hen. VIII, c. 15, which enabled termors to falsify recoveries obtained on feigned titles. 2 Inst. 321, 322; Co. Litt. 46 a." (H. W. Challis, *The Law of Real Property*, London, 1885, c. 8, p. 46.)

Mr. Challis would hardly think it fair to say that the lessee of land to-day held an estate "liable to destruction at the will of his lessor," merely because the latter might by a collusive use of fraud and forgery enable a claimant to destroy both of their interests by recovering "judgment upon a supposed title paramount." Yet the legal rule by which that might be done now is precisely the same by which the termor was ousted under a feigned recovery. That the trick was often performed, and safer in the thirteenth century is probable. But so far was the termor from being "liable to destruction at the will of the reversioner" that he had a writ of entry *ad terminum qui nondum præterit* against his reversioner or lessor, and anyone else who interfered with his possession (*quoscunque dejectores*), to recover both the unexpired term and damages: and that, too, with all the advantages of a freeholder in a real action, grand cape, petty cape, and all! (Bracton, lib. 4, tr. 1, c. 36, fol. 220.) As to the doubts that were long afterwards raised about the right to recover the term, something must be said in another note. It is sufficient here to show the state of the case at least twenty years *before* the statute of Gloucester.

But Mr. Challis goes still further when he says: "The foregoing considerations warrant the conclusion that terms of years originally pushed themselves into the rank of legal estates only by virtue of the statute 21 Hen. VIII, c. 15. This conclusion as to the primitive legal status of terms of years is confirmed by the fact that the word "seisin" is used by the old writers synonymously with possession: showing that they recognized no possession unaccompanied by an estate of freehold." (*Ib.* p. 47.)

The fact of this "synonymous" use of the two terms by Bracton (not by later writers during a long period) is certain; but so also is his use of *seisina*

to freeholds, as when they were little better than tenancies at the will of the landlord.

§ 192. **c. Definition of estate for years.**—Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. And therefore this estate is frequently called a term, *terminus*, because its duration or continuance is bounded, limited, and determined: for every such estate must have a certain beginning, and certain end.<sup>1</sup> But *id certum est, quod certum reddi potest* (that is certain which can be made certain): therefore, if a man make a lease to another, for so many years as J. S. shall name, it is a good lease for years;<sup>m</sup> for though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery of the lease.<sup>n</sup> A lease for so many years as J. S. shall live, is void from the beginning;<sup>o</sup> for it is neither certain, nor can ever be reduced to a certainty, during the continuance of the lease.<sup>4</sup> And the same doctrine holds, if a parson make a lease of his glebe for so many years as he shall continue parson of Dale; for this is still more uncertain. But a lease for twenty or more years, if J. S. shall so long live, or if he should so long continue parson,

<sup>1</sup> Co. Litt. 45.

<sup>n</sup> Co. Litt. 46.

<sup>m</sup> 6 Rep. 35.

<sup>o</sup> *Ibid.* 45.

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for the termor's possession. The natural inference is the reverse of that drawn above.

In conclusion, the mistakes of Blackstone and others, including Mr. Challis, as to the status or "legal rights" of the termor in this early period, could hardly be better contradicted than they are in a single sentence from the chapter of Bracton cited above. *Non magis poterit aliquis firmarium ejicere de firma sua, quam tenentem aliquem de libero tenemento suo. Et unde si ille ejecerit qui tradidit, seysinam restituet cum damnis; quia talis restitutio non multum differt a disseysina.* "No one can eject a farmer from his farm [term] any more than a tenant from his freehold. And even if his lessor have ejected him, he shall restore his *seisin* with damages; for such a remedy does not differ much from that of disseisin." (Fol. 220 b).—HAMMOND.

<sup>4</sup> "This statement refers, presumably, only to the operation of such a disposition, regarded as a lease for years. A conveyance in similar terms, properly executed, would, it is submitted, confer an estate *pur autre vie*." Edward Jenks, Esq., in Stephen, 1 Comm. (16th ed.), 179 n.



is good;<sup>p</sup> for there is a certain period fixed, beyond which it cannot last; though it may determine sooner, on the death of J. S. or his ceasing to be parson there.

§ 193. d. *Beginning of the term.*—We have before remarked, and endeavored to assign the reason of, the inferiority in which the law places an estate for years, when compared with an estate for life, or an inheritance: observing, that an estate for life, even if it be *pur autre vie* (for the life of another), is a freehold; but that an estate for a thousand years is only a chattel, and reckoned part of the personal estate.<sup>a</sup> Hence it follows, that a lease for years may be made to commence *in futuro* (at a future time), though a lease for life cannot. As, if I grant lands to Titius to hold from Michaelmas next for [144] twenty years, this is good; but to hold from Michaelmas next for the term of his natural life, is void. For no estate of freehold can commence *in futuro*; because it cannot be created at common law without livery of seisin, or corporal possession of the land: and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter.<sup>r</sup> And, because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised*, or to have true legal seisin of the lands. Nor, indeed, does the bare lease vest any estate in the lessee; but only gives him a right of entry on the tenement, which right is called his *interest in the term*, or *interesse termini*: but when he has actually so entered, and thereby accepted the grant, the estate is then and not before vested in him, and he is *possessed*, not properly of the land, but of the term of years;<sup>s</sup> the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word "*term*" does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease; and therefore the *term* may expire, during the continuance of the *time*; as by surrender, forfeiture, and the

<sup>p</sup> *Ibid.*

<sup>r</sup> 5 Rep. 94.

<sup>a</sup> *Ibid.* 46.

<sup>s</sup> Co. Litt. 46.

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<sup>5</sup> This doctrine, as is said by the editor of Stephen's Comm. (I, 180), may well seem somewhat puzzling. It is suggested that what Coke probably meant to insist upon was, that the lessee was not "seised" of the land, but only possessed of it for a term of years.

like. For which reason, if I grant a lease to A for the term of three years, and after the expiration of the said *term* to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect: but if the remainder had been to B from and after the expiration of the said *three years*, or from and after the expiration of the said *time*, in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term.<sup>t</sup>

§ 194. e. Incidents of an estate for years.—Tenant for term of years hath incident to, and inseparable from his estate, unless by special agreement, the same estovers, which we formerly observed<sup>u</sup> that tenant for life was entitled to; that is to say, house-bote, fire-bote, plow-bote, and hay-bote;<sup>w</sup> terms which have been already explained.<sup>x</sup>

§ 195. (1) Emblements.—<sup>[145]</sup> With regard to emblements, or profits of land sowed by tenant for years, there is this difference between him, and tenant for life: that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn, and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he never could reap the profits of.<sup>y</sup><sup>z</sup> But where the lease for years depends upon an uncertainty; as, upon the death of the lessor, being himself only tenant for life, or being a husband seised in right of his wife; or if the term of years be determinable upon a life or lives; in all these cases, the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto.<sup>z</sup> Not so, if it determine by the act of the party himself;

<sup>t</sup> *Ibid.* 45.

<sup>x</sup> Pag. 35.

<sup>u</sup> Pag. 122.

<sup>y</sup> Litt. § 68.

<sup>w</sup> Co. Litt. 45.

<sup>z</sup> Co. Litt. 56.

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<sup>z</sup> The rights of agricultural tenants, in respect to compensation for crops and improvements, have been greatly modified by the provisions of the Agricultural Holdings Act of 1908.

as if tenant for years does anything that amounts to a forfeiture: in which case the emblements shall go to the lessor, and not to the lessee, who hath determined his estate by his own default.<sup>a</sup>

§ 196. 2. **Estates at will.**—The second species of estates not freehold are estates at *will*. An estate at will is where lands and tenements are let by one man to another, to have and to hold at the will of the lessor; and the tenant by force of this lease obtains possession.<sup>b</sup> Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other; because the lessor may determine his will, and put him out whenever he pleases. But every estate at will is at the will of both parties, landlord and tenant; so that either of them may determine his will, and quit his connections with the other at his own pleasure.<sup>c</sup> Yet this must be understood with some restriction. [146] For, if the tenant at will sows his land, and the landlord before the corn is ripe, or before it is reaped, puts him out, yet the tenant shall have the emblements, and free ingress, egress, and regress, to cut and carry away the profits.<sup>d</sup> And this for the same reason, upon which all the cases of emblements turn; viz., the point of uncertainty: since the tenant could not possibly know when his landlord would determine his will, and therefore could make no provision against it; and having sown the land, which is for the good of the public, upon a reasonable presumption, the law will not suffer him to be a loser by it. But it is otherwise, and upon reason equally good, where the tenant himself determines the will; for in this case the landlord shall have the profits of the land.<sup>e 7</sup>

§ 197. a. **Termination of estate at will.**—What act does, or does not, amount to a determination of the will on either side, has formerly been matter of great debate in our courts. But it is now, I think, settled, that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer; which must either be made upon the land,<sup>f</sup> or notice must be given

<sup>a</sup> *Ibid.* 55.

<sup>b</sup> *Litt.* § 68.

<sup>c</sup> *Co. Litt.* 55.

<sup>d</sup> *Co. Litt.* 56.

<sup>e</sup> *Ibid.* 55.

<sup>f</sup> *Ibid.*

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<sup>7</sup> A tenant at will is liable for voluntary, but not for permissive waste.

to the lessee<sup>g</sup>) the exertion of any act of ownership by the lessor, as entering upon the premises and cutting timber,<sup>h</sup> taking a distress for rent and impounding it thereon,<sup>i</sup> or making a feoffment, or lease for years of the land to commence immediately;<sup>k</sup> any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure;<sup>l</sup> or, which is *instar omnium* (equivalent to all), the death or outlawry, of either lessor or lessee;<sup>m</sup> puts an end to or determines the estate at will.

§ 198. **b. Rights after termination of estate at will.**—The law is, however, careful that no sudden determination of the will by one party shall tend to the manifest and unforeseen prejudice of the other. This appears in the case of [147] emblements before mentioned; and, by a parity of reason, the lessee after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils.<sup>n</sup> And, if rent be payable quarterly or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half-year.<sup>o</sup><sup>8</sup> And, upon the same principle, courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will; but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved: in which case they will not suffer either party to determine the tenancy even at the end of the year, without reasonable notice to the other.<sup>p</sup>

<sup>g</sup> 1 Ventr. 248.

<sup>h</sup> Co. Litt. 55.

<sup>i</sup> *Ibid.* 57.

<sup>k</sup> 1 Roll. Abr. 860; 2 Lev. 83.

<sup>l</sup> Co. Litt. 55.

<sup>m</sup> 5 Rep. 116. Co. Litt. 57. 62.

<sup>n</sup> Litt. § 69.

<sup>o</sup> Salk. 414. 1 Sid. 339.

<sup>p</sup> This kind of lease was in use as long ago as the reign of Hen. VIII. when half a year's notice seems to have been required to determine it. (T. 13 Hen. VIII. 15, 16--1521).

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<sup>8</sup> Mr. Jenks declares this doctrine to be inconsistent with the passage in Co. Litt. 55 b, which is usually quoted in support of it. See Stephen, 1 Comm. (16th ed.), 187 n.

§ 199. **c. Copyholds.**—There is one species of estates at will that deserves a more particular regard than any other; and that is, an estate held by copy of court roll; or, as we usually call it, a *copyhold* estate. This, as was before observed,<sup>a</sup> was in its original and foundation nothing better than a mere estate at will. But, the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts; therefore, though they still are held at the will of the lord, and so are in general expressed in the court rolls to be, yet that will is qualified, restrained, and limited, to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will: his will is no longer arbitrary and precarious; but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. A copyhold tenant is therefore now full as properly a tenant by the custom as a tenant at will; the custom [148] having arisen from a series of uniform wills. And therefore it is rightly observed by Calthorpe,<sup>r</sup> that “copyholders and customary tenants differ not so much in nature as in name: for although some be called copyholders, some customary, some tenants by the verge, some base tenants, some bond tenants, and some by one name and some by another, yet do they all agree in substance and kind of tenure: all the said lands are holden in one general kind, that is, by custom and continuance of time; and the diversity of their names doth not alter the nature of their tenure.”

§ 200. (1) **Forms of copyhold.**—Almost every copyhold tenant being therefore thus tenant at the will of the lord according to the custom of the manor; which customs differ as much as the humor and temper of the respective ancient lords (from whence we may account for their great variety), such tenant, I say, may have, so far as the custom warrants, any other of the estates or quantities of interest, which we have hitherto considered, or may hereafter consider, to hold united with this customary estate at will. A copyholder may, in many manors, be tenant in fee simple,

<sup>a</sup> Pag. 93.

<sup>r</sup> On Copyholds. 51. 54.



in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition; subject, however, to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulged by immemorial custom, has declared to be a forfeiture or absolute determination of those interests; as in some manors the want of issue male, in others the cutting down timber, the nonpayment of a fine, and the like. Yet none of these interests amount to freehold; for the freehold of the whole manor abides always in the lord only,\* who hath granted out the use and occupation, but not the corporal seisin or true possession of certain parts and parcels thereof, to these his customary tenants at will.

§ 201. (2) **Evolution of copyhold.**—The reason of originally granting out this complicated kind of interest, so that the same man shall, with regard to the same land, be at one and the same time tenant in fee simple [149] and also tenant at the lord's will, seems to have arisen from the nature of villeinage tenure; in which a grant of any estate of freehold, or even for years absolutely, was an immediate enfranchisement of the villein.<sup>†</sup> The lords, therefore, though they were willing to enlarge the interest of their villeins, by granting them estates which might endure for their lives, or sometimes be descendible to their issue, yet did not care to manumit them entirely; and for that reason it seems to have been contrived, that a power of resumption at the will of the lord should be annexed to these grants, whereby the tenants were still kept in a state of villeinage, and no freehold at all was conveyed to them in their respective lands: and of course, as the freehold of all lands must necessarily rest and abide somewhere, the law supposed it to continue and remain in the lord. Afterwards, when these villeins became modern copyholders, and had acquired by custom a sure and indefeasible estate in their lands, on performing their usual services, but yet continued to be styled in their admissions tenants at the will of the lord,—the law still supposed it an absurdity to allow, that such as were thus nominally tenants at will could have any freehold interest: and therefore continued and still continues to determine, that the freehold of lands so holden abides in the lord of the manor, and not in the tenant; for though he *really* holds

\* Litt. § 81. 2 Inst. 326.

† Mirr. c. 2. § 28. Litt. § 204, 5, 6.

to him and his heirs forever, yet he is also *said* to hold at another's will. But with regard to certain other copyholders, of free or privileged tenure, which are derived from the ancient tenants in villein socage,<sup>u</sup> and are not said to hold *at the will of the lord*, but only *according to the custom of the manor*, there is no such absurdity in allowing them to be capable of enjoying a freehold interest: and therefore the law doth not suppose the freehold of such lands to rest in the lord of whom they are holden, but in the tenants themselves;<sup>v</sup> who are sometimes called *customary freeholders*, being allowed to have a freehold *interest* though not a freehold *tenure*.

[150] However, in common cases, copyhold estates are still ranked (for the reasons above mentioned) among tenancies at will; though custom, which is the life of the common law, has established a permanent property in the copyholders, who were formerly nothing better than bondmen, equal to that of the lord himself, in the tenements holden of the manor; nay, sometimes even superior; for we may now look upon a copyholder of inheritance, with a fine certain, to be little inferior to an absolute freeholder in point of interest, and in other respects, particularly in the clearness and security of his title, to be frequently in a better situation.

§ 202. 3. *Estates at sufferance*.—An estate at *sufferance*, is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all. As if a man takes a lease for a year, and, after the year is expired, continues to hold the premises without any fresh leave from the owner of the estate.<sup>9</sup>

<sup>u</sup> See page 98, etc.

<sup>v</sup> Fitzh. Abr. tit. Corone. 310. Custom. 12 Bro. Abr. tit. Custom. 2. 17. Tenant per Copie 22. 9 Rep. 76. Co. Litt. 59. Copyh. § 32. Cro. Car. 229. 1 Roll. Abr. 562. 2 Ventr. 143. Carth. 432. Lord Raym. 1225.

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<sup>9</sup> "This definition of Blackstone has been adopted by this court, and it has been held that after the termination of the term of a tenant, if he holds over, he becomes a tenant at sufferance, unless something is done to change that status to some other, as, for instance, to turn it into a tenancy at will or for another period or term." *Stanley v. Stembridge*, 140 Ga. 750, 79 S. E. 842, 844.

Or, if a man maketh a lease at will, and dies, the estate at will is thereby determined: but if the tenant continueth possession, he is tenant at sufferance.<sup>w</sup> But, no man can be tenant at sufferance against the king, to whom no *laches*, or neglect, in not entering and ousting the tenant, is ever imputed by law: but his tenant, so holding over, is considered as an absolute intruder.<sup>x</sup> But, in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant; for, before entry, he cannot maintain an action of trespass against the tenant by sufferance, as he might against a stranger:<sup>y</sup> and the reason is, because the tenant being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

[151] Thus stands the law, with regard to tenants by sufferance; and landlords are obliged in these cases to make formal entries upon their lands,<sup>z</sup> and recover possession by the legal process of ejectment: and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained. But now, by statute 4 Geo. II, c. 28 (Landlord and Tenant, 1730), in case any tenant for life or years, or other person claiming under or by collusion with such tenant, shall willfully hold over after the determination of the term, and demand made and notice in writing given, by him to whom the remainder or reversion of the premises shall belong, for delivering the possession thereof; such person, so holding over or keeping the other out of possession, shall pay for the time he detains the lands, at the rate of double their yearly *value*. And, by statute 11 Geo. II, c. 19 (Distress for Rent, 1737), in case any tenant, having power to determine his lease, shall give notice of his intention to quit the premises, and shall not deliver up the possession at the time contained in such notice, he shall thenceforth pay double the former *rent*, for such time as he continues in possession. These statutes have almost put an end to the practice of tenancy by sufferance, unless with the tacit consent of the owner of the tenement.

<sup>w</sup> Co. Litt. 57.

<sup>y</sup> *Ibid.*

<sup>x</sup> *Ibid.*

<sup>z</sup> 5 Mod. 384.

## CHAPTER THE TENTH.

[152]

### OF ESTATES UPON CONDITION.

#### § 203. Definition and classification of estates upon condition.

Besides the several divisions of estates, in point of interest, which we have considered in the three preceding chapters, there is also another species still remaining, which is called an estate *upon condition*; being such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created, or enlarged, or finally defeated.<sup>a</sup> And these conditional estates I have chosen to reserve till last, because they are indeed more properly qualifications of other estates than a distinct species of themselves: seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions. Estates, then, upon condition, thus understood, are of two sorts: 1. Estates upon condition *implied*: 2. Estates upon condition *expressed*: under which last may be included, 3. Estates held in *vadio*, *gage*, or *pledge*: 4. Estates by *statute merchant* or *statute staple*: 5. Estates held by *elegit*.

§ 204. 1. **Estates upon condition, implied.**—Estates upon condition implied in law are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an office, generally, without adding other words; the law tacitly annexes hereto a secret condition that the grantee shall duly execute his office,<sup>b</sup> on breach of which condition [153] it is lawful for the grantor, or his heirs, to oust him, and grant it to another person.<sup>c</sup>

§ 205. a. **Grounds of forfeiture.**—For an office, either public or private, may be forfeited by *misuser* or *nonuser*, both of which are breaches of this implied condition. 1. By *misuser*, or abuse; as if a judge takes a bribe, or a park-keeper kills deer without authority. 2. By *nonuser*, or neglect; which in public offices, that

<sup>a</sup> Co. Litt. 201.

<sup>c</sup> Litt. § 379.

<sup>b</sup> Litt. § 378.

concern the administration of justice, or the commonwealth, is of itself a direct and immediate cause of forfeiture: but nonuser of a private office is no cause of forfeiture, unless some special damage is proved to be occasioned thereby.<sup>d</sup> For in the one case delay must necessarily be occasioned in the affairs of the public, which require a constant attention; but, private offices not requiring so regular and unremitted a service, the temporary neglect of them is not necessarily productive of mischief; upon which account some special loss must be proved, in order to vacate these. Franchises, also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them; and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.<sup>e</sup>

Upon the same principle proceed all the forfeitures which are given by law of life estates and others; for any acts done by the tenant himself, that are incompatible with the estate which he holds. As if tenants for life or years enfeoff a stranger in fee simple: this is, by the common law, a forfeiture of their several estates; being a breach of the condition which the law annexes thereto, viz., that they shall not attempt to create a greater estate than they themselves are entitled to.<sup>f</sup> So if any tenants for years, for life, or in fee, commit a felony; the king or other lord of the fee is entitled to have their tenements, because their estate is determined by the breach of the condition, "that they shall not commit felony," which the law tacitly annexes to every feudal donation.

§ 206. 2. Estates upon condition, expressed.—<sup>[154]</sup> An estate on condition expressed in the grant itself is where an estate

<sup>d</sup> Co. Litt. 233.

<sup>f</sup> Co. Litt. 215.

<sup>e</sup> 9 Rep. 50.

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<sup>1</sup> It is pointed out (Stephen, 1 Comm. (16th ed.), 192 n), that Blackstone's statement is not quite sound, for it was only where the attempt to create the greater estate was by feoffment, or other conveyance actually passing seisin, that the rule of forfeiture applied. Other conveyances were "innocent," i. e., they transferred only what lawfully belonged to the grantor, and so were not "tortious" as regards the remaindermen. The forfeitures mentioned have been abolished by the Real Property Limitation Act, 1833, and the Real Property Act, 1845. Forfeiture for breach of implied condition is now very rare, except, perhaps, in the case of freeholds.



is granted, either in fee simple or otherwise, with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.<sup>g</sup> These conditions are therefore either *precedent* or *subsequent*.<sup>2</sup>

§ 207. a. **Conditions precedent.**—Precedent are such as must happen or be performed before the estate can vest or be enlarged: subsequent are such, by the failure or nonperformance of which an estate already vested may be defeated. Thus, if an estate for life be limited to A upon his marriage with B, the marriage is a precedent condition, and till that happens no estate<sup>h</sup> is vested in A. Or, if a man grant to his lessee for years, that upon payment of a hundred marks within the term he shall have the fee, this also is a condition precedent, and the fee simple passeth not till the hundred marks be paid.<sup>i</sup>

§ 208. b. **Conditions subsequent.**—But if a man grant an estate in fee simple, reserving to himself and his heirs a certain rent; and that, if such rent be not paid at the times limited, it shall be lawful for him and his heirs to re-enter, and avoid the estate: in this case the grantee and his heirs have an estate upon condition subsequent, which is defeasible if the condition be not strictly performed.<sup>k</sup> To this class may also be referred all base fees, and fee simples conditional at the common law.<sup>1</sup> Thus an estate to a man and his heirs, *tenants of the manor of Dale*, is an estate on condition that he and his heirs continue tenants of that manor. And so, if a personal annuity be granted at this day to a man and the heirs of his body; as this is no tenement within the statute of Westminster the Second, it remains, as at common law, a fee simple on condition that the grantee has heirs of his body. Upon the same principle depend all the determinable estates of freehold, which we mentioned in the eighth chapter: as *durante viduitate* (during widowhood), etc.: these are estates upon condition that

<sup>g</sup> Co. Litt. 201.

<sup>k</sup> Litt. § 325.

<sup>h</sup> Show. Parl. Cas. 83, etc.

<sup>1</sup> See pag. 109, 110, 111.

<sup>i</sup> Co. Litt. 217.

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<sup>2</sup> These conditions are commonly called "conditions in deed."

the grantees do not marry, and the like. And, on the breach of any of these <sup>[155]</sup> subsequent conditions, by the failure of these contingencies; by the grantee's not continuing tenant of the manor of Dale, by not having heirs of his body, or by not continuing sole; the estates which were respectively vested in each grantee are wholly determined and void.

§ 209. (1) **Distinction between conditions and limitations.**—A distinction is, however, made between a *condition in deed* and a *limitation*, which Littleton<sup>m</sup> denominates also a *condition in law*. For when an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominates a *limitation*: as when land is granted to a man, *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.* and the like.<sup>n</sup> In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes immediately vested, without any act to be done by him who is next in expectancy.<sup>3</sup> But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, etc.<sup>o</sup>), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.<sup>p 4</sup> But, though strict words of condition be used in the

<sup>m</sup> § 380. 1 Inst. 234.

<sup>n</sup> 10 Rep. 41.

<sup>o</sup> *Ibid.* 42.

<sup>p</sup> Litt. § 347. Stat. 32 Hen. VIII. c. 34 (Reversionary Interests, 1540).

<sup>3</sup> These are the qualified fees or other estates described above, p. \*149.

<sup>4</sup> It is said that, so different are the two kinds of conveyance, objects which would be illegal if aimed at by way of condition subsequent may be substantially achieved by the use of conditional limitations. Thus it is claimed that, while a conveyance of a legal fee simple with a condition for a forfeiture

creation of the estate, yet if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation and not a <sup>[156]</sup> condition:<sup>a</sup> because, if it were a condition, then, upon the breach thereof, only A or his representatives could avoid the estate by entry, and so D's remainder might be defeated by their neglecting to enter; but, when it is a limitation, the estate of B determines, and that of D commences, the instant that the failure happens. So, also, if a man by his will devises land to his heir at law, on condition that he pays a sum of money, and for nonpayment devises it over, this shall be considered as a limitation, otherwise no advantage could be taken of the nonpayment, for none but the heir himself could have entered for a breach of condition.<sup>r 5</sup>

In all these instances, of limitations or conditions subsequent, it is to be observed, that so long as the condition, either express or

<sup>a</sup> 1 Ventr. 202.

<sup>r</sup> Cro. Eliz. 205. 1 Roll. Abr. 411.

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on the bankruptcy of the grantee, would be clearly bad as to the condition (Re Dugdale, [1883] 38 Ch. D. 176), yet a conveyance of a fee simple *until* bankruptcy of the grantee would be operative to deprive his creditors of the land in the event of his bankruptcy. Re Leach, [1912] 2 Ch. 422. In Re Leach, however, the limitation was (a) equitable, and (b) by devise. See Stephen, 1 Comm. (16th ed.), 194.

<sup>5</sup> "The will of B. F. contains the following clauses: 'I give my son A. J. F. my home farm, with all its appurtenances. I give my son P. F. my lower farm, that was Waitman's, with all its appurtenances; but my wife, N., to have the full control of both said farms during her widowhood, and no longer.' . . .

"At common law the devise would have been of a defeasible estate for life, there being no words of inheritance in the clause. 2 Bl. Comm. 156. Under our statute (Code, c. 71, § 8) the language imports a defeasible fee simple 'unless a contrary intention shall appear by the will, conveyance, or grant.' The English statute (1 Viet., c. 26, § 28) is very much like ours. Under that statute it has been held that, if the same land be given in one part of the will to A and in another to B, the presence of words of limitation in the latter gift, and their absence in the former, are material to correct the apparent contradiction, and to show that the testator meant a gift to A for life, with remainder to B in fee. Jarm. Wills, 1135; Gravenor v. Watkins, 6 L. R. C. P. 500." Furbee v. Furbee, 49 W. Va. 191, 38 S. E. 511.

implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold, provided the estate upon which such condition is annexed be in itself of a freehold nature; as if the original grant express either an estate of inheritance, or for life, or no estate at all, which is constructively an estate for life. For the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold;<sup>s</sup> because the estate is capable to last forever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a certain time, and may determine sooner (as a grant for ninety-nine years, provided A, B, and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by its uncertainty, ranked among estates of freehold.

§ 210. *c. Impossible and illegal conditions.*—These express conditions, if they be *impossible* at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law*, or *repugnant* to the nature of the estate, are void. In any of which cases, if they be conditions *subsequent*, that <sup>[157]</sup> is, to be performed after the estate is vested, the estate shall become absolute in the tenant. As, if a feoffment be made to a man in fee simple, on condition that unless he goes to Rome in twenty-four hours; or unless he marries with Jane S. by such a day (within which time the woman dies, or the feoffor marries her himself); or unless he kills another; or in case he aliens in fee; then in any of such cases the estate shall be vacated and determine: here the condition is void, and the estate made absolute in the feoffee. For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant.<sup>t</sup> But if the condition be *precedent*, or to be performed before the estate vests, as a grant to a man that, if he kills another or goes to Rome in a day, he shall have an estate in fee; here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant: for he hath no estate until the condition be performed.<sup>u</sup>

<sup>s</sup> Co. Litt. 42.

<sup>u</sup> *Ibid.*

<sup>t</sup> Co. Litt. 206.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice. Such are,

§ 211. 3. Estates in gage or pledge.—Estates held *in radio*, in gage, or pledge; which are of two kinds, *vivum vadium*, or living pledge; and *mortuum vadium*, dead pledge; or *mortgage*.<sup>6</sup>

<sup>6</sup> Mortgage.—“A concise definition of mortgage which should embrace both its equitable and its legal character is virtually impossible. Considered in its modern character, as stripped of its legal notions and embodying purely equitable principles throughout a large portion of the United States, the definition given by the California Civil Code seems to be complete and accurate: ‘A mortgage is a contract by which specific property is *hypothecated* for the performance of an act, without the necessity of a change of possession.’ Cal. Civ. Code, § 2920. (The term ‘hypothecated’ is here used in its strict technical sense, and with appropriateness of application.) Several forms of definition, regarding the mortgage as a common-law conveyance, are added in the foot-note. These attempted definitions are all erroneous, upon any theory of the instrument; they do not go beyond the literal import of the language in which a mortgage is usually expressed; and they utterly ignore all the equitable elements, which are as much and as truly constituent parts of the mortgage as the legal elements. Any true definition based upon the original common-law and equitable system must embody and express all the double nature of the mortgage—that it is both a lien in equity and a conveyance at law.”—POMEROY, Equity Jur., § 1191.

Bouvier's Law Dict. (Rawle's 3d Rev.) attempts to meet Prof. Pomeroy's “virtually impossible” demands by the following definition of mortgage: “A conveyance of real estate or assignment of personal property, without parting with the possession in either case, by way of hypothecation as security for the performance of some act, usually the payment of money, and treated at law as a conveyance or assignment, but in equity as a lien.”

An instrument, although in form an absolute deed, having been intended merely as security for payment of a debt is a mortgage. *Todd v. Todd*, 164 Cal. 255, 128 Pac. 413; *White v. Walsh*, 62 Misc. Rep. 423, 114 N. Y. Supp. 1015. The contemporaneous agreement for a resale and purchase does not of itself make the deed a mortgage. The conveyance must be judged according to the real intent of the parties. If there is a debt subsisting between the parties, and it is the intention to continue the debt, it is a mortgage; but if the conveyance extinguishes the debt, and the parties intend that result, a contract for a resale at the same price does not destroy the character of the deed as an absolute conveyance. *Hays v. Emerson*, 75 Ark. 551, 87 S. W. 1027. One sure test and essential requisite of a mortgage is the existence of a debt from the grantor to the grantee in the deed. If there is no debt, the instrument cannot be a mortgage, whatever else it may be. *Jones v. Hubbard*, 193 Mo. 147, 90 S. W. 1137; *Smith v. Hope*, 47 Fla. 295, 35 South. 865; *Perkins*



§ 212. a. *Vivum vadium*.—*Vivum vadium*, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another; and grants him an estate, as, of 20*l. per annum*, to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void, as soon as such sum is raised. And in this case the land or pledge is said to be living: it subsists, and survives the debt; and, immediately on the discharge of that, results back to the borrower.<sup>w</sup>

<sup>w</sup> *Ibid.* 205.

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v. Trinity Realty Co., 69 N. J. Eq. 723, 61 Atl. 167; Rotan Grocery Co. v. Turner, 46 Tex. Civ. App. 534, 102 S. W. 932.

Another form of conveyance for the purpose of securing payment of money is the deed of trust or trust deed. There are really two forms of this. There is the deed of trust in the nature of a mortgage and the deed of trust, which for the trust purposes is unconditional and indefeasible. The latter is an absolute parting with the title, and the grantor has no power of redemption. Whether a conveyance is one or the other depends on the terms of the deed. The deed of trust in the nature of a mortgage has, in many states, tended to supersede the ordinary mortgage. The distinction between them is the fact that, in the deed of trust, another person than the creditor is selected as grantee and such person holds in trust for the creditor to secure the payment of the debt, and beyond that in trust for the grantor. The chief practical difference between a deed of trust with power of sale and a plain mortgage is that the deed of trust may be foreclosed according to its terms by the trustee without the authority of court, whereas a simple mortgage can be foreclosed only under a decree of court. *Axman v. Smith*, 156 Mo. 286, 57 S. W. 105. Both the deed of trust and the mortgage are securities for a debt. Both create specific liens on the property; and in both the equitable title or right of redemption remains in the debtor, and is an estate or interest in the property that the debtor may sell, or that may be seized and sold under judicial process by his other creditors, subject to the lien created by the mortgage or deed of trust. *Ladd v. Johnson*, 32 Or. 195, 49 Pac. 756; *Bartlett v. Teah*, 1 Fed. 768, 1 McCrary, 176; *Brecht v. Law Union & Crown Ins. Co.*, 153 Fed. 452. Under Cal. Civ. Code, §§ 865, 866, providing that the grantee of realty subject to a trust acquires a legal estate except as against the trustee, a trust deed is substantially a mortgage with power of sale, and the trustor is the holder of the legal title, entitled to exercise the ordinary incidents of ownership subject to the execution of the trust. *Hollywood Lumber Co. v. Love*, 155 Cal. 270, 100 Pac. 698.

All accessions to the real property subsequent to the mortgage are bound by it. *Arques v. Wasson*, 51 Cal. 620, 21 Am. Rep. 718. After some conflict of decision, it is now settled that a mortgage of after-acquired property is valid

§ 213. **b. Mortgage.**—But *mortuum vadium*, a dead pledge, or *mortgage* (which is much more common than the other), is where a man borrows of another a specific sum (e. g., 200*l.*) [158] and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-enter on the estate so granted in pledge; or, as is now the most usual way, that the mortgagee shall reconvey the estate to the mortgagor: in

and equity will give effect to it, whether the title subsequently acquired by the mortgagor is legal or equitable. *Bear Lake & River W. W. etc. Co. v. Garland*, 164 U. S. 1, 41 L. Ed. 327, 17 Sup. Ct. Rep. 7.

The equity of redemption is available by any person interested in the mortgaged estate, provided he is in privity with the mortgagor. This includes heirs, devisees, executors, administrators, and assignees of the mortgagor; subsequent encumbrances; tenants for years; judgment creditors; dowress and tenant by the curtesy, as well as others. *Merriam v. Barton*, 14 Vt. 501; *Hoover v. Johnson*, 47 Minn. 434, 50 N. W. 475; *Jackson v. Beckett* etc. Mfg. Co., 86 Ark. 591, 20 L. R. A. (N. S.) 454, 112 S. W. 161.

**Clogging the equity.**—In 1681, in the leading case of *Harris v. Harris*, 1 Vern. 33, Lord Nottingham laid down the principle: "Once a mortgage, always a mortgage." This doctrine is perhaps to-day more frequently expressed in the phrase, "clogging the equity." *Noakes v. Rice*, [1902] App. Cas. 24; *Bradley v. Carritt*, [1903] App. Cas. 253. The purpose of Lord Nottingham's doctrine was to render invalid agreements in a mortgage for forfeiture of a right to redeem. But it had also rendered invalid all dealings with the property, or encumbrances thereon, by the mortgagee, as against the mortgagor coming to redeem. It bore on both parties, preventing each of them from making any binding disposition of the property as a whole. Almost a deadlock was thus brought about. Attempts were made to reserve in the mortgage deeds express powers of disposition and control in the mortgagee. But such provisions were always exposed to the danger of being made ineffective by the court of chancery as attempts to "clog the equity."

Relief was accordingly sought of the legislature. In 1860 parliament passed the Law of Property Amendment Act (Lord Cranworth's Act), which conferred upon every mortgagee, after default in payment of principal or interest, the power to sell the mortgaged land and pay himself out of the proceeds, and to insure any insurable property, and to appoint a receiver of the rents and profits. The act did not, however, give any power to lease; and any of the powers given might be excluded by the express terms of the mortgage.

The next step was taken by the Conveyancing Act of 1881, which included all the privileges of the earlier statute, but conferred on either mortgagee or mortgagor, when in possession, power to make binding leases, and in many other ways relieved mortgages of the strict rules that impeded them, and

this case the land, which is so put in pledge, is by law, in case of nonpayment at the time limited, forever dead and gone from the mortgagor; and the mortgagee's estate in the lands is then no longer conditional, but absolute. But, so long as it continues conditional, that is, between the time of lending the money and the time allotted for payment, the mortgagee is called tenant in mortgage.\* But, as it was formerly a doubt,† whether, by taking such estate in fee, it did not become liable to the wife's dower, and other encumbrances, of the mortgagee (though that doubt has been long ago overruled by our courts of equity‡), it therefore became

\* Litt. § 332.

‡ Hardr. 466.

† Ibid. § 357. Cro. Car. 191.

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worked toward a fuller freedom of alienation. See Jenks, Short Hist. Eng. Law, 219, 220, 253, 254.

The American courts, equally with the English, hold to the doctrine that, "once a mortgage, always a mortgage," and refuse to give effect to any provision or stipulation that tends to "clog the equity of redemption." It is an established doctrine that an equity of redemption is inseparably connected with a mortgage; that is to say, so long as the instrument is one of security, the borrower has, in a court of equity, a right to redeem the property upon payment of the loan. This right cannot be waived or abandoned by any stipulation of the parties made at the time, even if embodied in the mortgage. This is a doctrine from which a court of equity never deviates. *Peugh v. Davis*, 96 U. S. 332, 24 L. Ed. 775; *Pomeroy*, Eq. Jur., § 1193; *Parmer v. Parmer*, 74 Ala. 285; *Bayley v. Bailey*, 5 Gray (Mass.), 505; *Hazeltine v. Granger*, 44 Mich. 503, 7 N. W. 74; *Bradbury v. Davenport*, 114 Cal. 593, 55 Am. St. Rep. 92, 46 Pac. 1062.

**Tacking.**—It is a settled doctrine of equity that where the defendant acquired the legal estate at the time and as part of his original purchase, the fact of his purchase having been *bona fide* for value and without notice is a perfect defense in equity to any suit brought by the holder of a prior equitable estate, lien, encumbrance, or other interest, seeking either to establish and enforce his equitable estate, lien, or interest, or to obtain any other relief with respect thereto which can be given by a court of equity. This protection is not confined to a defendant who obtained the legal title contemporaneously with his original purchase. It includes those cases where, of several successive purchasers holding equitable estates, one of them later in time has obtained an outstanding legal estate. By far the most frequent instance in England is that of three or more successive mortgagees by conveyance, A, B, and C, where the first only would obtain the legal estate and the others an equitable one. If C, at the time of loaning his money and taking his mortgage, had no notice of B's prior encumbrance—that is, was a *bona fide* purchaser of the equitable

usual to grant only a long term of years, by way of mortgage;\* with condition to be void on repayment of the mortgage money: which course has been since continued, principally because on the death of the mortgagee such term becomes vested in his personal representatives, who alone are entitled in equity to receive the money lent, of whatever nature the mortgage may happen to be.

§ 214. (1) *Mortgagee's right of possession.*—As soon as the estate is created, the mortgagee may immediately enter on the lands; but is liable to be dispossessed, upon performance of the condition by payment of the mortgage money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment; when, in case of failure, whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now forever dead.

§ 215. (2) *Equity of redemption.*—But here again the courts of equity interpose; and, though a mortgage be thus forfeited, and the [159] estate absolutely vested in the mortgagee at the common

\* Not so in this country, where mortgages in fee are still used. (2 Brev. 213.)—HAMMOND.

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estate—on afterwards learning of B's claim, he may buy in or procure a transfer of A's mortgage to himself, and may thus put himself in a position of perfect defense against the enforcement of B's lien; he thus acquires, in fact, not only a defense to any suit brought by B, but the absolute precedence over B in the satisfaction of the liens out of the mortgaged premises. This particular application of the doctrine to successive mortgages is known in English equity as the rule concerning "tacking"—a rule which has been universally rejected by the courts of the various states. Pomeroy, *Eq. Jur.*, § 768. The equity tribunals of England established the rule in the cases of *Hedworth v. Primate* (1662), *Hardres*, 318, and *Marsh v. Lee* (1670), 2 *Ventr.* 337, 86 *Eng. Reprint*, 473. The rule of tacking was abolished by the *Vendor and Purchaser Act* of 1874, but revived by the *Land Transfer Act* of 1875. *Jenks, Short Hist. Eng. Law*, 219. Tacking is naturally inconsistent with the system of recording mortgages which prevails in the American states. The doctrine has been severely criticised. *Langdell, Eq. Pl.* 191; *Ames, Lect. Leg. Hist.* 269. For other connections in which the term "tacking" is used in this country, see 3 *Bouvier, Law Dict. (Rawle's 3d Rev.)*, 3216.

law, yet they will consider the real value of the tenements compared with the sum borrowed. And, if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate; paying to the mortgagee his principal, interest, and expenses: for otherwise, in strictness of law, an estate worth 1,000*l.* might be forfeited for nonpayment of 100*l.* or a less sum. This reasonable advantage, allowed to mortgagors, is called the *equity of redemption*: and this enables a mortgagor to call on the mortgagee, who has possession of his estate, to deliver it back and account for the rents and profits received, on payment of his whole debt and interest; thereby turning the *mortuum* into a kind of *vivum vadium*. But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately; or else call upon the mortgagor to redeem his estate presently, or, in default thereof, to be forever *foreclosed* from redeeming the same; that is, to lose his equity of redemption without possibility of recall. And also, in some cases of fraudulent mortgages,<sup>a</sup> the fraudulent mortgagor forfeits all equity of redemption whatsoever. It is not, however, usual for mortgagees to take possession of the mortgaged estate, unless where the security is precarious, or small; or where the mortgagor neglects even the payment of interest: when the mortgagee is frequently obliged to bring an ejectment, and take the land into his own hands, in the nature of a pledge, or the *pignus* of the Roman law; whereas, while it remains in the hands of the mortgagor, it more resembles their *hypotheca*, which was where the possession of the thing pledged remained with the debtor.<sup>b</sup> But, by statute 7 Geo. II, c. 20 (Mortgage, 1733), after payment or tender by the mortgagor of principal, interest, and costs, the mortgagee can maintain no ejectment; but may be compelled to reassign his securities. In Glanvill's time, when the universal

<sup>a</sup> Stat. 4 & 5 W. & M. c. 16 (Mortgage, 1692).

<sup>b</sup> *Pignoris appellatione eam proprie rem contineri dicimus, quæ simul etiam traditur creditori. At eam, quæ sine traditione nuda conventionione tenetur, proprie hypothecæ appellatione contineri dicimus.* (The appellation of "pledge" is properly given to that security which is delivered immediately to the creditor. But that which is bound by a naked compact without delivery we properly call a "hypotheca.") Inst. l. 4. t. 6. § 7.



method of conveyance was by livery of seisin [160] or corporal tradition of the lands, no gage or pledge of lands was good unless possession was also delivered to the creditor; "*si non sequatur ipsius vadii traditio, curia domini regis hujusmodi privatas conventiones tueri non solet* (if delivery of the pledge itself do not follow, the king's court is not accustomed to take cognizance of private agreements of this kind)": for which the reason given is, to prevent subsequent and fraudulent pledges of the same land: "*cum in tali casu possit eadem res pluribus aliis creditoribus tum prius tum posterius invadiari* (since in such a case the same thing might be pledged to many creditors as well before as afterwards)."<sup>c</sup> And the frauds which have arisen, since the exchange of these public and notorious conveyances for more private and secret bargains, have well evinced the wisdom of our ancient law.

§ 216. 4. Estates by statute merchant and statute staple.—A fourth species of estates, defeasible on condition subsequent, are those held by *statute merchant*, and *statute staple*; which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. For both the statute merchant and statute staple are securities for money; the one entered into pursuant to the statute 13 Edw. I *de mercatoribus* (1285), and thence called a statute merchant; the other pursuant to the statute 27 Edw. III, c. 9 (1353), before the mayor of the staple, that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns,<sup>d</sup> and thence this security is called a statute staple. They are both, I say, securities for debts, originally permitted only among traders, for the benefit of commerce; whereby the lands of the debtor are conveyed to the creditor, till out of the rents and profits of them his debt may be satisfied: and, during such time as the creditor so holds the lands, he is tenant by statute merchant or statute staple. There is also a similar security, the recognizance in the nature of a statute staple, which extends the benefit of this mercantile trans-

<sup>c</sup> 1. 10. c. 8.

<sup>d</sup> See book I, c. 8.

action to all the king's subjects in general, by virtue of the statute 23 Hen. VIII, c. 6 (Recognizances for Debt, 1531).<sup>\* 7</sup>

§ 217. 5. Estate by *elegit*.—Another similar conditional estate, created by operation of law, for security and satisfaction of debts, is called an <sup>[161]</sup> estate by *elegit*.<sup>8</sup> What an *elegit* is, and why so called, will be explained in the third part of these Commentaries. At present I need only mention, that it is the name of a writ, founded on the statute<sup>o</sup> of Westm. 2, by which, after a plaintiff has obtained judgment for his debt of law, the sheriff gives him possession of one-half of the defendant's lands and tenelements, to be held, occupied, and enjoyed, until his debt and damages are fully paid: and, during the time he so holds them, he is called tenant by *elegit*. It is easy to observe that this is also a mere conditional estate, defeasible as soon as the debt is levied. But it is remarkable, that the feudal restraints of alienating lands, and charging them with the debts of the owner, were softened much

\* Ninth edition adds, "Amended by 8 Geo. I. c. 25 (1721), which direct such recognizance to be enrolled and certified into chancery. But these, by the statute of frauds, 29 Car. II. c. 3 (1677), are only binding upon the lands in the hands of *bona fide* purchasers from the day of their enrollment, which is ordered to be marked on the record."

<sup>o</sup> 13 Edw. I, c. 18 (Damages, 1285).

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<sup>7</sup> The Statute Merchant and the Statute Staple, after having been long obsolete, were repealed by the Statute Law Revision Act, 1863.

<sup>8</sup> **Writ of *elegit*.**—The statute of Westminster 2 provided that the creditor might have a writ commanding the sheriff to "deliver to him [all the chattels of the debtor saving only his oxen and beasts of his plow, and] the one-half of his land, until the debt be levied upon a reasonable price or extent." This power of the creditor to seize and sell half the debtor's land is now extended to the whole. 1 & 2 Vict., c. 110 (Judgments, 1838). The writ by which this is effected has ever since the statute of Westminster 2 been called the writ of *elegit*. The remedy by *elegit* against the goods of the debtor, after having been long disused, was revived in 1880 in consequence of the discovery that it afforded a more ample protection to the creditor in the case of the bankruptcy of the debtor. By the Bankruptcy Act of 1883 the writ of *elegit* is no longer to affect goods; and the words of the statute of Westminster 2 in brackets as quoted above are repealed. See Digby, Hist. Real Prop. (5th ed.), 281; 3 Bl. Comm. 418. The writ is still, to some extent, in use in the United States. 4 Kent, Comm. 431, 436.

earlier and much more effectually for the benefit of trade and commerce, than for any other consideration. Before the statute of *quia emptores*,<sup>f</sup> it is generally thought that the proprietor of lands was enabled to alienate no more than a moiety of them: the statute, therefore, of Westm. 2 permits only so much of them to be affected by the process of law as a man was capable of alienating by his own deed. But by the statute *de mercatoribus* (passed in the same year<sup>g</sup>) the whole of a man's lands was liable to be pledged in a statute merchant, for a debt contracted in trade; though only *half* of them was liable to be taken in execution for any other debt of the owner.

§ 218. a. **Chattels real.**—I shall conclude what I had to remark of these estates, by statute merchant, statute staple, and *elegit*, with the observation of Sir Edward Coke,<sup>h</sup> “These tenants have uncertain interests in lands and tenements, and yet they have but chattels and no freeholds” (which makes them an exception to the general rule); “because though they may hold an estate of inheritance, or for life, *ut liberum tenementum* (as a freehold), until their debt be paid; yet it shall go to their executors: for *ut* is similitudinary; and though, to recover their estates, they shall have the same remedy (by assize) as a tenant of the freehold shall have,\* yet it is but the similitude <sup>[162]</sup> of a freehold, and *nullum simile est idem* (things similar are not the same).” This indeed only proves them to be chattel interests, because they go to the executors, which is inconsistent with the nature of a freehold: but it does not assign the reason why these estates, in contradistinction to other uncertain interests, shall vest in the executors of the tenant and not the heir; which is probably owing to this: that, being a security and remedy provided for personal debts due to the deceased, to which debts the executor is entitled, the law has, therefore, thus directed their succession; as judging it reasonable, from a principle of natural equity, that the security and remedy

\* Ninth edition adds note: “The words of the statute *de mercatoribus* are, ‘*puisse porter bref de novele disseisine, auxi sicum de frank-tenement* (a writ of novel disseisin may likewise carry with it the freehold).’”

<sup>f</sup> 18 Edw. I (1290).

<sup>g</sup> 13 Edw. I (1285).

<sup>h</sup> 1 Inst. 42, 43.

should be vested in them, to whom the debts if recovered would belong. And, upon the same principle, if lands be devised to a man's executor, until out of their profits the debts due from the testator be discharged, this interest in the lands shall be a chattel interest, and on the death of such executor shall go to *his* executors:<sup>1</sup> because they, being liable to pay the original testator's debts, so far as his assets will extend, are in reason entitled to possess that fund, out of which he has directed them to be paid.

<sup>1</sup> Co. Litt. 42.

## OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

§ 219. Estates in respect to the time of enjoyment.—Hitherto we have considered estates solely with regard to their duration, or the *quantity of interest* which the owners have therein. We are now to consider them in another view; with regard to the *time of their enjoyment*, when the actual permanency of the profits (that is, the taking, perception, or receipt, of the rents and other advantages arising therefrom) begins. Estates, therefore, with respect to this consideration, may either be in *possession*, or in *expectancy*: and of expectancies there are two sorts; one created by act of the parties, called a *remainder*; the other by act of law, and called a *reversion*.

§ 220. 1. Estates in possession.—Of estates in *possession* (which are sometimes called estates *executed*, whereby a present interest passes to and resides in the tenant, not depending on any subsequent circumstance or contingency, as in the case of estates *executory*), there is little or nothing peculiar to be observed.<sup>1</sup> All the estates we have hitherto spoken of are of this kind; for, in laying down general rules, we usually apply them to such estates as are then actually in the tenant's possession. But the doctrine of estates in expectancy contains some of the nicest and most ab-

<sup>1</sup> But it is material to remark, that a man may have an estate in possession in land, and may yet not be in actual possession of the land. For it has long been the settled rule of law, that a freehold interest which is merely subject to a term of years, is an interest in possession; and the owner of such freehold interest, if actually in receipt of the profits of the term, is properly described as being *seised in his demesne as of fee* (or *freehold*). (See Challis, Real Property (2d ed.), p. 89.) The origin of this rule was, undoubtedly, the doctrine of the common law, that the occupation of the lessee for years was not *seisin*, but a minor kind of possession, the existence of which was not inconsistent with the *seisin* of the lessor. And although, by changes in the law, this distinction has become of less importance, yet the old rule survives for some purposes, e. g., to enable a widow to claim dower out of her husband's reversion on a term of years, which she cannot do out of a true reversion. (Co. Litt. 29 b, 32 a.)—STEPHEN, 1 Comm. (16th ed.), 210.



struse learning in the English law. These will therefore require a minute discussion, and demand some degree of attention.

§ 221. 2. *Estates in remainder.*—<sup>[164]</sup> An estate, then, in remainder may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee simple granteth lands to A for twenty years, and, after the determination of the said term, then to B and his heirs forever: here A is tenant for years, remainder to B in fee. In the first place, an estate for years is created or carved out of the fee, and given to A; and the residue or remainder of it is given to B. But both these interests are in fact only one estate; the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee.<sup>a</sup> They are indeed different *parts*, but they constitute only one *whole*: they are carved out of one and the same inheritance: they are both created, and may both subsist, together; the one in possession, the other in expectancy. So if land be granted to A for twenty years, and after the determination of the said term to B for life; and after the determination of B's estate for life, it be limited to C and his heirs forever: this makes A tenant for years, with remainder to B for life, remainder over to C in fee. Now, here the estate of inheritance undergoes a division into three portions: there is first A's estate for years carved out of it; and after that B's estate for life; and then the whole that remains is limited to C and his heirs. And here also the first estate, and both the remainders, for life and in fee, are one estate only; being nothing but parts or portions of one entire inheritance: and if there were a hundred remainders, it would still be the same thing; upon a principle grounded in mathematical truth, that all the parts are equal, and no more than equal, to the whole.

§ 222. *No remainder on a fee simple.*—And hence, also, it is easy to collect, that no remainder can be limited after the grant of an estate in fee simple:<sup>b</sup> because a fee simple is the highest and largest estate, that a subject is capable of enjoying; and he that is tenant in fee hath in him the *whole* of the estate: a remainder,

<sup>a</sup> Co. Litt. 143.

<sup>b</sup> Plowd. 29. Vaugh. 269.

therefore, which is only a portion, or residuary *part*, of the estate, cannot be reserved after the whole is disposed of. A particular estate, with all <sup>[165]</sup> the remainders expectant thereon, is only one fee simple; as 40*l.* is a part of 100*l.* and 60*l.* is the remainder of it: wherefore, after a fee simple once vested, there can no more be a remainder limited thereon, than after the whole 100*l.* is appropriated there can be any residue subsisting.

§ 223. a. Rules on the creation of remainders.—Thus much being premised, we shall be the better enabled to comprehend the rules that are laid down by law to be observed in the creation of remainders, and the reasons upon which those rules are founded.

§ 224. (1) The particular estate.—And, first, there must necessarily be some particular estate, precedent to the estate in remainder.<sup>c</sup> As, an estate for years to A, remainder to B for life; or, an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part, or *particular*, of the inheritance; the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason; that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of: for, where the whole is conveyed at once, there cannot possibly exist a remainder; but the interest granted, whatever it be, will be an estate in possession.

§ 225. Estates in futuro.—An estate created to commence at a distant period of time without any intervening estate, is therefore properly no remainder: it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law,<sup>d</sup> to be executed either now or hereafter, as the contracting parties should agree: but an estate of freehold must be created to commence immediately. For it is an ancient rule of the common law that no estate of freehold can be created to commence *in futuro*; but it ought to take effect presently either

<sup>c</sup> Co. Litt. 49. Plowd. 25.

<sup>d</sup> Raym. 151.

in possession or remainder;<sup>o</sup> because at common [166] law no freehold in lands could pass without livery of seisin: which must operate either immediately, or not at all. It would therefore be contradictory, if an estate, which is not to commence till hereafter, could be granted by a conveyance which imports an immediate possession. Therefore, though a lease to A for seven years, to commence from next Michaelmas, is good; yet a conveyance to B of lands, to hold to him and his heirs forever from the end of three years next ensuing, is void. So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular estate, which may subsist till that period of time is completed; and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law. As, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A; here by the livery the freehold is immediately created, and vested in B, during the continuance of A's term of years. The whole estate passes at once from the grantor to the grantees, and the remainderman is seised of his remainder at the same time that the termor is possessed of his term.<sup>2</sup> The enjoyment of it must indeed be deferred till here-

<sup>o</sup> 5 Rep. 94.

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<sup>2</sup> **Seisin of remainderman.**—In strict logic, there can be neither remainder nor reversion after a term of years. As Blackstone here shows, "the freehold is immediately created [or in case of a reversion is reserved] and vested in [the remainderman] B during the continuance of A's term of years." Hence B's estate is an estate of freehold in possession, whether it comes to him from another by livery of seisin made to the termor in his behalf, or being in him is not parted with, when he creates the term himself. Hence, also, there can be no contingent remainder after such a term, any more than there possibly can be such a thing as a contingent reversion. If this rule had always been recognized, the entire doctrine of remainders would be greatly simplified: it would have to deal only with freehold estates, the rules of which are comparatively simple. But it is altogether too late to correct the usage, which dates at least from the thirteenth century, as Britton shows, and from a time when *seisin* was predicated as freely of terms and other chattel interests, and even of personal chattels, as it has since been of freeholds. This is beginning

after; but it is to all intents and purposes an estate commencing *in presenti* (immediately), though to be occupied and enjoyed *in futuro* (at a future time).

§ 226. Estates at will.—As no remainder can be created, without such a precedent particular estate, therefore the particular estate is said to *support* the remainder. But a lease at will is not held to be such a particular estate, as will support a remainder over.<sup>f</sup> For an estate at will is of a nature so slender and precarious, that it is not looked upon as a portion of the inheritance; and a portion must first be taken out of it, in order to constitute a remainder. Besides, if it be a freehold remainder, livery of seisin must be given at the time of its creation; and the entry of the grantor, to do this, determines the estate at will [167] in the very instant in which it is made:<sup>g</sup> or if it be a chattel interest, though perhaps it might operate as a *future contract*, if the tenant for years be a party to the deed of creation, yet it is void by way of *remainder*: for it is a separate independent contract, distinct from the precedent estate at will; and every remainder must be part of one and the same estate, out of which the preceding particular estate is taken.<sup>h</sup><sup>3</sup> And hence it is generally true, that if the particular estate is void in its creation, or by any means is

<sup>f</sup> 8 Rep. 75.

<sup>h</sup> Raym. 151.

<sup>g</sup> Dyer. 18.

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to be well understood: indeed, the chief difficulty now seems to be, to convince historical students that there is no mystery in this original use of the word "seisin" for mere possession. But it will assist the beginner, materially, to remember that all the rules for remainders after chattel interests in land really belong to estates that are already freehold, and in seisin, although the mere possession is in the termor: or, in other words, that so far as the doctrine of remainders is concerned, the term of years may be regarded as a nullity, or as a mere contract with the real owner of the land, not an estate in it.—HAMMOND.

3 The particular estate must be of a freehold nature. For a remainder is an estate in expectancy, which cannot be created to commence *in futuro*, without the support of an intervening estate, in which the seisin of the land is in the meantime lodged. This seisin could not be attached to a leasehold interest. Where the remainder was itself a term of years, there was no necessity for an intervening freehold; but a so-called "leasehold remainder" is not properly a remainder at all, but merely an *interesse termini* (*ante*, \*144). See 1 Stephen's Comm. (16th ed.), 216.

defeated afterwards, the remainder supported thereby shall be defeated also:<sup>1</sup> as where the particular estate is an estate for the life of a person not *in esse* (in existence);<sup>k</sup> or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate;<sup>l</sup> in either of these cases the remainder over is void.

§ 227. (2) **Remainder and particular estate commence at same time.**—A second rule to be observed is this; that the remainder must commence or pass out of the grantor at the time of the creation of the particular estate.<sup>m</sup> As, where there is an estate to A for life, with remainder to B in fee: here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate, whenever a *freehold* remainder is created. For, if it be limited even on an estate for years, it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor; otherwise the remainder is void.<sup>n</sup> Not that the livery is necessary to strengthen the estate for years; but, as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery made to the tenant of the particular estate, to relate and inure to him in remainder, as both are but one estate in law.<sup>o</sup>

§ 228. (3) **Vesting of remainder.**—<sup>[168]</sup> A third rule respecting remainders is this; that the remainder must vest in the grantee during the continuance of the particular estate, or *eo instanti* (from the instant) that it determines.<sup>p</sup> As, if A be tenant for life, remainder to B in tail; here B's remainder is vested in him, at the creation of the particular estate to A for life: or, if A and B be tenants for their joint lives, remainder to the survivor in fee; here though during their joint lives the remainder is vested in neither, yet on the death of either of them, the remainder vests

<sup>1</sup> Co. Litt. 298.<sup>n</sup> Litt. § 60.<sup>k</sup> 2 Roll. Abr. 415.<sup>o</sup> Co. Litt. 49.<sup>l</sup> 1 Jon. 58.<sup>p</sup> Plowd. 25. 1 Rep. 66.<sup>m</sup> Litt. § 671. Plowd. 25.



instantly in the survivor: wherefore both these are good remainders. But, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son; here the remainder will be void, for it did not vest in anyone during the continuance, nor at the determination, of the particular estate: and, even supposing that B should afterwards have a son, he shall not take by this remainder; for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever.<sup>a</sup> And this depends upon the principle before laid down, that the precedent particular estate, and the remainder are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate or at the very instant when that determines, so that no other estate can possibly come between them. For there can be no intervening estate between the particular estate, and the remainder supported thereby: the thing supported must fall to the ground, if once its support be severed from it.

§ 229. b. Division of remainders.—It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*.

§ 230. (1) Vested remainders.—*Vested* remainders (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*) are where the estate is invariably fixed, to remain to a determinate person, after the [169] particular estate is spent.<sup>4</sup> As if A be tenant for twenty years, remainder

<sup>a</sup> 1 Rep. 138.

<sup>r</sup> 3 Rep. 21.

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<sup>4</sup> Vested and contingent remainders.—This definition requires that the person who will certainly take at the end of the particular estate (provided he lives until then), be now determined. But the definition given by Kent, and repeatedly approved by the United States supreme court and other American courts, is that “it is the *present capacity* of taking effect in possession, if the possession were to become vacant, that distinguishes a vested from a contingent remainder.” (4 Comm. 203.) The difference between these two definitions is marked, though it has often been overlooked in the discussion of an intricate subject. Under the latter, every remainder is vested if the remainderman is capable of taking at this moment, should the estate fall in. Blackstone requires in addition that he should also be certain to take *whenever* it does fall

to B in fee; here B's is a vested remainder, which nothing can defeat, or set aside.

§ 231. (2) **Contingent remainders.**—Contingent or *executory* remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect, either to a dubious and uncertain *person*, or upon a dubious and uncertain *event*; so that the particular estate may chance to be determined, and the remainder never take effect.<sup>a</sup>

§ 232. (a) **Limited to uncertain person.**—First, they may be limited to a dubious and uncertain *person*. As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail; this is a contingent remainder, for it is uncertain whether B will have a son or no: but the instant that a son is born, the remainder is no longer contingent, but vested. Though, if A had died before the contingency happened, that is, before B's son was born, the remainder would have absolutely gone; for the particular estate was determined before the remainder could vest. Nay, by the strict rule of law, if A were tenant for life, remainder to his own eldest son in tail, and A died without issue born, but leaving his wife *enceinte* or big with child, and after his death a posthumous son was born, this son could not take the land, by virtue of this remainder; for the particular estate determined before there was any person *in esse*, in whom the remainder could vest.<sup>b</sup> But, to remedy this hardship, it is enacted by statute 10 & 11 W. III, c. 16

<sup>a</sup> 3 Rep. 20.

<sup>b</sup> Salk. 228. 4 Mod. 282.

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in; provided, of course, he lives long enough. Any other contingency than his death, which may prevent him from taking at that time, is fatal to the vested character of the remainder: while, according to the other rule, "if there is a present right to a future possession, though that right may be defeated by some future event, contingent or certain, there is nevertheless a vested estate." (Lourie, J., in *Manderson v. Lukens*, 23 Pa. St. 31, 62 Am. Dec. 312; *Carver v. Jackson*, 4 Pet. 1, 90, 7 L. Ed. 761, 792.)

In New York and some other states the latter rule is now adopted by statute, and of course is binding. For the doubts created by overlooking the change thus made, compare *Olney v. Hull*, 21 Pick. (Mass.) 311; *Thomson v. Ludington*, 104 Mass. 193; *Moore v. Littell*, 41 N. Y. 66; *Doe v. Considine*, 6 Wall. 458, 18 L. Ed. 869.—HAMMOND.

(Posthumous Children, 1698), that posthumous children shall be capable of taking in remainder, in the same manner as if they had been born in their father's lifetime: that is, the remainder is allowed to vest in them, while yet in their mother's womb.<sup>u</sup>

§ 233. (i) **Common possibility.**—This species of contingent remainders, to a person not in being, must, however, be limited to someone, that may by common possibility, or *potentia propinqua* (a near possibility), be *in esse* at or before the particular estate determines.<sup>w</sup> As if an estate be [170] made to A for life, remainder to the heirs of B: now, if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est hæres viventis* (no one is heir of a living person): but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua* (a near possibility), and therefore allowed in law.<sup>x</sup> But a remainder to the right heirs of B (if there be no such person as B *in esse*) is void.<sup>y</sup> For here there must two contingencies happen; first, that such a person as B shall be born; and secondly, that he shall also die during the continuance of the particular estate; which make it *potentia remotissima*, a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen), is good; for by common possibility he may have one; but if it be limited in particular to his son John, or Richard, it is bad, if he have no son of that name: for it is too remote a possibility that he should not only have a son, but a son of a particular name.<sup>z</sup> A limitation of a remainder to a bastard before it is born, is not good:<sup>a</sup> for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may a remainder be contingent, on account of the uncertainty of the *person* who is to take it.

§ 234. (b) **Limited on uncertain event.**—A remainder may also be contingent, where the person to whom it is limited is fixed

<sup>u</sup> See Book I. pag. 130.

<sup>w</sup> 2 Rep. 51.

<sup>x</sup> Co. Litt. 378.

<sup>y</sup> Hob. 33.

<sup>z</sup> 5 Rep. 51.

<sup>a</sup> Cro. Eliz. 509.

and certain, but the *event* upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee; here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent; and if B dies first, it never can vest in his heirs, but is forever gone; but if A dies first, the remainder to B becomes vested.

§ 235. (c) *Freeholds limited only on freeholds.*—<sup>[171]</sup> Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate, less than a freehold. Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void:<sup>b</sup> but if granted to A for life, with a like remainder, it is good. For, unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void: it cannot pass out of him, without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere: unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

§ 236. (d) *Contingent remainders, how defeated.*—Contingent remainders may be *defeated*, by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested.<sup>c</sup> Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate, before any of

<sup>b</sup> 1 Rep. 130.

<sup>c</sup> *Ibid.* 66, 135.

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<sup>5</sup> *Contingent remainders, how defeated.*—But a mere disseisin of the particular tenant will not destroy them, so long as he retains a right of entry. (Fearne on Remainders, p. 286.) Of course the tenant's alienation that merely transfers his estate to another will not destroy the remainders. *Aliter*, if he destroys the estate, as by feoffment. But it is questionable whether this rule applies in states where the tenant's alienation is by statute good only to the extent that he may legally transfer, and does not work a forfeiture.—HAMMOND.

those remainders vest; the consequence of which is that he utterly defeats them all. As, if there be tenant for life, with remainder to his eldest son unborn in tail, and the tenant for life, before any son is born, surrenders his life estate, he by that means defeats the remainder in tail to his son: for his son not being *in esse*, when the particular estate determined, the remainder could not then vest; and, as it could not vest then, by the rules before laid down, it never can vest at all.

§ 237. (i) **How preserved from defeat.**—In these cases, therefore, it is necessary to have trustees appointed to preserve the contingent remainders; in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his determines. If, therefore, his estate for life determines otherwise than by his death, their estate,\* for the residue of his natural life, will then take effect, and become a [172] particular estate in possession, sufficient to support the remainders depending in contingency. This method is said to have been invented by Sir Orlando Bridgman, Sir Geoffrey Palmer, and other eminent council, who betook themselves to conveyancing during the time of the civil wars; in order thereby to secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life;<sup>4</sup> and when after the Restoration, those gentlemen came to fill the first offices of the law, they supported this invention within reasonable and proper bounds, and introduced it into general use.

§ 238. c. **Executory devises.**—Thus the student will observe how much nicety is required in creating and securing a remainder; and I trust he will in some measure see the general reasons, upon which this nicety is founded.<sup>6</sup> It were endless to attempt to enter

\* Ninth edition reads, "the estate of the trustees."

<sup>4</sup> See Moor. 486. 2 Roll. Abr. 797. pl. 12. 2 Sid. 159. 2 Chan. Rep. 170.

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<sup>6</sup> **Executory estates.**—Mr. Fearn objects to this definition as too broad, because it covers also contingent remainders given by will, and would substitute for it: "Such a limitation of a future estate or interest in lands or chattels (though in the case of chattels personal it is more properly an executory bequest), as the law admits in the case of a will, though contrary to the rules



upon the particular subtilties and refinements, into which this doctrine, by the variety of cases which have occurred in the course of many centuries, has been spun out and subdivided: neither are they consonant to the design of these elementary disquisitions. I must not, however, omit, that in devises by last will and testament (which, being often drawn up when the party is *inops consilii* (without counsel), are always more favored in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice), in these devises, I say, remainders may be created in some measure contrary to the rules before laid down: though our lawyers will not allow such dispositions to be strictly remainders; but call them by another name, that of *executory devises*, or devises hereafter to be executed.

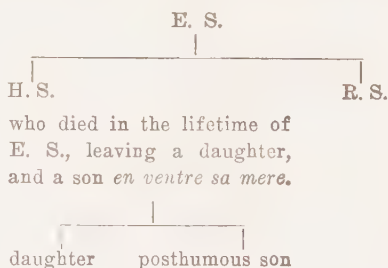
§ 239. (1) Differences between remainders and executory devises.—An executory devise of lands is such a disposition of them by will, that thereby no estate vests at the death of the devisor, but only on some future contingency.<sup>7</sup> It differs from a

of limitation in conveyances at common law.” (Civil Remainders, p. 368; Coleman’s Epitome, p. 75.)

But the American student must remember that in many states by statute such interests may be created by deed as well as will, and should properly be termed “executory estates” rather than executory devises. In other respects Blackstone’s description applies to them.—HAMMOND.

<sup>7</sup> Rule in Shelley’s Case.—Shelley’s Case (1581), 1 Co. Rep. 93b (76 Eng. Reprint, 206).

“Facts: Property is limited to Edward Shelley for life, remainder to the heirs male of his body. Edward Shelley has two sons, Henry and Richard. Henry, the elder, dies in his father’s lifetime, leaving a daughter, and a wife *enceinte*, him surviving. Edward Shelley, the father, dies while Henry’s widow is still *enceinte*; and Richard enters as heir male. Shortly after, Henry’s widow gives birth to a posthumous son.



“Question: Is the posthumous son entitled to the property?”

“Held: The answer to this question depends upon whether, under a limitation of a freehold to the ancestor, with remainder to the heirs, the heirs take

remainder in three very material points: 1. That it needs not any [173] particular estate to support it. 2. That by it a fee simple or other less estate may be limited after a fee simple. 3. That by this means a remainder may be limited of a chattel interest after a particular estate for life created in the same.

§ 240. (a) **Particular estate not necessary in executory devise.**—The first case happens when a man devises a future estate to arise upon a contingency; and, till that contingency happens, does not dispose of the fee simple, but leaves it to descend to his heir at law. As if one devises land to a feme sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it; a freehold commencing

by *descent* or *purchase*. If by *purchase*, the posthumous son cannot claim the property, since he was *in utero* at the time of the ancestor's [E. S.'s] death. But if, under such limitation, the heirs take by *descent*, the posthumous son will be entitled: for it is a technical rule of law that for the purpose of taking by *descent*, a child *en ventre sa mere* must be regarded as standing in the position of a child *in esse*; and so regarded, Henry's son would be entitled as heir male before his father's younger brother Richard.

"The court, following a long-established principle (subsequently known as the Rule in Shelley's Case), held that under the form of limitation in question, the heirs take by *descent* and not *purchase*, and that the posthumous son was accordingly entitled.

"*Proposition*: Where, in the same instrument, a freehold is limited to the ancestor and a remainder to his heirs, *the heirs* are words of limitation of the estate and not of purchase. 1 Co. 104a."—SPITZ, Cond. and Fut. Int. 39.

**Origin of the rule.**—According to Blackstone (Harg. Law Tracts, 501), the Rule in Shelley's Case is merely a reiteration of an ancient principle, first mentioned in Abel's Case, 18 Edw. II, 577 (1324). Coke (1 Co. 105b) informs us that Shelley's Case itself, owing to the nicety of the questions and the extent of the interests involved, aroused widespread discussion, and that all the judges were assembled in conference by Queen Elizabeth for its determination. Spitz, Cond. and Fut. Int. 39; 2 Reeves, Real Prop. § 892; Digby, Hist. Real Prop. (5th ed.), 269. 1 Stephen's Comm. (16th ed.), p. 226, says: "With regard to the origin and reason of the Rule in Shelley's Case, opinion is somewhat divided. But the reasonable view appears to be, that it was introduced in the interests of the crown and the feudal magnates, who, if it had been possible to split up every fee into two successive estates, the one in possession, held by a tenant for life, and the other in remainder, claimed by the expectant heir as a purchaser, would have been deprived of those numerous and profitable perquisites of forfeiture, escheat, wardship, marriage, and

*in futuro* (at a future period). This limitation, though it would be void in a deed, yet is good in a will, by way of executory devise.\* For, since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do, if it passes at all), therefore it may commence *in futuro*; because the principal reason why it cannot commence *in futuro* in other cases is the necessity of actual seisin, which always operates *in præsenti* (immediately). And, since it may thus commence *in futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And hence, also, it follows, that such an executory devise, not being a present interest, cannot be barred by a recovery, suffered before it commences.†

\* 1 Sid. 153.

† Cro. Jac. 593.

the like, which, for the most part, only accrued upon the descent of an estate in fee. However this may be, it is very material for the student to observe—(1) that the rule is now so firmly fixed in our law, that not even an expressed intention on the part of the settler will prevent it applying; (2) that it holds where both the limitations are equitable, as well as where they are both legal. In other words, the rule is not a rule of construction, but a rule of law; and it applies to equitable as well as to legal interests.” (The rule was discussed, with great learning and ingenuity by the late Lord MacNaghten, in the case of *Van Grutten v. Foxwell*, [1897] App. Cas. 658.)

**Rule in Shelley's Case in United States.**—The rule in Shelley's Case has been abolished in a number of states (among others, California, Kentucky, Maine, Massachusetts, Michigan, Missouri, New York, Virginia, and Wisconsin), and where this is the case, the ancestor will take a life estate with a contingent remainder to his heirs. 1 *Stimson*, Am. Stat. Law, § 1406; *Trumbull v. Trumbull*, 149 Mass. 200, 4 L. R. A. 117, 21 N. E. 366; *Wilson v. Alston*, 122 Ala. 630, 25 South. 225; *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049. In this connection, see the well-known lament of Chancellor Kent on the abolition of the rule in New York, 4 *Kent*, Comm., 233, note. On the desirability of the abrogation of the rule, see 1 *Tiffany*, Real Prop., § 133, note. In many states the rule remains in full force. *Zabriskie v. Wood*, 23 N. J. Eq. 541; *Waller v. Pollitt*, 104 Md. 172, 64 Atl. 1040; *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Hubbird v. Goin*, 137 Fed. 822, 70 C. C. A. 320; *Lee v. Lee*, 45 Ind. App. 645, 91 N. E. 507; *Sagers v. Sagers*, 158 Iowa, 729, 43 L. R. A. (N. S.) 562, 138 N. W. 911; *Clark v. Neves*, 76 S. C. 484, 12 L. R. A. (N. S.) 298, 57 S. E. 614. A valuable discussion of the rule and its use in Illinois may be found in *Kales*, Fut. Interests, § 127 ff.

§ 241. (b) **Fee, or less estate, limited on executory devise.**—By executory devise a fee, or other less estate, may be limited after a fee. And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but, if he dies before the age of twenty-one, then to B and his heirs: this remainder, though void in a deed, is good by way of executory devise.<sup>g</sup>

§ 242. (i) **Rule against perpetuities.**—But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate [174] term of years; for courts of justice will not indulge even wills, so as to create a perpetuity, which the law abhors:<sup>h</sup> because by perpetuities (or the settlement of an interest, which shall go in the succession prescribed, without any power of alienation<sup>1</sup>) estates are made incapable of answering those ends, of social commerce, and providing for the sudden contingencies of private life, for which property was at first established. The utmost length that has been hitherto allowed for the contingency of an executory devise of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards. As when lands are devised to such unborn son of a feme covert, as shall first attain the age of twenty-one, and his heirs; the utmost length of time that can happen before the estate can vest, is the life of the mother and the subsequent infancy of her son: and this hath been decreed to be a good executory devise.<sup>k s</sup>

<sup>g</sup> 2 Mod. 289.

<sup>1</sup> Salk. 229.

<sup>h</sup> 12 Mod. 287. 1 Vern. 16.

<sup>k</sup> Forr. 232.

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<sup>s</sup> **Rule against perpetuities.**—The rule against perpetuities has been stated by a learned writer upon the rule, in the following language: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." (Gray, *Perpetuities*, 2d ed., sec. 201.) It is apparent from this definition that a more accurate designation of the rule would be the rule against remoteness. An illustration of a limitation void under the rule is where a testator makes an executory devise to such children of A as may attain the age of twenty-five years. (Leake,

§ 243. (c) **Remainder limited on a chattel interest.**—By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another, which could not be done by deed: for by law the first grant of it, to a man for life, was a total disposition of the whole term; a life estate being esteemed of a higher and larger nature than any term of years.<sup>1</sup> And, at first, the courts were tender, even in the case of a will, of restraining the devisee for life from aliening the term; but only held, that in case he died without exerting that act of ownership, the remainder over should then take place:<sup>m</sup> for the

<sup>1</sup> 8 Rep. 95.

<sup>m</sup> Bro. tit. Chatteles. 23. Dyer. 74.

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Property in Land, 2d ed., 322.) A may possibly have a child born after the testator's death, and though there are other children of A living at testator's death, not until the subsequently born child either reaches twenty-five or dies before that time can the interest vest. Until that time it is impossible to say who will be the children entitled. The limitation is therefore void, for there is the *possibility* that the interest will not vest within lives in being at the time of the creation of the limitation plus the period of twenty-one years, and the rule requires that it *must* vest within that time. And the person claiming that the limitation is valid cannot argue that it is a physical impossibility that A should have other children by reason of extreme age or other incapacity. (*Jee v. Audley*, 1 Cox Ch. 324, 29 Eng. Reprint, 1186.) Nor does it matter that the actual fact is that A has children all of whom are over twenty-five years of age at the time of testator's death, and that in fact there is no child subsequently born. (Williams, Real Property, 21st ed., 407.) In the application of the rule against perpetuities, the law will not permit anything short of the absolute logical certainty of the vesting within the prescribed period to render valid a future limitation. The only relaxation of the extreme rigor of the rule is in the case where there is an unborn child actually begotten but not born at the beginning or the end of the period. In such a case, the gross term of twenty-one years may be increased by the actual period of gestation. (Leake, Property in Land, 2d ed., 317.)

The rule against perpetuities is an instance of judicial legislation, operating in comparatively recent times. As Blackstone says, it is based upon the impolicy of permitting estates to be limited so as "to be made incapable of answering those ends of social commerce, . . . for which property was at first established," or to use the phrase of a modern economist, it is a development of the principle of the "fluidity of property." (Ely, Property and Contract in Relation to the Distribution of Wealth, vol. I, c. xviii.) Just as the mediæval judges invented the doctrine of common recoveries in support of this principle, so the judges of the seventeenth and eighteenth centuries invented the rule against perpetuities for the same reason. In 1620, in the



restraint of the power of alienation, especially in very long terms, was introducing a species of perpetuity. But, soon afterwards, it was held,<sup>n</sup> that the devisee for life hath no power of aliening the term, so as to bar the remainderman: yet in order to prevent the danger of perpetuities, it was settled,<sup>o</sup> that though such remainders may be limited to as many persons successfully as the devisor thinks proper, yet they must all be [175] *in esse* during the life of the first devisee; for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainderman who happens to survive the rest: or, that such remainder may be limited to take effect upon such contin-

<sup>n</sup> Dyer. 358. 8 Rep. 96.

<sup>o</sup> 1 Sid. 451.

case of *Pells v. Brown* (Cro. Jac. 590, 79 Eng. Reprint, 504), it was established that a future limitation by way of executory devise was indestructible. If such limitations were to be permitted indefinitely, the probable result would be the withdrawal of property from the ordinary channels of commerce. To obviate this evil, Lord Chancellor Nottingham, in the Duke of Norfolk's case, in 1681, enunciated the rule in its original form,—that the future interest by way of executory devise is valid if it must necessarily vest within the period of lives in being at the time of its creation. (3 Chan. Cas. 1; Pollexfen, 223.) When Blackstone wrote, the precise limits of the period within which the future estate must vest were not absolutely settled, and with his usual accuracy, he states that “the utmost length that has been *hitherto* allowed . . . is that of a life or lives in being and one and twenty years afterwards.” Since his book was written, the rule in its modern form has been definitely settled in *Cadell v. Palmer*, decided by the house of lords in 1832 (1 Cl. & F. 372, 411, 6 Eng. Reprint, 956). It can now be stated that the period of lives in being plus the gross term of twenty-one years (that is, without reference to the actual minority of children), is the utmost time that will be allowed for the vesting of future estates,—allowing the period of gestation also, where necessary. The rule in this form prevails as part of the common law of America. (*Becker v. Chester*, 115 Wis. 90, 91 N. W. 87.)

Blackstone treats of the rule with reference only to executory devises, and it is true that in his time courts had not applied the rule to other future interests, and that it was invented to prevent the inconveniences that would flow from the decision in *Pells v. Brown*. But the rule has been extended since Blackstone wrote so as to cover almost every kind of future interest, whether legal or equitable, whether in realty or personalty. Contingent remainders, rights of entry for breach of common-law conditions, equitable interests under contracts of sale of real property, all have been held subject to the rule by the English courts. (Leake, *Property in Land*, 2d ed., 317.) The American courts, however, have not applied the rule to rights of entry

gency only as must happen (if at all) during the life of the first devisee.<sup>p</sup>

Thus much for such estates in expectancy, as are created by the express words of the parties themselves; the most intricate title in the law. There is yet another species, which is created by the act and operation of the law itself, and this is called a reversion.

§ 244. 3. **Estates in reversion.**—An estate in *reversion* is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him.<sup>q</sup> Sir Edward Coke<sup>r</sup> describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without

<sup>p</sup> Skinn. 341. 3 P. Wms. 358.

<sup>r</sup> 1 Inst. 142.

<sup>q</sup> Co. Litt. 22.

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for breach of condition. (Gray, Perpetuities, 2d ed., § 304.) It should be carefully noted that the rule has no application to vested interests; it applies only where an interest is to become vested upon some contingency. It should also be observed that though the rule had its origin in the principle of freedom of alienation, it is now applied to future interests though they may be alienable. (Gray, Restraints on Alienation, 2d ed., § 8.)

“The rule against perpetuities is not a rule of construction, but a peremptory command of law. It is not, like a rule of construction, a test, more or less artificial, to determine intention. Its object is to defeat intention. Therefore, every provision in a will or settlement is to be construed as if the rule did not exist and then to the provision so construed the rule is to be remorselessly applied.” (Gray, Perpetuities, § 629.)

Closely connected with the rule against perpetuities, is the statutory rule embodied in the so-called Thellusson Act forbidding the accumulation of income for a greater period than twenty-one years or the minority of children. (39 & 40 Geo. III, c. 98, 1800.) The purpose of the act is to prevent the evils which would result from permitting accumulations during the possibly long period allowed by the rule against perpetuities. Accumulations directed to be made in violation of the statute are void only as to the excess. (Leake, Property in Land, 2d ed., 337.) Statutes similar to the Thellusson Act have been passed in many American states.

In New York, in 1828, a system apparently designed to take the place of the rule against perpetuities was adopted in the Revised Statutes. The central principle of this system is that every future interest is void which may by any possibility suspend the absolute power of alienation for more than two lives in being at the time of the creation of the estate. The absolute power of alienation is suspended when there are no persons in being by whom

any special reservation, vested in the donor by act of law: and so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee simple of all lands must abide somewhere; and if he, who was before possessed of the whole, carves out of it any smaller estate, and grants it away, whatever is not so granted remains in him. A reversion is never, therefore, created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise. But both are equally transferable, when actually vested, being both estates *in præsenti*, though taking effect *in futuro*.

§ 245. a. Incidents of reversions.—The doctrine of reversions is plainly derived from the feudal constitution. For, when a feud was granted to a man for life, or to him and his issue male, rendering either rent, or other services; then, on his death or the failure of issue male, the feud was determined and resulted back to the [176] lord or proprietor, to be again disposed of at his pleasure. And hence the usual *incidents* to reversions are said to be *fealty* and *rent*. When no rent is reserved on the particular estate, fealty, however, results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority; being frequently the only evidence that the lands are holden at all. Where rent is reserved, it is also incident, though not inseparably so, to the reversion.<sup>a</sup> The rent may be granted away, reserving the reversion; and the reversion may be granted away, reserving the rent; by *special* words: but by a *general* grant of the reversion, the rent will pass with it, as incident thereunto; though by the grant of the rent generally, the

<sup>a</sup> Co. Litt. 143.

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an absolute fee in possession can be conveyed. In California, the future interest is void if it may by any possibility suspend the absolute power of alienation beyond the lives of persons in being, instead of two lives in being, as in New York. (Civ. Code, §§ 715, 716.) Under these statutes it has been held that a trust to hold property for a definite period is void, irrespective of the shortness of the period. (Estate of Walkerly (1895), 108 Cal. 627, 49 Am. St. Rep. 97, 41 Pac. 772.) Of the New York system, Mr. Gray says its effect "is that in no civilized country is the making of a will so delicate an operation, and so likely to fail of success, as in New York." (Gray, Perpetuities, 2d ed., § 750.)—O. K. McMURRAY.

reversion will not pass. The incident passes by the grant of the principal, but not *e converso* (conversely): for the maxim of law is, "*Accessorium non ducit, sed sequitur, suum principale* (The accessory does not precede but follows its principal)."<sup>t</sup>

§ 246. b. Distinctions between remainders and reversions.— These *incidental* rights of the reversioner, and the respective modes of descent, in which remainders very frequently differ from reversions, have occasioned the law to be careful in distinguishing the one from the other, however inaccurately the parties themselves may describe them. For if one, seised of a paternal estate in fee, makes a lease for life, with remainder to himself and his heirs, this is properly a mere reversion,<sup>u</sup> to which rent and fealty shall be incident; and which shall only descend to the heirs of his father's blood, and not to his heirs general, as a remainder limited to him by a third person would have done:<sup>w</sup> for it is the old estate, which was originally in him, and never yet was out of him. And so, likewise, if a man grants a lease for life to A, reserving rent, with reversion to B and his heirs, B hath a remainder descendible to his heirs general, and not a reversion to which the rent is incident; but the grantor shall be entitled to the rent, during the continuance of A's estate.<sup>x</sup>

§ 247. 4. Statute of Fraudulent Concealment of Deaths, 1707. [177] In order to assist such persons as have any estate in remainder, reversion, or expectancy, after the death of others, against fraudulent concealments of their deaths, it is enacted by the statute 6 Ann., c. 18 (1707), that all persons on whose lives any lands or tenements are holden, shall (upon application to the court of chancery and order made thereupon) once in every year, if required, be produced to the court, or its commissioners; or upon neglect or refusal, they shall be taken to be actually dead, and the person entitled to such expectant estate may enter upon and hold the lands and tenements, till the party shall appear to be living.

<sup>t</sup> *Ibid.* 151, 152.

<sup>u</sup> *Cro. Eliz.* 321.

<sup>w</sup> 3 *Lev.* 407.

<sup>x</sup> 1 *And.* 23.

§ 248. 5. **Doctrine of merger.**—Before we conclude the doctrine of remainders and reversions, it may be proper to observe, that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate,<sup>79</sup> the less is immediately annihilated; or, in the law phrase, is said to be *merged*, that is, sunk or drowned, in the greater. Thus, if there be tenant for years, and the reversion in fee simple descends to or is purchased by him, the term of years is merged in the inheritance, and shall never exist any more. But they must come to one and the same person in one and the same right; else, if the freehold be in his own right, and he has a term in right of another (*en autre droit*) there is no merger. Therefore, if tenant for years dies, and makes him who hath the reversion in fee his executor, whereby the term of years vests also in him, the term shall not merge; for he hath the fee in his own right and the term of years in the right of the testator, and subject to his debts and legacies. So, also, if he who hath the reversion in fee marries the tenant for years, there is no merger; for he hath the inheritance in his own right, the lease in the right of his wife.<sup>80</sup> An estate-tail is an exception to this rule: for a man may have in his own right both an estate-tail and a reversion in fee; and the estate-tail, though a less estate, shall not merge in the fee.<sup>a</sup> For estates-tail are protected and preserved from merger by the [178] operation and construction, though not by the express words, of the *statute de donis*: which operation and construction have probably arisen upon this consideration; that, in the common cases of *merger* of estates for life or years by uniting with the inheritance, the particular tenant hath the sole interest in them, and hath full power at any time to defeat, destroy, or surrender them to him that hath the reversion; therefore, when such an estate unites with the reversion in fee, the law considers it in the light of a virtual surrender of

<sup>79</sup> 3 Lev. 437.

<sup>80</sup> Plow. 418. Cro. Jac. 275. Co. Litt. 338.

<sup>a</sup> 2 Rep. 41. 8 Rep. 74.

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<sup>9</sup> Mr. Jenks remarks that it is very doubtful whether this decision (*Duncomb v. Duncomb* (1695), 3 Lev. 437, 83 Eng. Reprint, 770), is consistent with the rule in *Shelley's Case*. 1 Stephen, Comm. (16th ed.), 227 n.



the inferior estate.<sup>b</sup> But, in an estate-tail, the case is otherwise: the tenant for a long time had no power at all over it, so as to bar or to destroy it; and now can only do it by certain special modes, by a fine, a recovery, and the like:<sup>c</sup> it would therefore have been strangely improvident, to have permitted the tenant in tail by purchasing the reversion in fee, to merge his particular estate, and defeat the inheritance of his issue: and hence it has become a maxim, that a tenancy in tail, which cannot be surrendered, cannot also be merged in the fee.<sup>10</sup>

<sup>b</sup> Cro. Eliz. 302.

<sup>c</sup> See pag. 116.

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<sup>10</sup> The doctrine of merger has been greatly modified in England by the Judicature Act of 1873, which provides that there shall be no merger, by operation of law only, of any estate the beneficial interest in which would not be denied to be merged in equity. And as it was the rule in equity to deny a merger in all cases where any beneficial right or interest would be unjustly affected thereby, or where it was the obvious intention of the settler that no merger should take place, recent decisions have tended to restrict the operation of the principle. 1 Stephen, Comm. (16th ed.), 228. *Snow v. Boycott*, [1892] 3 Ch. 110; *Capital and Counties Bank v. Rhodes*, [1903] 1 Ch. 652; *Lea v. Thursby*, [1904] 2 Ch. 57.

## OF ESTATES IN SEVERALTY, JOINT TENANCY, COPARCENARY, AND COMMON.

§ 249. Estates in respect to the number of their tenants.—We come now to treat of estates, with respect to the number and connections of their owners, the tenants who occupy and hold them. And, considered in this view, estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways;<sup>1</sup> in severalty, in joint tenancy, in coparcenary, and in common.

§ 250. 1. Estates in severalty.—He that holds lands or tenements in *severalty*, or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. This is the most common and usual way of holding an estate; and therefore we may make the same observations here, that we did upon estates in possession, as contradistinguished from those in expectancy, in the preceding chapter: that there is little or nothing peculiar to be remarked concerning it, since all estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and that in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty. I shall therefore proceed to consider the other three species of estates, in which there are always a plurality of tenants.

§ 251. 2. Estates in joint tenancy.—<sup>[180]</sup> An estate in *joint tenancy* is where lands or tenements are granted to two or more persons, to hold in fee simple, fee-tail, for life, for years, or at will.

<sup>1</sup> Correction of a criticism on Blackstone.—This does not mean, as certain critics have assumed for the sake of correcting Blackstone, that every estate can be held in all four such ways: nor does Blackstone say so. He certainly knew, for he has said as much elsewhere, that an estate less than fee cannot be held in coparcenary. The examples of his mistake commonly given, e. g., that joint tenancy cannot be taken by descent, or coparcenary by purchase, etc., are limitations of *title*, not of estate. He has nowhere said that all four ways of holding an estate are consistent with any kind of a title.—HAMMOND.

In consequence of such grants an estate is called an estate in joint tenancy,<sup>a</sup> and sometimes an estate in *jointure*, which word as well as the other signifies an union or conjunction of interest; though in common speech the term "*jointure*" is now usually confined to that joint estate, which by virtue of the statute 27 Hen. VIII, c. 10 (Statute of Uses, 1535), is frequently vested in the husband and wife before marriage, as a full satisfaction and bar of the woman's dower.<sup>b</sup>

In unfolding this title, and the two remaining ones in the present chapter, we will first inquire, how these estates may be *created*; next, their *properties* and respective *incidents*; and lastly, how they may be *severed* or *destroyed*.

§ 252. a. **Creation of joint estate.**—The *creation* of an estate in joint tenancy depends on the wording of the deed or devise, by which the tenants claim title; for this estate can only arise by purchase or grant, that is, by the act of the parties, and never by the mere act of law. Now, if an estate be given to a plurality of persons, without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint tenants in fee of the lands. For the law interprets the grant so as to make all parts of it take effect, which can only be done by creating an equal estate in them both. As, therefore, the grantor has thus united their names, the law gives them a thorough union in all other respects. For,

§ 253. b. **Properties of joint estate.**—The *properties* of a joint estate are derived from its unity, which is fourfold; the unity of *interest*, the unity of *title*, the unity of *time*, and the unity of *possession*: or, in other words, joint tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.<sup>2</sup>

<sup>a</sup> Litt. § 277.

<sup>b</sup> See pag. 137.

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<sup>2</sup> The identity of the interest and title of joint tenants is commonly analyzed into the "fourfold unity" of *interest*, *title*, *time*, and *possession*. (2 Bl. Comm. 180–184.) This analysis has perhaps attracted attention rather

§ 254. (1) **Unity of interest.**—<sup>[181]</sup> First, they must have one and the same *interest*. One joint tenant cannot be entitled to one period of duration or quantity of interest in lands, and the other to a different; one cannot be tenant for life, and the other for years: one cannot be tenant in fee, and the other in tail.<sup>c</sup> But, if land be limited to A and B for their lives, this makes them joint tenants of the freehold; if to A and B and their heirs, it makes them joint tenants of the inheritance.<sup>d</sup> If land be granted to A and B for their lives, and to the heirs of A; here A and B are joint tenants of the freehold during their respective lives, and A has the remainder of the fee in severalty: or, if land be given to A and B, and the heirs of the body of A; here both have a joint estate for life, and A hath a several remainder in tail.<sup>e</sup>

§ 255. (2) **Unity of title.**—Secondly, joint tenants must also have an unity of *title*: their estate must be created by one and the same act, whether legal or illegal; as by one and the same grant, or by one and the same disseisin.<sup>f</sup> Joint tenancy cannot arise by descent or act of law; but merely by purchase, or acquisition by the act of the party: and, unless that act be one and the same, the two tenants would have different titles; and if they had different titles, one might prove good, and the other bad, which would absolutely destroy the jointure.

§ 256. (3) **Unity of time.**—Thirdly, there must also be an unity of *time*: their estates must be vested at one and the same period, as well as by one and the same title. As in case of a present estate made to A and B; or a remainder in fee to A and B after a particular estate; in either case A and B are joint tenants of this

<sup>c</sup> Co. Litt. 188.

<sup>e</sup> *Ibid.* § 285.

<sup>d</sup> Litt. § 277.

<sup>f</sup> *Ibid.* § 278.

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by reason of its captivating appearance of symmetry and exactness, than by reason of its practical utility. It means only, that each joint tenant stands, in all respects, in exactly the same position as each of the others; and that anything which creates a distinction either severs the joint tenancy or prevents it from arising. Blackstone seems not to have adverted to the fact that the “unity of time” is not, under the learning of uses and devises, an indispensable requisite.—CHALLIS, *Real Prop.* (3d ed.), 367.

present estate, or this vested remainder. But if, after a lease for life, the remainder be limited to the heirs of A and B; and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir; and then B dies, whereby the other moiety becomes vested in the heir of B: now A's heir and B's heir are not joint tenants of this remainder, but tenants in common; for one moiety vested at one time, and the other moiety vested at another.<sup>g</sup> [182] Yet, where a feoffment was made to the use of a man, and such wife as he should afterwards marry, for term of their lives, and he afterwards married; in this case it seems to have been held that the husband and wife had a joint estate, though vested at different times:<sup>h</sup> because the *use* of the wife's estate was in abeyance and dormant till the intermarriage; and, being then awakened, had relation back, and took effect from the original time of creation.

§ 257. (4) *Unity of possession.*—Lastly, in joint tenancy, there must be an unity of *possession*. Joint tenants are said to be seised *per my et per tout*, by the *half* or *moiety*, and *by all*;<sup>3</sup> that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*.<sup>1</sup> They have not, one of them a seisin of one-half or moiety, and the other of the other moiety; neither can one be exclusively seised of one acre, and his companion of an-

<sup>g</sup> Co. Litt. 188.

<sup>4</sup> Litt. § 238. 5 Rep. 10.

<sup>h</sup> Dyer. 340. 1 Rep. 101.

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<sup>3</sup> *Seisin per my et per tout.*—This translation rests on the authority of Littleton and Lord Coke, but has been criticised by modern writers who no doubt are more familiar with the niceties of law-French than these authors or Blackstone. *Mie* or *my* unquestionably had both meanings, i. e., of a *moiety*, and of *nothing*. Littleton translated it better than Blackstone, *per chescun parcel*, which is not confined to the case of *two* tenants only, as "half" is.

Whether Bracton was translating this maxim in the passage quoted by our author in note *k* is doubtful. At all events, he is speaking there (fol. 430 *a*) of coheirs, not of joint tenants or tenants by entirety. (See note of Serjeant Manning to *Murray v. Hall*, 7 Com. B. 455; 2 Minor's Institutes, 404.)—HAMMOND.



other; but each has an undivided moiety of the whole, and not the whole of an undivided moiety.<sup>k\*4</sup>

§ 258. (5) **Other incidents of joint estates.**—Upon these principles, of a thorough and intimate union of interest and possession, depend many other consequences and incidents to the joint tenant's estate. If two joint tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall inure to both, in

\* Ninth edition adds: "And therefore, if an estate in fee be given to a man and his wife, they are neither properly joint tenants, nor tenants in common: for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety, *per tout et non per my* (by all, and not by the half); the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor. [To which is added as a note: Litt. § 665. Co. Litt. 187. Bro. Abr. t. Cui in Vita. 8. 2 Vern. 120. 2 Lev. 39.]"

<sup>k</sup> *Quilibet totum tenet et nihil tenet; scilicet, totum in communi, et nihil separatim per se.* (Each holds the entirety and yet holds nothing; that is, the entirety in common, and nothing separately by itself.) Bract. l. 5. tr. 5. c. 26.

<sup>4</sup> Coke tells us that "there can be no moieties between" husband and wife. Co. Litt. 187b; Thomas' Coke, 855; 2 Yeates, 462. Littleton says that the reason is that they are one person in law. Id. Blackstone tells us that for that reason "they cannot take the estate by moieties; but both are seised of the entirety." 2 Bl. Comm. 182; 2 Cruise Dig. 492. If they are "one person in law"—if "there be no moieties between them"—if "they cannot take by moieties," but both "must be seised of the entirety"—the intention to create a tenancy in common is immaterial, for the rule is that the very same words which create such an estate between other parties create an entirety in husband and wife. The case of *Green v. King* was determined, not on any supposed intention of the parties to the conveyance, but on the sole ground of the absolute incapacity of the husband and wife, who are regarded as one person in law, to take, during coverture, separate estates. 2 Bl. Rep. 1211. The case of *Rogers v. Benson* was decided upon the same ground. 5 Johns. Ch. (N. Y.) 431, 437. *Jackson v. Stevens* was determined on the same principle of incapacity to take by moieties. 16 Johns. (N. Y.) 110, 115. *Sutliff v. Forgey* is an authority to the same point. 1 Cow. (N. Y.) 89, 95. *Barber v. Harris* was also determined on the ground of the incapacity of husband and wife to take either as joint tenants or tenants in common. 15 Wend. 617. In *Taul v. Campbell* authorities were cited by the court in affirmance of the same doctrine. 7 Yerg. (Tenn.) 319, 27 Am. Dec. 508. In *Den v. Hardenbergh* the same ground was taken. 10 N. J. L. 42, 18 Am. Dec. 371. In

respect of the joint reversion.<sup>1</sup> If their lessee surrenders his lease to one of them, it shall also inure to both, because of the privity, or relation of their estate.<sup>m</sup> On the same reason, livery of seisin, made to one joint tenant, shall inure to both of them;<sup>n</sup> and the entry, or re-entry, of one joint tenant is as effectual in law as if it were the act of both.<sup>o</sup> In all actions also relating to their joint estate, one joint tenant cannot sue or be sued without joining the other.<sup>p</sup> But if two or more joint tenants be seised of an advowson, and they present different clerks, the bishop may refuse to admit either: because neither joint tenant hath a several right of patronage, but each is seised of [183] the whole: and, if they do not both agree within six months, the right of presentation shall lapse. But the ordinary may, if he pleases, admit a clerk presented by either, for the good of the church, that divine service may be regularly performed; which is no more than he otherwise would be entitled to do, in case their disagreement continued, so as to incur a lapse: and, if the clerk of one joint tenant be so admitted, this shall keep up the title in both of them; in respect of the privity and union of their estate.<sup>q</sup> Upon the same ground it is held, that one joint tenant cannot have an action against another for trespass, in respect of his land;<sup>r</sup> for each has an equal right to enter on any part of it. But one joint tenant is not capable by himself to do any act, which may tend to defeat or injure the estate of the other; as to let leases, or to grant copyholds:<sup>s</sup> and, if any waste be done, which tends to the destruction of the inheritance, one joint tenant may have an action of waste against the other, by

<sup>1</sup> Co. Litt. 214.<sup>m</sup> *Ibid.* 192.<sup>n</sup> *Ibid.* 49.<sup>o</sup> *Ibid.* 319. 364.<sup>p</sup> *Ibid.* 195.<sup>q</sup> Co. Litt. 185.<sup>r</sup> 3 Leon. 262.<sup>s</sup> 1 Leon. 234.

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Rogers v. Grider the same principle is affirmed. 1 Dana (Ky.), 242. Other cases to the same effect might be cited. This doctrine prevails, it is believed, in every state of the Union, where the common law furnishes the rule of decision. Chancellor Kent did but reiterate the reason of the rule when he declared it to be founded, not on any supposed intention of the parties to the conveyance, but on the "unity of husband and wife," and announced, as the necessary result of that unity, that "they cannot take by moieties." 2 Kent, Comm., 132; 4 Kent, Comm., 362.—Stuckey v. Keefe's Executors, 26 Pa. St. 397, 401.

construction of the statute Westm. 2, c. 22.<sup>†</sup> So, too, though at common law no action of account lay for one joint tenant against another, unless he had constituted him his bailiff or receiver,<sup>‡</sup> yet now by the statute 4 Ann., c. 16 (Joint Tenants, 1705), joint tenants may have actions of account against each other, for receiving more than their due share of the profits of the tenements held in joint tenancy.

§ 259. (6) *Doctrine of survivorship*.—From the same principle also arises the remaining grand incident of joint estates; viz., the doctrine of *survivorship*: by which when two or more persons are seised of a joint estate, of inheritance, for their own lives, or *pur auter vie* (for the life of another), or are jointly possessed of any chattel interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor; and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate.<sup>¶</sup><sup>5</sup> This is the natural and regular consequence of the union and entirety of their interest. The interest of two joint tenants [184] is not only equal or similar, but also is one and the same. One has not originally a distinct moiety from the other; but, if by any subsequent act (as by alienation or forfeiture of

† 2 Inst. 403.

¶ Litt. § 280, 281.

‡ Co. Litt. 200.

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<sup>5</sup> *Joint tenancies*.—It will be noticed that the peculiar incidents of joint tenancy must end with the last survivor of those first taking. Whether the inheritance be limited to his heirs or to those of all the joint tenants, they cannot well hold with all the requisite unities. Even if this may be considered theoretically possible under the rule of primogeniture, it would not be so by American law, dividing at each descent among all the heirs of the same degree. Practically the most careful limitation of the kind would be soon wrecked.

This may not be true, however, of the kind of joint tenancy now most common in the United States, in many of them the only kind, where the joint tenants take the estate not "in their own right," but for a particular purpose, such as a railroad mortgage or other trust. Here the ordinary rules of descent are overridden by the power of the courts of equity to substitute new trustees, and there is no reason why such a joint interest might not be continued thus for generation after generation, with continual survivorship among the trustees in each.—HAMMOND.

either) the interest becomes separate and distinct, the joint tenancy instantly ceases. But, while it continues, each of two joint tenants has a concurrent interest in the whole; and therefore, on the death of his companion, the sole interest in the whole remains to the survivor. For the interest, which the survivor originally had, is clearly not divested by the death of his companion; and no other person can now claim to have a *joint* estate with him, for no one can now have an interest in the whole, accruing by the same title, and taking effect at the same time as his own; neither can anyone claim a *separate* interest in any part of the tenements; for that would be to deprive the survivor of the right which he has in all, and every part. As, therefore, the survivor's original interest in the whole still remains; and as no one can now be admitted, either jointly or severally, to any share with him therein; it follows that his own interest must now be entire and several, and that he shall alone be entitled to the whole estate (whatever it be) that was created by the original grant.

This right of survivorship is called by our ancient authors<sup>\*</sup> the *jus accrescendi*, because the right, upon the death of one joint tenant, accumulates and increases to the survivors; or, as they themselves express it, "*pars illa communis accrescit superstitibus, de persona in personam, usque ad ultimam superstitem* (that common share accumulates to the survivors from one person to another even to the last survivor)." And this *jus accrescendi* ought to be mutual; which I apprehend to be one reason why neither the king,<sup>†</sup> nor any corporation,<sup>‡</sup> can be a joint tenant with a private person. For here is no mutuality; the private person has not even the remotest chance of being seised of the entirety, by benefit of survivorship; for the king and the corporation can never die.

§ 260. c. Joint tenancy, how severed and destroyed.—[185] We are, lastly, to inquire, how an estate in joint tenancy may be *severed* and *destroyed*. And this may be done by destroying any of its constituent unities.

\* Bracton. l. 4. tr. 3. c. 9. § 3. Fleta. l. 3. c. 4.

† Co. Litt. 190. Finch. L. 83.

‡ 2 Lev. 12.

§ 261. (1) **Destruction of unity of time.**—1. That of *time*, which respects only the original commencement of the joint estate, cannot indeed (being now past), be affected by any subsequent transactions.

§ 262. (2) **Partition.**—But 2. The joint tenants' estate may be destroyed, without any alienation, by merely disuniting their *possession*. For joint tenants being seised *per my et per tout* (by half and by all), everything that tends to narrow that interest, so that they shall not be seised throughout the whole, and throughout every part, is a severance or destruction of the jointure. And therefore, if two joint tenants agree to part their lands, and hold them in severalty, they are no longer joint tenants; for they have now no joint interest in the whole, but only a several interest respectively in the several parts. And for that reason, also, the right of survivorship is by such separation destroyed.<sup>a</sup> By common law all the joint tenants might agree to make partition of the lands, but one of them could not compel the other so to do:<sup>b</sup> for, this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII, c. 1 (Partition, 1539), and 32 Hen. VIII, c. 32 (Partition, 1540), joint tenants, either of inheritances or other less estates, are compellable by writ of partition to divide their lands.<sup>c 6</sup>

§ 263. (3) **Alienation.**—3. The jointure may be destroyed by destroying the unity of *title*. As if one joint tenant aliens and con-

<sup>a</sup> Co. Litt. 188. 193.

<sup>b</sup> Litt. § 290.

<sup>c</sup> Thus, by the civil law, *nemo invitus compellitur ad communionem* (no one is compelled to a joint possession against his will). (Ff. 12. 6. 26. § 4.) And again: *Si non omnes qui rem communem habent, sed certi ex his, dividere desiderant; hoc judicium inter eos accipi potest.* (If only some of those who hold a thing in common desire a partition, this judgment may be received between them.) (Ff. 10. 3. 8.)

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<sup>6</sup> This writ was abolished, together with the other ancient forms of real action, by the Real Property Limitation Act of 1833. But joint tenants may be compelled by action to make partition or to submit to a sale and division of the proceeds, by the Partition Acts of 1868 and 1876.



veys his estate to a third person: here the joint tenancy is severed, and turned into tenancy in common;<sup>d</sup> for the grantee and the remaining joint tenant hold by different titles (one derived from the original, the other from the subsequent, grantor), though, till partition made, the unity of possession continues.<sup>7</sup> But a devise of one's share by will [186] is no severance of the jointure: for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other<sup>e</sup>) is already vested.<sup>f</sup>

§ 264. (4) Merger.—4. It may also be destroyed, by destroying the unity of *interest*. And therefore, if there be two joint tenants for life, and the inheritance is purchased by or descends upon either, it is a severance of the jointure:<sup>g</sup> though, if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure, without merging in the inheritance; because, being created by one and the same conveyance, they are not separate estates (which is requisite in order to a merger), but branches of one entire estate.<sup>h</sup> In like manner, if a joint tenant in fee makes a lease for life of his share, this defeats the jointure:<sup>i</sup> for it destroys the unity both of title and of interest. And, whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi* the same instant ceases with it.<sup>k</sup> Yet, if one of three joint ten-

<sup>d</sup> Litt. § 292.

<sup>e</sup> *Jus accrescendi præfertur ultimæ voluntati*. (The right of survivorship is preferred to the last will.) Co. Litt. 185.

<sup>f</sup> Litt. § 287.

<sup>g</sup> Cro. Eliz. 470.

<sup>h</sup> 2 Rep. 60. Co. Litt. 182.

<sup>i</sup> Litt. § 302, 303.

<sup>k</sup> *Nihil de re accrescit ei, qui nihil in re quando jus accresceret habet*. (No part of the estate accrues to him, who has nothing in the estate when the right accrues.) Co. Litt. 188.

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<sup>7</sup> It is said that the nature of the alienation required to effect a severance is a matter of some doubt; but that probably a mere lease for years by one joint tenant does not work a severance. *Palmer v. Rich*, [1897] 1 Ch. 134. See, however, *Napier v. Williams*, [1911] 1 Ch., at p. 369. 1 *Stephen's Comm.* [16th ed.], 235 n.

ants aliens his share, the two remaining tenants still hold their parts by joint tenancy and survivorship;<sup>1</sup> and, if one of three joint tenants releases his share to one of his companions, though the joint tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure;<sup>m</sup> for they still preserve their original constituent unities. But when, by any act or event, different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated; so that the tenants have no longer these four indispensable properties, a sameness of interest, and undivided possession, a title vesting at one and the same time, and by one and the same act or grant; the jointure is instantly dissolved.

§ 265. (5) Utility of severance of joint estates.—[187] In general it is advantageous for the joint tenants to dissolve the jointure; since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. Sometimes, however, it is disadvantageous to dissolve the joint estate: as if there be joint tenants for life, and they make partition, this dissolves the jointure; and, though before they each of them had an estate in the whole for their own lives and the life of their companion, now they have an estate in a moiety only for their own lives merely; and, on the death of either, the reversioner shall enter on his moiety.<sup>n</sup> And therefore, if there be two joint tenants for life, and one grants away his part for the life of his companion, it is a forfeiture;<sup>o</sup> for in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life; and then he grants the same land for the life of another: which grant, by a tenant for his own life merely, is a forfeiture of his estate;<sup>p</sup> for it is creating an estate which may by possibility last longer than that which he is legally entitled to.<sup>8</sup>

<sup>1</sup> Litt. § 294.

<sup>o</sup> 4 Leon. 237.

<sup>m</sup> *Ibid.* § 304.

<sup>p</sup> Co. Litt. 252.

<sup>n</sup> 1 Jones. 55.

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<sup>8</sup> By the common law in England, a joint tenancy occurs where there has been a limitation of the same estate, by deed, will, or parol, to two or more persons without words of severance. Jenks. Mod. Land Law, 170. In the United States the presumption is that persons holding jointly hold as tenants

§ 266. 3. *Estates in coparcenary.*—An estate held in *coparcenary* is where lands of inheritance descend from the ancestor to two or more persons. It *arises* either by common law, or particular custom. By common law: as where a person seised in fee simple or in fee-tail dies, and his next heirs are two or more females, his daughters, sisters, aunts, cousins, or their representatives; in this case they shall all inherit, as will be more fully shown, when we treat of descents hereafter: and these coheirs are then called *coparceners*; or, for brevity, *parceners* only.<sup>a</sup> Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, etc.<sup>r</sup> And, in either of these cases, all the parceners put together make but one heir, and have but one estate among them.<sup>s</sup>

§ 267. a. *Properties of parceners.*—<sup>[188]</sup> The *properties* of parceners are in some respects like those of joint tenants; they having the same unities of *interest*, *title*, and *possession*. They may sue and be sued jointly for matters relating to their own lands:<sup>t</sup> and the entry of one of them shall in some cases inure as the entry of them all.<sup>u</sup> They cannot have an action of trespass against each other: but herein they differ from joint tenants, that they are also excluded from maintaining an action of waste;<sup>w</sup> for coparceners could at all times put a stop to any waste by writ of

<sup>a</sup> Litt. § 241, 242.

<sup>t</sup> Co. Litt. 164.

<sup>r</sup> *Ibid.* § 265.

<sup>u</sup> *Ibid.* 188, 243.

<sup>s</sup> Co. Litt. 163.

<sup>w</sup> 2 Inst. 403.

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in common, unless a clear intention to the contrary be shown. Cal. Civil Code, § 686; Estate of Hittell, 141 Cal. 432, 75 Pac. 53; Webster v. Vandeventer, 6 Gray (Mass.), 428. In many states the rule of survivorship has been abolished by statute, except in the case of joint trustees or mortgages. The Cal. Civil Code, § 683, reads: "A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants." Denigan v. San Francisco Sav. Union, 127 Cal. 142, 78 Am. St. Rep. 35, 59 Pac. 390. See 1 Washburn, Real Prop. (6th ed.), § 857, where the statute laws of the several states are discussed in a note. 23 Cyc. 489. Survivorship has never existed in Connecticut. Phelps v. Jepson, 1 Root (Conn.), 48, 1 Am. Dec. 33; Ohio, Miles v. Fisher, 10 Ohio, 1, 36 Am. Dec. 61; nor in Kansas, Nebraska, or Idaho.

partition, but till the statute of Henry the Eighth, joint tenants had no such power. Parceners also differ materially from joint tenants in four other points: 1. They always claim by descent, whereas joint tenants always claim by purchase. Therefore, if two sisters purchase lands, to hold to them and their heirs, they are not parceners, but joint tenants:<sup>x</sup> and hence it likewise follows, that no lands can be held in coparcenary, but estates of inheritance, which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man hath two daughters, to whom his estate descends in coparcenary, and one dies before the other; the surviving daughter and the heir of the other, or, when both are dead, their two heirs, are still parceners;<sup>y</sup> the estates vesting in each of them at different times, though it be the same quantity of interest, and held by the same title. 3. Parceners, though they have an *unity*, have not an *entirety*, of interest. They are properly entitled each to the whole of a distinct moiety;<sup>z</sup> and of course there is no *jus accrescendi*, or survivorship between them: for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent and united in possession, so long are the tenants therein, whether male or female, called parceners. But if [189] the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener aliens her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*.<sup>a</sup>

§ 268. b. Partition.—Parceners are so called, saith Littleton<sup>b</sup> because they may be constrained to make *partition*. And he mentions many methods of making it;<sup>c</sup> four of which are by consent, and one by compulsion. The first is, where they agree to divide the lands into equal parts in severalty, and that each shall have such a determinate part. The second, when they agree to choose some friend to make partition for them, and then the sisters shall

<sup>x</sup> Litt. § 254.

<sup>y</sup> Co. Litt. 164, 174.

<sup>z</sup> *Ibid.* 164, 164.

<sup>a</sup> Litt. § 309.

<sup>b</sup> § 241.

<sup>c</sup> § 243 to 264.

choose each of them her part according to seniority of age; or otherwise, as shall be agreed. The privilege of seniority is in this case personal; for if the eldest sister be dead, her issue shall not choose first, but the next sister. But, if an advowson descend in coparcenary, and the sisters cannot agree in the presentation, the eldest and her issue, nay her husband, or her assigns, shall present alone, before the younger.<sup>d</sup> And the reason given is that the former privilege, of priority in choice upon a division, arises from an act of her own, the agreement to make partition; and therefore is merely personal: the latter, of presenting to the living, arises from the act of the law, and is annexed not only to her person, but to her estate also. A third method of partition is, where the eldest divides, and then she shall choose last; for the rule of law is, *cujus est divisio, alterius est electio* (she who makes the division has the last choice). The fourth method is where the sisters agree to cast lots for their shares. And these are the methods by consent.<sup>e</sup> That by compulsion is, where one or more sue out a writ of partition against the others; whereupon the sheriff shall go to the lands, and make partition thereof by the verdict of a jury there impaneled, and assign to each of the parceners her part in severalty.<sup>e</sup><sup>10</sup> But there are some things [190] which are in their nature impartible. The mansion-house, common of estovers, common of piscary uncertain, or any other common without stint, shall not be divided; but the elder sister, if she pleases, shall have them, and make the others a reasonable satisfaction in other parts of the inheritance: or, if that cannot be, then they

<sup>d</sup> Co. Litt. 166. 3 Rep. 22.

<sup>e</sup> By statute 8 & 9 W. III. c. 31 (Partition, 1696), an easier method of carrying on the proceedings on a writ of partition, of lands held either in joint tenancy, parcenary, or common, than was used at the common law, is chalked out and provided.

<sup>9</sup> Now (Real Property Act, 1845) parceners of full age and capacity, whether married or single, may make a voluntary partition by ordinary modes of conveyance *inter vivos*.

<sup>10</sup> The writ of partition was abolished by the Real Property Limitation Act of 1833, and now partition of an estate held in coparcenary can only be compelled by judgment of court in a partition action.



shall have the profits of the thing by turns, in the same manner as they take the advowson.<sup>f 11</sup>

§ 269. *c. Hotchpot.*—There is yet another consideration attending the estate in coparcenary; that if one of the daughters has had an estate given with her in *frank-marriage* by her ancestor (which we may remember was a species of estates-tail, freely given by a relation for advancement of his kinswoman in marriage<sup>g</sup>), in this case, if lands descend from the *same* ancestor to her and her sisters in fee simple, she or her heirs shall have no share of them, unless they will agree to divide the lands so given in frank-marriage in equal proportion with the rest of the lands descending.<sup>h</sup> This mode of division was known in the law of the Lombards;<sup>i</sup> which directs the woman so preferred in marriage, and claiming her share of the inheritance, *mittere in confusum cum sororibus, quantum pater aut frater ei dederit, quando ambulaverit ad maritum* (to bring into hotchpot with her sisters, when she shall marry, as much as her father or brother may have given her). With us it is denominated bringing those lands into *hotchpot*.<sup>k</sup> which term I shall explain in the very words of Littleton:<sup>l</sup> “It seemeth that this word *hotchpot*, is in English a pudding; for in a pudding is not commonly put one thing alone, but one thing with other things together.”<sup>12</sup> By this housewifely metaphor our

<sup>f</sup> Co. Litt. 164, 165.

<sup>i</sup> l. 2. t. 14. c. 15.

<sup>g</sup> See pag. 115.

<sup>k</sup> Britton. c. 72.

<sup>h</sup> Bracton. l. 2. c. 34. Litt. § 266. 273.

<sup>l</sup> § 267.

<sup>11</sup> The Partition Acts of 1868 and 1876 provide now for a sale of the property and division of the proceeds, in lieu of actual partition.

<sup>12</sup> The form of hotchpot at common law which Blackstone describes above has, as he says, become obsolete in practice. It still exists in theory, since, the requisite conditions being fulfilled, gifts of frank-marriage are still perfectly valid in England. But the term (French), *hocheput*; cf. Old Dutch, *hutspot* [Skeat] is used in law to signify the mingling in property in various cases, in which a person claiming to share in a common fund is bound, as a condition of so doing, to bring into the fund other property deemed in law to have been previously advanced to him in anticipation of his final share in the fund. Hotchpot resembles in principle, and is perhaps related in origin to, the *collatio bonorum* of Roman law. According to the Digest (37, 6, 1 pr.), “the right of emancipated children was conditional on their bringing into *collatio bonorum* (hotchpot) their property, which was reckoned as part of the inheritance, for

ancestors meant to inform us,<sup>m</sup> that the lands, both those given in frank-marriage and those descending in fee simple, should be mixed and blended together, and then divided in equal portions among all the daughters. But this was left to the choice of the donee in frank-marriage; and if she did not choose to put her lands in hotchpot, she was presumed to be sufficiently [191] provided for, and the rest of the inheritance was divided among her other sisters. The law of hotchpot took place then only, when the other lands descending from the ancestor were fee simple; for, if they descended in tail, the donee in frank-marriage was entitled to her share, without bringing her lands so given into hotchpot.<sup>n</sup> And the reason is, because lands descending in fee simple are distributed by the policy of law, for the maintenance of all the daughters; and, if one has a sufficient provision out of the same inheritance, equal to the rest, it is not reasonable that she should have more: but lands, descending in tail, are not distributed by the operation of law, but by the designation of the giver, *per formam doni* (by the form of the gift); it matters not, therefore, how unequal this distribution may be. Also no lands, but such as are given in frank-marriage, shall be brought into hotchpot; for no others are looked upon in law as given for the advancement of woman, or by way of marriage portion.<sup>o</sup> And therefore, as gifts in frank-marriage are fallen into disuse, I should hardly have mentioned the law of hotchpot, had not this method of division been revived and copied by the statute for distribution of personal estates, which we shall hereafter consider at large.

<sup>m</sup> Litt. § 268.

<sup>o</sup> *Ibid.* 275.

<sup>n</sup> Litt. § 274.

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the purpose of dividing it between them and their brothers and sisters living under their father's *potestas* (power). This was demanded by justice, for the property that the children living under the *potestas* would have enjoyed if they had been emancipated was necessarily reckoned as part of the inheritance."

Other forms of hotchpot prevail in England: (1) by local custom; (2) by the Statute of Distributions (p. \*517, *post*); (3) by express direction in settlements and wills; (4) in equity: cosurcties claiming contribution "must bring into hotchpot every benefit received." In *re Deaton*, [1903] 2 Ch. 670. 6 *Encyclopædia of the Laws of England*, 612.

§ 270. d. **Dissolution of estate in coparcenary.**—The estate in coparcenary may be *dissolved*, either by partition, which disunites the possession; by alienation of one parcener, which disunites the title, and may disunite the interest; or by the whole at last descending to and vesting in one single person, which brings it to an estate in severalty.<sup>13</sup>

§ 271. 4. **Tenancy in common.**—Tenants in *common* are such as hold by several and distinct titles, but by unity of possession; because none knoweth his own severalty, and therefore they all occupy promiscuously.<sup>p</sup> This tenancy, therefore, happens, where there is a unity of possession merely, but perhaps an entire disunion of interest, of title, and of time. For, if there be two tenants in common of lands, one may hold his part in fee simple, the other in tail, or for life; so that there is no [192] necessary unity of interest: one may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title: one's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. The only unity there is, is that of possession: and for this Littleton gives the true reason, because no man can certainly tell which part is his own: otherwise even this would be soon destroyed.

§ 272. a. **Creation of tenancies in common.**—Tenancy in common may be created, either by the destruction of the two other estates, in joint tenancy and coparcenary, or by special limitation in a deed. By the destruction of the two other estates, I mean such destruction as does not sever the unity of possession, but only the unity of title or interest: as, if one of two joint tenants in fee aliens his estate for the life of the alienee, the alienee and the other joint tenant are tenants in common: for they now have several titles, the other joint tenant by the original grant, the alienee by

<sup>p</sup> *Ibid.* 292.

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<sup>13</sup> Tenancy in coparcenary was formerly recognized in a few of the older states of the Union. *Gilpin v. Hollingsworth*, 3 Md. 190, 56 Am. Dec. 737; *Stevenson v. Cofferin*, 20 N. H. 150. It is now generally nonexistent, or else abolished by statute. In many instances the statutes change such estates into tenancies in common. 38 Cyc. 5; 1 Washburn, *Real Prop.*, §§ 870-875.

the new alienation;<sup>a</sup> and they also have several interests, the former joint tenant in fee simple, the alienee for his own life only. So, if one joint tenant gives his part to A in tail, and the other gives his to B in tail, the donees are tenants in common, as holding by different titles, and conveyances.<sup>r</sup> If one of two parceners aliens, the alienee and the remaining parcener are tenants in common;<sup>s</sup> because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men*, or two *women*, and the heirs of their bodies, here the grantees shall be joint tenants of the life estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to a *man and woman*, and the heirs of their bodies begotten;<sup>t</sup> and in this, and the like cases, their issues shall be tenants in common; because they must claim by different titles, one as heir of A, and the other as heir of B; and those too not titles by purchase, [193] but descent. In short, whenever an estate in joint tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

§ 273. b. Joint tenancies preferred to tenancies in common.— A tenancy in common may also be created by express limitation in a deed: but here care must be taken not to insert words which imply a joint estate; and then if lands be given to two or more, and it be not joint tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint tenancy rather than tenancy in common;<sup>u</sup> because the divisible services issuing from land (as rent, etc.) are not divided, nor the entire services (as fealty) multiplied, by joint tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one, and the other moiety to the other, is an estate in common;<sup>w</sup> and, if one grants to another *half* his land, the grantor and grantee are also tenants in common:<sup>x</sup> because, as

<sup>a</sup> Litt. § 293.

<sup>r</sup> *Ibid.* 295.

<sup>s</sup> *Ibid.* 309.

<sup>t</sup> *Ibid.* 283.

<sup>u</sup> Salk. 392.

<sup>w</sup> Litt. § 298.

<sup>x</sup> *Ibid.* 299.

has been before<sup>r</sup> observed, joint tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed, that it is impossible they should take a joint interest in the whole of the tenants. But a *devise* to two persons to hold *jointly and severally*, is a joint tenancy;<sup>z</sup> because that is necessarily implied in the word “jointly,” the word “severally,” perhaps, only implying the power of partition: and an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath been said to be a joint tenancy<sup>a</sup> (for it implies no more than the law has annexed to that estate, viz., divisibility<sup>b</sup>), yet in *wills* it is certainly a tenancy in common;<sup>c</sup> because the deviser may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual as well as the safest way, when a tenancy in common [194] is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B, to hold *as tenants in common, and not as joint tenants*.

§ 274. c. Incidents of tenancies in common.—As to the *incidents* attending a tenancy in common: tenants in common (like joint tenants) are compellable by the statutes of Henry VIII and William III, before mentioned,<sup>d</sup> to make partition of their lands; which they were not at common law. They properly take by distinct moieties, and have no entirety of interest; and therefore there is no survivorship between tenants in common. Their other incidents are such as merely arise from the unity of possession; and are therefore the same as appertain to joint tenants merely upon that account: such as being liable to reciprocal actions of waste, and of account, by the statutes of Westm. 2, c. 22 (13 Edw. I, 1285), and 4 Ann., c. 16 (Joint Tenants, 1705). For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate;<sup>e</sup> though if one actually turns the other out of possession, an action of ejectment

<sup>r</sup> See pag. 182.

<sup>z</sup> Poph 52.

<sup>a</sup> 1 Equ. Cas. Abr. 291.

<sup>b</sup> 1 P. Wms. 17.

<sup>c</sup> 3 Rep. 39. 1 Ventr. 32.

<sup>d</sup> Pag. 185 and 189.

<sup>e</sup> Co. Litt. 199.



will lie against him.<sup>f</sup> But, as for other incidents of joint tenants, which arise from the privity of title, or the union and entirety of interest (such as joining or being joined in actions,<sup>g</sup> unless in the case where some entire or indivisible thing is to be recovered<sup>h</sup>), these are not applicable to tenants in common, whose interests are distinct, and whose titles are not joint but several.

§ 275. d. **Dissolution of tenancies in common.**—Estates in common can only be *dissolved* two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise; which brings the whole to one severalty: 2. By making partition between the several tenants in common, which gives them all respective severalties. For indeed tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

<sup>f</sup> *Ibid.* 200.

<sup>h</sup> *Co. Litt.* 197.

<sup>g</sup> *Litt.* § 311.

## [195] CHAPTER THE THIRTEENTH.

### OF THE TITLE TO THINGS REAL, IN GENERAL.

§ 276. **Title to things real.**—The foregoing chapters having been principally employed in defining the *nature* of things real, in describing the *tenures* by which they may be holden, and in distinguishing the several kinds of *estate* or interest that may be had therein, I come now to consider, lastly, the *title* to things real, with the manner of acquiring and losing it.

§ 277. **Definition of title.**—A title is thus defined by Sir Edward Coke,<sup>a</sup> *titulus est justa causa possidendi id quod nostrum est* (a title is the legal ground of possessing that which is our own); or, it is the means whereby the owner of lands hath the just possession of his property.

§ 278. **Steps requisite to complete title.**—There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

§ 279. 1. **Mere possession.**—The lowest and most imperfect degree of title consists in the mere *naked possession*, or actual occupation of the estate; without any apparent right, or any shadow or pretense of right, to hold and continue such possession.<sup>1</sup> This may happen, when one man invades the possession of another, and

<sup>a</sup> 1 Inst. 345.

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1 **Nature of possession.**—Throughout our inquiry we have to bear in mind that the following elements are quite distinct in conception, and, though very often found in combination, are also separable and often separated in practice. They are:

I. **Physical control, detention, or *de facto* possession.** This, as an actual relation between a person and a thing, is matter of fact. Nevertheless questions which the court must decide as matter of law arise as to the proof of the facts.

II. **Legal possession, the state of being a possessor in the eye of the law.**

This is a definite legal relation of the possessor to the thing possessed. In its most normal and obvious form, it coexists with the fact of physical control, and with other facts making the exercise of that control rightful. But it

by force or surprise turns him out of the occupation of his lands; which is termed a *disseisin*, being a deprivation of that actual

may exist either with or without detention, and either with or without a rightful origin.

A tailor sends to J. S.'s house a coat which J. S. has ordered. J. S. puts on the coat, and then has both physical control and rightful possession in law.

J. S. takes off the coat and gives it to a servant to take back to the tailor for some alterations. Now the servant has physical control (in this connection generally called "custody" by our authorities) and J. S. still has the possession in law.

While the servant is going on his errand, Z. assaults him and robs him of the coat. Z. is not only physically master of the coat, but, so soon as he has complete control of it, he has possession in law, though a wrongful possession. To see what is left to J. S. we must look to the next head.

III. Right to possess or to have legal possession. This includes the right to physical possession. It can exist apart from both physical and legal possession; it is, for example, that which remains to a rightful possessor immediately after he has been wrongfully dispossessed. It is a normal incident of ownership or property, and the name of "property" is often given to it. Unlike possession itself, it is not necessarily exclusive. A may have the right to possess a thing as against B and everyone else, while B has at the same time a right to possess it as against everyone except A. So joint tenants have both single possession and a single joint right to possess, but tenants in common have a single possession with several rights to possess. When a person having right to possess a thing acquires the physical control of it, he necessarily acquires legal possession also.

Right to possess, when separated from possession, is often called "constructive possession." The correct use of the term would seem to be coextensive with and limited to those cases where a person entitled to possess is (or was) allowed the same remedies as if he had really been in possession. But it is also sometimes specially applied to the cases where the legal possession is with one person and the custody with his servant, or some other person for the time being in a like position; and sometimes it is extended to other cases where legal possession is separated from detention.

"Actual possession" as opposed to "constructive possession" is in the same way an ambiguous term. It is most commonly used to signify physical control, with or without possession in law. "Bare possession" is sometimes used with the same meaning. "Lawful possession" means a legal possession which is also rightful or at least excusable; this may be consistent with a superior right to possess in some other person.

The whole terminology of the subject, however, is still very loose and unsettled in the books, and the reader cannot be too strongly warned that careful attention must in every case be paid to the context.

In the procedure of the common law (which no longer exists in England, but must be understood in order to understand the substance of the law), an

seisin, or corporal freehold of the lands, which the tenant before enjoyed. Or it may happen that after the death of the ancestor

action of trespass is the appropriate remedy for a wrong done to existing legal possession.

Wrongs affecting the right to possess are remediable by other forms of action, mainly ejectment (superseding the assizes and other possessory real actions) as to land, and trover (largely superseding detinue) as to personal chattels.

All actual legal possessors can maintain trespass (and control in fact is evidence of possession in law); but they may use the other remedies at their option in so far as they can show a right to possess. An owner who has parted with possession but may resume it at will can also maintain trespass. The right to sue in trespass is therefore not a sufficient test of possession, though it is a necessary one.—POLLOCK & WRIGHT, *Possession in the Common Law*, 26.

**Ownership.**—Ownership may be described as the entirety of the powers of use and disposal allowed by law. This implies that there is some power of disposal, and in modern times we should hardly be disposed to call a person an owner who had no such power. If we found anywhere a system of law which did not recognize alienation by acts of parties at all, we should say not that the powers of an owner were very much restricted in that system, but that it did not recognize ownership. The term, however, is not strictly a technical one in the common law; we shall presently see why. We must not suppose that all the powers of an owner need be exercisable at once and immediately; he may remain owner though he has parted with some of them for a time. He may for a time even part with his whole powers of use and enjoyment, and suspend his power of disposal, provided that he reserves, for himself or his successors, the right of ultimately reclaiming the thing and being restored to his power. This is the common case of hiring land, buildings, or goods. Again, the owner's powers may be limited in particular directions for an indefinite time by rights as permanent in their nature as ownership itself. Such is the case where the owner of Whiteacre has a right of way over his neighbor's field of Blackacre. As this example shows, what is thus subtracted from one owner's powers is generally added to another's. In short, the owner of a thing is not necessarily the person who at a given time has the whole power of use and disposal; very often there is no such person. We must look for the person having the residue of all such power when we have accounted for every detached and limited portion of it; and he will be the owner even if the immediate power of control and use is elsewhere. In the same way a political sovereign does not lose his independence merely because he has made a treaty by which he has agreed to forego or limit the exercise of his sovereign power in particular respects.—POLLOCK, *First Book of Jurisprudence*, 166.

**Distinction between possession and ownership.**—We are now in a position to take note of the manner in which ownership differs from possession on the one hand, and limited rights over particular things (*iura in re aliena*) on the

and before the entry of the heir, or [196] after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land, and hold out him that had a right to enter. In all which cases, and many others that might be here suggested, the wrongdoer has only a mere naked possession, which the rightful owner may put

other. Possession in fact—the effective and exclusive control of a thing—is prior to ownership and indeed to every legal rule and idea. The facts which we call actual or physical possession would still exist in a society where there was no recognition of individual property. But possession, as a fact, is interesting to lawyers only so far as legal results and incidents may attach to it; and to give definite rights to a possessor because he is in possession is to admit individual rights of exclusive use and enjoyment. We say because he is in possession. A system of law which merely forbade personal violence might incidentally protect possession so far as anyone who used actual violence in dispossessing another might thereby render himself liable to a penalty or damages. This would not be saying anything of possession except that it was not a crime which deprived the possessor of his ordinary personal rights, or a condition in itself odious to the law. Still less does this involve any connection of possession with title. When possession as such is regarded as a proper subject of protection, that is to say, when dispossession without just cause (apart from any violence or physical damage incidental to the act) is treated as calling for a remedy, then the relation to ownership becomes apparent. If a person out of possession is to have a standing-point at all, possession must be capable of being wrongful as well as rightful. There must be rights to possess, or to be put in possession, that can be severed from present possession. There must be room for conflicting claims to possession, and rules for deciding which of two claimants has the better right to possess the thing in dispute.

Now, this brings us to very close quarters with ownership. For ownership, as the entirety of legal powers of use and disposal, must include, as the most important of those powers, in fact, as the one thing by which alone the rest can be made effective, the right to maintain or claim possession; a right which, though it may be suspended or deferred, cannot be wholly dissociated from an owner's relation to the thing owned. Again, ownership is most commonly and completely manifested in actual possession and use. To deal with a thing at one's will is to deal with it like an owner; in the absence of manifest reason to the contrary, we suppose that a man is or claims to be owner of anything over which he exercises indefinite control. Thus active possession is a normal index of ownership (though by no means the only one even in common life), and the right to possess (whether immediate or not) is a necessary incident of ownership, or may perhaps rather be called ownership itself in its active or dynamic aspect. One who is out of possession and has a rightful claim to possess has need of the law's assistance. When he has recovered possession,



an end to, by a variety of legal remedies, as will more fully appear in the third book of these Commentaries. But in the meantime, till some act be done by the rightful owner to divest this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right, by degrees ripen

he has not any need to ask the law to do more for him. Once in possession he can deal with his own in any lawful manner.

Hence it is commonly sufficient for an owner to rely on his right to possession; and as it is commonly easier to prove the less right than the greater, not to speak for the present of the manner in which this works out in detail, it is often preferable to claim possession only. Nay, more; it is possible for ownership to be sufficiently guarded for all practical purposes by a system of remedies which omits, or has come to omit, any such solemn and express form of asserting ownership as that to which the Romans emphatically gave the name of Vindication. In the common law this has actually happened. For some centuries all practical remedies for the recovery of both land and goods have been possessory, and property has meant, for judicial purposes, the right, or the best right, to possess. Conversely, that which a man was entitled to possess not only was correctly described by him in pleading as *res sua*, but could not be described in any other way.

But this leads us to a further development. Possession and use being the common outward signs of ownership, it is reasonable to presume, in the absence of proof to the contrary, that existing peaceable possession is rightful, and further to infer ownership from the right to possess which we have thus presumed. Hence we treat the actual possessor not only as legal possessor, but as owner, as against everyone who cannot show a better right. As English lawyers say concerning interests in land, possession is *prima facie* evidence of seisin *in fee*: that is, not of legal possession or seisin alone, but of seisin coupled with the largest powers of use and disposal allowed by law. Then, if we regard the possessor as being rightfully in the exercise of control, we must allow him the powers of an owner within the limits of his apparent right. Not only his acts of use and occupation, but his acts of disposal must be valid against everyone who cannot make out a superior claim. And when the superior claim, if any such there be, ceases to be available, the rights founded on possession will be indistinguishable from the rights of ownership. In the case of movable goods which pass from hand to hand without formality, this becomes obvious, for in that case possession is often not merely the natural and usual proof of ownership, but the only proof. We have come, then, to distinctly recognizing possession as an origin of ownership, a "commencement of title" as our law calls it. Again we see that not only we have thus to recognize it, but a system of law can get on without recognizing any other origin. Continuous possession is quite capable of being, not merely a possible foundation of ownership, but its only foundation and evidence. And this, once

into a perfect and indefeasible title.<sup>2</sup> And, at all events, without such actual possession no title can be completely good.

§ 280. 2. Right of possession.—The next step to a good and perfect title is the *right of possession*, which may reside in one man, while the actual possession is not in himself but in another. For if a man be disseised, or otherwise kept out of possession, by

more, is exactly what has happened in the common law. With very few exceptions, possession traced through a chain of lawful transfer, or succession for a time long enough to exclude any reasonable apprehension of adverse claims, is the only acceptable proof of title in this country.—POLLOCK, *First Book of Jurisprudence*, 168.

Authorities on ownership and possession: Pollock and Wright, *Possession in the Common Law*; Holmes, *Common Law*, Lect. VI; Markby, *Elements of Law*, chaps. VIII and IX; Holland, *Jurisprudence* (11th ed.), pp. 190 ff; Pollock, *Genius of the Common Law*, p. 120; Maitland, *Mystery of Seisin*, 3 *Sel. Essays in Anglo-Am. Leg. Hist.* 591; Lightwood, *Possession in the Roman Law*, 3 *Law Quart. Rev.* 32. There is an abundant literature on the subject in German and French.

<sup>2</sup> **Title by prescription.**—Title by prescription was an important chapter in the Roman law. Continuous possession, in good faith, although without right, gave the possessor, after a given time, a perfect title. The civilians, as is shown by the requisite of *bona fides*, looked at the matter chiefly from the side of the adverse possessor. In England the point of view is different. English lawyers regard not the merit of the possessor, but the demerit of the one out of possession. The statutes of limitation provide, in terms, not that the adverse possessor shall acquire title, but that one who neglects for a given time to assert his right shall not thereafter enforce it. Nevertheless, the question of *bona fides* apart, there is no essential difference between the two systems on the point under discussion. In the English law, no less than in the Roman law, title is gained by prescriptive acquisition. As a matter of legal reasoning this seems clear. For, as already pointed out, the only imperfection in the disseisor's title is the disseisee's right to recover possession. When the period of limitation has run, the statute, by forbidding the exercise of the right, virtually annihilates it, and the imperfect title must become perfect.

This conclusion is abundantly supported by authority from Bracton's time down: "*Longa enim possessio . . . parit jus possidendi et tollit actionem vero domino petenti, quandoque unam, quandoque aliam, quandoque omnem. . . Sic enim . . . acquiritur possessio et liberum tenementum sine titulo et traditione per patientiam et negligentiam veri domini.*"

Blackstone is even more explicit: "Such actual possession is *prima facie* evidence of a legal title in the possessor; and it may, by length of time, and negligence of him who hath the right by degrees, ripen into a perfect and indefeasible title." Lord Mansfield may also be cited: "Twenty years' adverse

any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession; and may exert it whenever he thinks proper, by entering upon the disseisor, and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better; and an *actual* right of possession, which will stand the test against all opponents. Thus if the disseisor, or other wrongdoer, dies possessed of the land whereof he so became seised by his own unlawful act, and the same descends to his heir; now by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised; and it shall not be lawful for the person disseised to divest this apparent right by mere entry or other act of his own, but only by an action at law.<sup>b</sup> For, until the contrary be proved by legal demonstration, the law will rather presume the right to <sup>[197]</sup> reside in the heir, whose ancestor died seised, than in one who has no such presumptive evidence to urge in his own behalf. Which doctrine in some measure arose from the principles of the feudal law, which, after feuds became hereditary, much favored the right of descent; in order that there might be a person always upon the spot to perform the feudal duties and services:<sup>c</sup> and therefore, when a feudatory died in battle, or otherwise, it presumed always that his children were entitled to the feud, till the right was otherwise determined by his fellow-soldiers and fellow-tenants, the peers of the feudal court. But if he, who has the actual right of possession, puts in his claim and brings his action within a reasonable time,

<sup>b</sup> Litt. § 385.

<sup>c</sup> Gilb. Ten. 18.

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possession is a positive title to the defendant; it is not a bar to the action or remedy of the plaintiff only, but takes away his right of possession."

Sir Thomas Plummer, M. R., has expressed himself to the same effect as to equitable interests: "If the negligent owner has forever forfeited by his laches his right to any remedy to recover, he has in effect lost his title forever. The defendant keeps possession without the possibility of being ever disturbed by anyone. The loss of the former owner is necessarily his gain; it is more, he gains a positive title under the statute at law, and by analogy in equity."—AMES, Lectures on Legal History, 197; also in 3 Select Essays in Anglo-Am. Legal Hist. 567.

and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession, to which he hath such actual right. Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession, in consequence of the other's negligence. And by this, and certain other means, the party kept out of possession may have nothing left in him, but what we are next to speak of; viz.:

§ 281. 3. Mere right of property.—The mere *right of property*, the *jus proprietatis*, without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right*, *jus merum*; and the estate of the owner is in such cases said to be totally divested, and *put to a right*.<sup>a</sup> A person in this situation may have the true ultimate property of the lands in himself; but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist; who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law: by this means the disseisor or his heirs gain the actual right of possession: [198] for the law presumes that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title; and, therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. Yet, still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right; but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail, by alienating the lands to a stranger in fee, and dies; here the issue in tail hath no right of *possession*, independent of the right of *property*: for the law presumes *prima facie* that the ancestor would not disinherit, or attempt to disinherit, his heir, unless

<sup>a</sup> Co. Litt. 345.

he had power so to do; and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by showing the absolute right of property to reside in another person. The heir, therefore, in this case has only a *mere right*, and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action (that is, such wherein the right of possession only, and not that of property, is contested), and the other party hath indeed in himself the right of property, this is now turned to a *mere right*; and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

§ 282. Title by limitation.—Thus, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession*, and I still retain the *right of possession* and *right of property*. If the disseisor dies, and the lands descend to his son, the son gains an *apparent* right of possession; but I still retain the *actual* right both of possession and property. If I acquiesce for thirty years, without bringing any action to recover possession of the lands, the son gains the *actual right of possession*, and I retain nothing [199] but the *mere right of property*.<sup>3</sup> And even this

3 Statutes of Limitation.—The English Real Property Limitation Act of 1833 provides that the right and title of the person whose claim has been barred by the operation of the statute, as well as his mere remedy, shall be extinguished at the determination of the period within which it might have been enforced. It is the view of the courts that when all hostile claims are extinguished by lapse of time, the actual occupant has acquired title. *Doe v. Sumner* (1845), 14 Mees. & W. 39; *Asher v. Whitlock* (1865), L. R. 1 Q. B. 1; *Atkinson & Horsell's Contract*, [1912] 2 Ch. 1. On the other hand, registration of title to land, under the Land Transfer Acts of 1875 and 1897, affords protection to the registered owner, and to purchasers from him, against the acquisition of hostile rights by an adverse occupant. The act of 1897 says, in effect, that a registered owner shall be exempt from the operation of the Real Property Limitation Acts. For the prescribed times for bringing actions and claims under statute in England, see 2 Stephen, Comm. (16th ed.) 495 ff., or, more fully, 19 Halsbury, Laws of England, 33 ff.

In the United States the principle of acquiring title by an adverse possessor against the true owner is firmly established. *Thornely v. Andrews*, 40 Wash. 580, 111 Am. St. Rep. 983, 1 L. R. A. (N. S.) 1036, 82 Pac. 899. The period



right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of sixty years. So, also, if the father be tenant in tail, and aliens the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession*, and the son hath only the *mere right* or *right of property*. And hence it will follow that one man may have the *possession*, another the *right of possession*, and the third the *right of property*. For if tenant in tail enfeoffs A in fee simple, and dies, and B disseises A; now B will have the *possession*, A the *right of possession*, and the issue in tail the *right of property*: A may recover the possession against B; and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists,

§ 283. 4. Complete title.—A complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law,\* that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*.† And when to this double right the actual possession is also united, when there is, according to the expression of Fleta,‡ *juris et seisinæ conjunctio*

\* Mirr. l. 2. c. 27.

§ 1. 3. c. 15. § 5.

† Co. Litt. 266. Bract. l. 5. tr. 3. c. 5.

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of limitation is various and is fixed by the statutes of the several states. Adverse possession is defined to be an actual and visible appropriation of land commenced and continued under a color of title and claim of right inconsistent with and hostile to the claim of another. *White v. Pingenot*, 49 Tex. Civ. App. 641, 90 S. W. 672; *Willette v. Gifford*, 46 Ind. App. 185, 92 N. E. 186. It must include five elements: It must be (1) hostile or adverse; (2) actual; (3) visible, notorious and exclusive; (4) continuous; and (5) under a claim or color of title. *Page v. Bellamy*, 222 Ill. 556, 78 N. E. 938; *Mercer v. Watson*, 1 Watts (Pa.), 330, 341; *Paldi v. Paldi*, 95 Mich. 410, 54 N. W. 903; *Sharon v. Tucker*, 144 U. S. 533, 36 L. Ed. 532, 12 Sup. Ct. Rep. 720. There is no adverse possession against the state. *Hurst v. Dulany*, 84 Va. 701, 5 S. E. 802. Adverse and exclusive occupation of a railroad's right of way does not prevail against the railroad on the doctrine that the railroad is for a public purpose and the statute does not run against it. *Southern Pac. Co. v. Hyatt*, 132 Cal. 240, 54 L. R. A. 522, 64 Pac. 272.

(a conjunction of the right and seisin), then, and then only, is the title completely legal.<sup>4</sup>

<sup>4</sup> **Nature of ownership.**—It is customary to speak of one as owner of a thing, although he has ceased to possess it for a time, either by his own act, as in the case of a lease or bailment, or without his consent, as in the case of a loss or disseisin. And yet everyone would admit that the power of present enjoyment is one of the attributes of perfect ownership. It is evident, therefore, that it is only by an inaccurate, or, at least, elliptical use of language, that a landlord, bailor, loser, or disseisee can be called a true owner. The potential is treated as if actually existent. On the other hand, no one will affirm that the tenant, bailee, finder, or disseisor can be properly described as owner. For although they all have the power of present enjoyment, and, consequently, the power of transfer, their interest is either of limited duration, or altogether precarious. It would seem to follow, therefore, that wherever there is a lease, bailment, loss, or disseisin of a *res*, no one can be said to be the full owner of it. And this, it is submitted, is the fact. Only he in whom the power to enjoy and the unqualified right to enjoy concur can be called an owner in the full and strict sense of the term. The correctness of this conclusion is confirmed by the opinion of Blackstone, expressed with his wonted felicity. After speaking of the union in one person of the possession, the right of possession, and the right of property, he adds: "In which union consists a complete title to lands, tenements, and hereditaments. For it is an ancient maxim of the law, that no title is completely good, unless the right of possession be joined with the right of property; which right is then denominated a double right, *jus duplicatum*, or *droit droit*. And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juris et seisinæ conjunctio*, then, and then only, is the title completely legal."

A true property may, therefore, be shortly defined as possession coupled with the unlimited right of possession.—AMES, *Lectures on Legal History*, 193; also in 3 *Select Essays in Anglo-Am. Legal Hist.*, 562.

## CHAPTER THE FOURTEENTH. [200]

### OF TITLE BY DESCENT.

§ 284. Modes of acquiring and losing title.—The several gradations and stages, requisite to form a complete title to lands, tenements, and hereditaments, having been briefly stated in the preceding chapter, we are next to consider the several manners, in which this complete title (and therein principally the right of *propriety*) may be reciprocally lost and acquired: whereby the dominion of things real is either continued, or transferred from one man to another. And here we must first of all observe, that (as gain and loss are terms of relation, and of a reciprocal nature) by whatever method one man gains an estate, by that same method or its correlative some other man has lost it. As where the heir acquires by descent, the ancestor has first lost or abandoned his estate by his death: where the lord gains land by escheat, the estate of the tenant is first of all lost by the natural or legal extinction of all his hereditary blood: where a man gains an interest by occupancy, the former owner has previously relinquished his right of possession: where one man claims by prescription or immemorial usage, another man has either parted with his right by an ancient and now forgotten grant, or has forfeited it by the supineness or neglect of himself and his ancestors for ages; and so, in case of forfeiture, the tenant by his own misbehavior or neglect has renounced his interest in the estate; whereupon it devolves to that person who by law may take advantage of such default: and, in alienation by common assurances, the two considerations of loss and acquisition are so [201] interwoven, and so constantly contemplated together, that we never hear of a conveyance, without at once receiving the ideas as well of the grantor as the grantee.

§ 285. 1. Descent and purchase.—The methods, therefore, of acquiring on the one hand, and of losing on the other, a title to estates in things real, are reduced by our law to two: *descent*, where the title is vested in a man by the single operation of law; and *purchase*, where the title is vested in him by his own act or agreement.<sup>a</sup>

<sup>a</sup> Co. Litt. 18.

§ 286. a. **Descent, or hereditary succession.**—Descent, or hereditary succession, is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance.

§ 287. (1) **Importance of doctrine of descent.**—The doctrine of descents, or law of inheritances in fee simple, is a point of the highest importance; and is indeed the principal object of the laws of real property in England. All the rules relating to purchases, whereby the legal course of descents is broken and altered, perpetually refer to this settled law of inheritance, as a *datum* or first principle universally known, and upon which their subsequent limitations are to work. Thus a gift in tail, or to a man and the heirs of his body, is a limitation that cannot be perfectly understood without a previous knowledge of the law of descents in fee simple. One may well perceive that this is an estate confined in its descent to such heirs only of the donee, as have sprung or shall spring from his body; but who those heirs are, whether all his children both male and female, or the male only, and (among the males) whether the eldest, youngest, or other son alone, or all the sons together, shall be his heir; this is a point, that we must result back to the standing law of descents in fee simple to be informed of.

§ 288. (2) **Descent at common law.**—<sup>[202]</sup> In order, therefore, to treat a matter of this universal consequence the more clearly, I shall endeavor to lay aside such matters as will only tend to breed embarrassment and confusion in our inquiries, and shall confine myself entirely to this one object. I shall therefore decline considering at present who are, and who are not, capable of being heirs; reserving that for the chapter of *escheats*. I shall also pass over the frequent division of descents, in those by *custom*, *statute*, and *common law*: for descents by *particular custom*, as to all the sons in gavelkind, and to the youngest in borough-English, have already been often<sup>b</sup> hinted at, and may also be incidentally touched upon again; but will not make a separate consideration

<sup>b</sup> See Vol. I. pag. 74. 75. Vol. II. pag. 83. 85.

by themselves, in a system so general as the present: and descents by *statute*, or in fees-tail *per formam doni* (by the form of the gift), in pursuance of the statute of Westminster the Second, have also been already<sup>c</sup> copiously handled; and it has been seen that the descent in tail is restrained and regulated according to the words of the original donation, and does not entirely pursue the common-law doctrine of inheritance; which, and which only, it will now be our business to explain.

And, as this depends not a little on the nature of kindred, and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood.<sup>d</sup>

§ 289. (a) **Consanguinity.**—Consanguinity, or kindred, is defined by the writers on these subjects to be “*vinculum personarum ab eodem stipite descenditum*”; the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

§ 290. (i) **Lineal consanguinity.**—[203] Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles (the *propositus*\* in the table of consanguinity) and his father, grandfather, great-grandfather, and so upwards in the direct ascending line; or between John Stiles and his son, grand-son, great-grandson, and so downwards in the direct descending line. Every generation, in this lineal direct consanguinity, constitutes a different degree, reckoning either upwards or downwards: the father of John Stiles is related to him in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great grandsire, and great-grandson in the third. This is the only natural way of

\*The one whose relations are sought to be ascertained by a genealogical table; Webster Dict.

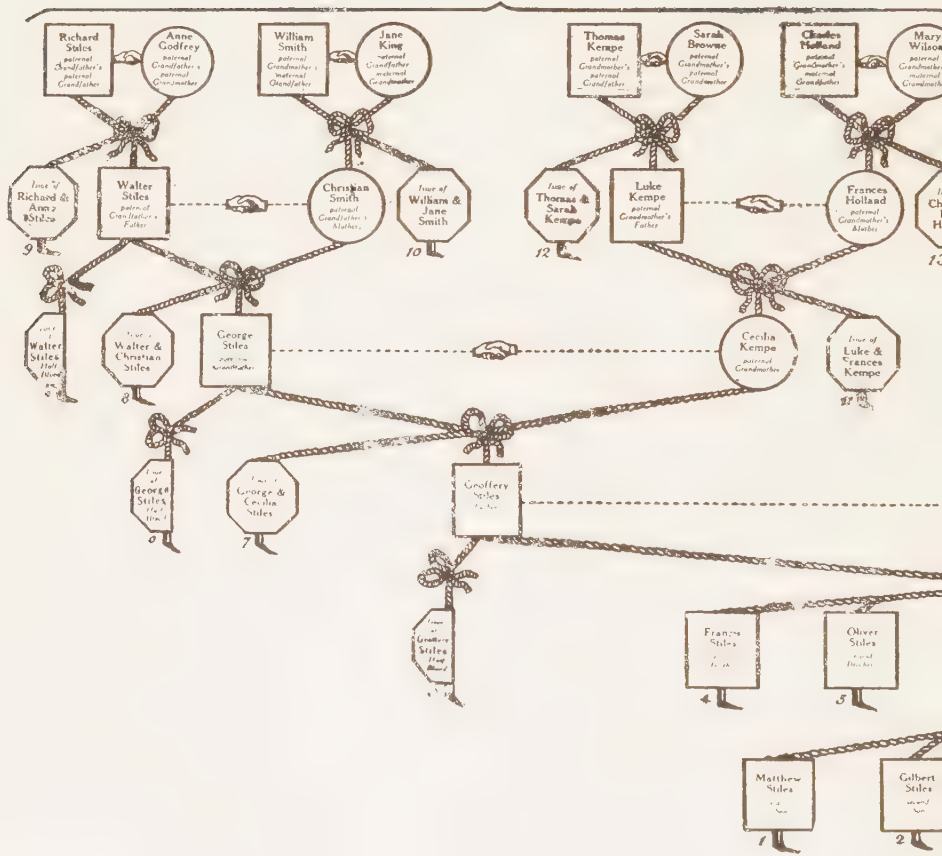
<sup>c</sup> See pag. 112, etc.

<sup>d</sup> For a fuller explanation of the doctrine of consanguinity, and the consequences resulting from a right apprehension of its nature, see, *An essay on collateral consanguinity*. (Law Tracts, Oxon. 1762, 8,0 or 1772, 4,0)

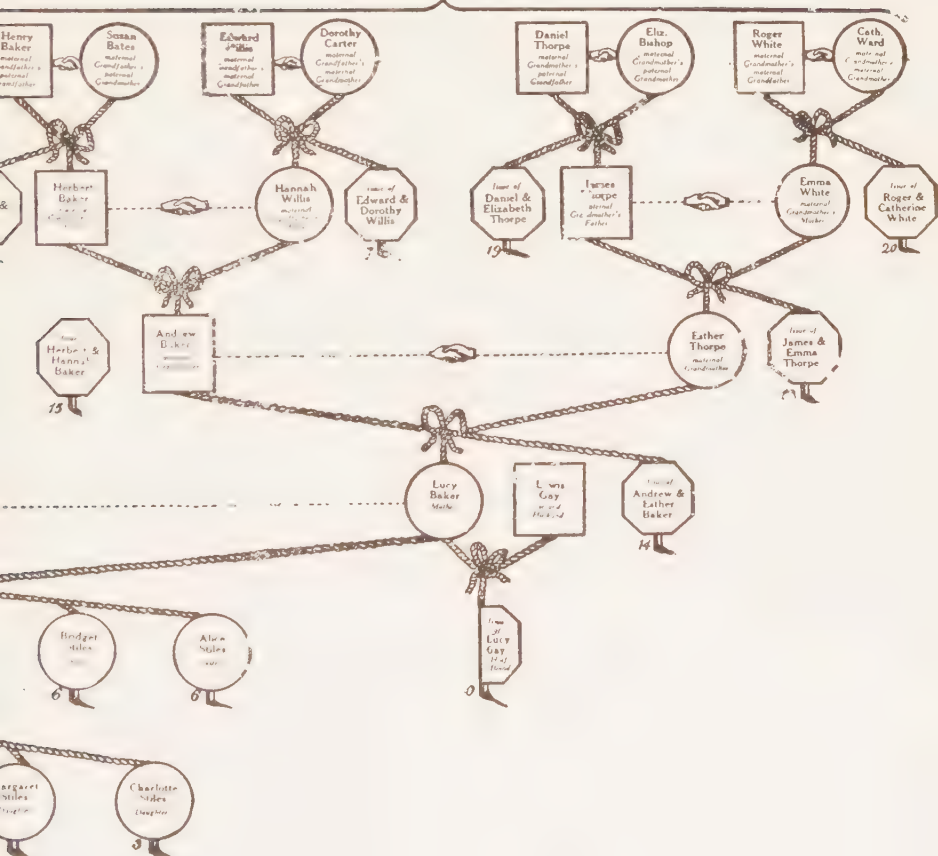




# PATERNAL LINE



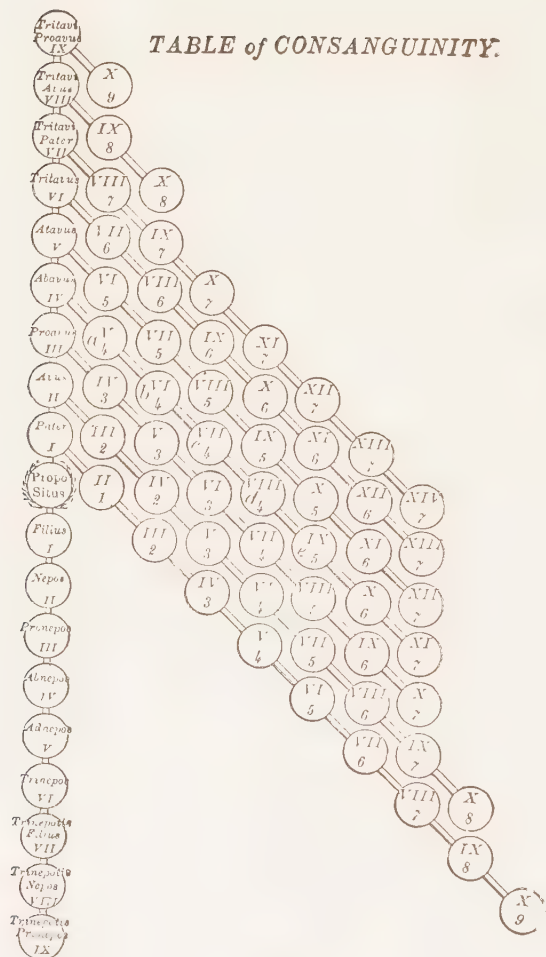
# MATERNAL LINE











reckoning the degrees in the direct line, and therefore universally obtains, as well in the civil,<sup>e</sup> and canon,<sup>f</sup> as in the common law.<sup>g</sup>

The doctrine of lineal consanguinity is sufficiently plain and obvious; but it is at the first view astonishing to consider the number of lineal ancestors which every man has, within no very great number of degrees: and so many different bloods<sup>h</sup> is a man said to contain in his veins, as he hath lineal ancestors. Of these he hath two in the first ascending degree, his own parents; he hath four in the second, the parents of his father and the parents of his mother; he hath eight in the third, the parents of his two grandfathers and two grandmothers; and by the same rule of progression, he hath an hundred and twenty-eight in the seventh; a thousand and twenty-four in the tenth; and at the twentieth degree, or the distance of twenty generations, every man hath above a million of ancestors, as common arithmetic will demonstrate.<sup>i</sup> This lineal consanguinity, we may observe, falls strictly within the definition of *vinculum personarum* [204] *ab eodem stipite descendunt* (the connection of persons from a common ancestor); since lineal relations are such as descend one from the other, and both of course from the same common ancestor.

§ 291. (ii) **Collateral consanguinity.**—Collateral kindred answers to the same description: collateral relations agreeing with the lineal in this, that they descend from the same stock or ancestor; but differing in this, that they do not descend one from the other. Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have [205] each a numerous issue; both these issues are lineally descended from John

<sup>e</sup> Ff. 38. 10. 10.

<sup>f</sup> Decretal. l. 4. tit. 14.

<sup>g</sup> Co. Litt. 23.

<sup>h</sup> *Ibid.* 12.

<sup>i</sup> This will seem surprising to those who are unacquainted with the increasing power of progressive numbers; but is palpably evident from the following table of a geometrical progression, in which the first term is 2, and the denominator also 2: or, to speak more intelligibly, it is evident, for that each of us has two ancestors in the first degree; the number of whom is doubled at every

Stiles as their common ancestor; and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos* (blood relations).

We must be careful to remember that the very being of collateral consanguinity consists in this descent from one and the same common ancestor. Thus *Titius* and his brother are related. Why? Because both are derived from one father. *Titius* and his first cousin are related. Why? Because both descend from the same grandfather; and his second cousin's claim to consanguinity is this, that they both are derived from one and the same great-grandfather. In short, as many ancestors as a man has, so many common stocks he has, from which collateral kinsmen may be derived. And as we are taught by Holy Writ that there is one couple of ancestors belonging to us all, from whom the whole race of mankind is remove, because each of our ancestors has also two immediate ancestors of his own.

<i>Lineal Degrees.</i>	<i>Number of Ancestors.</i>
1 .....	2
2 .....	4
3 .....	8
4 .....	16
5 .....	32
6 .....	64
7 .....	128
8 .....	256
9 .....	512
10 .....	1,024
11 .....	2,048
12 .....	4,096
13 .....	8,192
14 .....	16,384
15 .....	32,768
16 .....	65,536
17 .....	131,072
18 .....	262,144
19 .....	524,288
20 .....	1,048,576

A shorter method of finding the number of ancestors at any even degree is by squaring the number of ancestors at half that number of degrees. Thus 16 (the number of ancestors at four degrees) is the square of 4, the number of ancestors at two; 256 is the square of 16; 65,536 of 256; and the number of ancestors at 40 degrees would be the square of 1,048,576, or upwards of a million millions.

descended, the obvious and undeniable consequence is, that all men are in some degree related to each other. For, indeed, if we only suppose each couple of our ancestors to have left, one with another, two children; and each of those children on an average to have left two more (and, without such a supposition, the human species must be daily diminishing); we shall find that all of us have now subsisting near two hundred and seventy millions of kindred in the fifteenth degree, at the same distance from the several common ancestors as ourselves are; besides those that are one or two descents nearer to or further from the common stock, who may amount to as many more.<sup>k</sup> And, if this calculation should appear incompat-

<sup>k</sup> This will swell more considerably than the former calculation, for here, though the first term is but 1, the denominator is 4; that is there is *one* kinsman (a brother) in the first degree, who makes together with the *propositus*, the two descendants from the first couple of ancestors; and in every other degree the number of kindred must be the *quadruple* of those in the degree which immediately precedes it. For, since each couple of ancestors has two descendants, who increase in a duplicate *ratio*, it will follow that the *ratio*, in which all the descendants increase downwards, must be double to that in which the ancestors increase upwards: but we have seen that the ancestors increase in a duplicate *ratio*: therefore the descendants must increase in a double duplicate, that is, in a quadruple *ratio*.

<i>Collateral Degrees.</i>	<i>Number of Kindred.</i>
1 .....	1
2 .....	4
3 .....	16
4 .....	64
5 .....	256
6 .....	1,024
7 .....	4,096
8 .....	16,384
9 .....	65,536
10 .....	262,144
11 .....	1,048,576
12 .....	4,194,304
13 .....	16,777,216
14 .....	67,108,864
15 .....	268,435,456
16 .....	1,073,741,824
17 .....	4,294,967,296
18 .....	17,179,869,184
19 .....	68,719,476,736
20 .....	274,877,906,944

THIS calculation may also be formed by a more compendious process, viz., by squaring the couples, or half the number, of ancestors at any given degree;

ible with the number of inhabitants on the earth, it is because, by intermarriages among the several descendants from the same ancestor, a hundred or a thousand modes of consanguinity may be consolidated in one person, or he may be related to us a hundred or a thousand different ways.

§ 292. (iii) *Computation of degrees.*—<sup>[206]</sup> The method of computing these degrees in the canon law,<sup>1</sup> which our law has adopted,<sup>m</sup> is as follows:<sup>1</sup> We begin at the common ancestor, and

which will furnish us with the number of kindred we have in the same degree, at equal distance with ourselves from the common stock, besides those at unequal distances. Thus, in the tenth lineal degree, the number of ancestors is 1,024; its half, or the couples, amount to 512; the number of kindred in the tenth collateral degree amounts therefore to 262,144 or the square of 512. And if we will be at the trouble to recollect the state of the several families within our own knowledge, and observe how far they agree with this account; that is, whether, on an average, every man has not one brother or sister, four first cousins, sixteen second cousins, and so on; we shall find that the present calculation is very far from being overcharged.

<sup>1</sup> Decretal. 4. 14.3 & 9.

<sup>m</sup> Co. Litt. 23.

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<sup>1</sup> *Computation of degrees.*—The difference of the computation by the civil and canon laws may be expressed shortly thus: the civilians take the sum of the degrees in both lines to the common ancestor; the canonists take only the number of degrees in the longer line. Hence, when the canon law prohibits all marriages between persons related to each other within the seventh degree, this would restrain all marriages within the fourteenth degree of the civil law. It has been observed that all marriages are prohibited between persons who are related to each other within the third degree, according to the computation of the civil law. This affords a solution to the vulgar paradox, that first cousins may marry, and second cousins cannot. For first cousins and all cousins may marry by the civil law; and neither first nor second cousins can marry by the canon law. The church originally reckoned degrees by the former as the only system known to it while confined to countries of the Roman empire; but adopted the German (common law) computation, because it included nearly twice as many relatives within a certain degree, such as the fourth or sixth, etc. One might consider this the sneer of some enemy, if it were not stated by approved Catholic writers, who explain it by saying that it increased the number of the prohibitions of the canon law which might be dispensed with. It is said, adds Professor Christian, that the canon-law computation has been adopted by the law of England; yet I do not know a single instance in which we have occasion to refer to it. But the civil-law



reckon downwards; and in whatsoever degree the two persons, or the most remote of them, is distant from the common ancestor, that is the degree [207] in which they are related to each other. Thus *Titius* and his brother are related in the first degree; for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree; for the nephew is two degrees removed from the common ancestor; viz., his own grandfather, the father of *Titius*. Or. (to give a more illustrious instance from our English annals), King Henry the Seventh, who slew Richard the Third in the battle of Bosworth, was related to that prince in the fifth degree. Let the *propositus*, therefore, in the table of consanguinity represent King Richard the Third, and the class marked (*e*) King Henry the Seventh. Now, their common stock or ancestor was King Edward the Third, the *abavus* (great-great-grandfather) in the same table: from him to Edmond, Duke of York, the *proavus* (great-grandfather), is one degree; to Richard, Earl of Cambridge, the *avus* (grandfather), two; to Richard, Duke of York, the *pater* (father), three; to King Richard the Third, the *propositus*, four: and from King Edward the Third to John of Gant (*a*) is one degree; to John, Earl of Somerset (*b*), two; to John, Duke of Somerset (*c*), three; to Margaret, Countess of Richmond (*d*), four; to King Henry, the Seventh (*e*), five. Which last mentioned prince, being the furthest removed from the common stock, gives the denomination to the degree of kindred in the canon and municipal law. Though according to the computation of the civilians (who count upwards, from either of the per-

computation is of great importance in ascertaining who are entitled to the administration and to the distributive shares of intestate personal property. (See *post*, \*504, \*515.) And now this civilian computation has been adopted by statute in most of the United States.—HAMMOND.

The importance of reckoning degrees of collateral kinship is now, for the purposes of descent of real estate, almost at an end. For the new method of tracing the inheritance, prescribed by the Inheritance Act, 1833, which governs all descents taking place on a death which has happened since 31st December, 1833, entirely ignores direct relationship between collaterals, and provides that they shall inherit from one another only as representing the common ancestor. Thus, if A die intestate and without issue, his brother B, if he inherits A's estate at all, will do so, not as A's brother, but as representing their common father, to whom on failure of A's issue the estate will first descend.—STEPHEN, 1 Comm. (16th ed.), 303.

sons related, to the common stock, and then downwards again to the other; reckoning a degree for each person both ascending and descending), these two princes were related in the ninth degree, for from King Richard the Third to Richard, Duke of York, is one degree; to Richard, Earl of Cambridge, two; to Edmond, Duke of York, three; to King Edward the Third, the common ancestor, four; to John of Gant, five; to John, Earl of Somerset, six; to John, Duke of Somerset, seven; to Margaret, Countess of Richmond, eight; to King Henry the Seventh, nine.<sup>a</sup>

§ 293. (3) Rules of descent.—[<sup>208</sup>] The nature and degrees of kindred being thus in some measure explained, I shall next proceed to lay down a series of rules, or canons of inheritance, according to which estates are transmitted from the ancestor to the heir; together with an explanatory comment, remarking their original and progress, the reasons upon which they are founded, and in some cases their agreement with the laws of other nations.<sup>2</sup>

<sup>a</sup> See the table of consanguinity annexed; wherein all the degrees of collateral kindred to the *propositus* are computed, so far as the tenth of the civilians and the seventh of the canonists inclusive; the former being distinguished by the numeral letters, the latter by the common ciphers.

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2 Modern English rules of inheritance.—The modern rules of descent in England are governed mainly by the Inheritance Act of 1833. These have been affected in some ways by the Land Transfer Act of 1897, which seem unnecessary to mention here. The canons of inheritance, under the act of 1833, are as follows:

1. The first rule is, that inheritance shall be traced from the purchaser; and “the purchaser” is defined, by the statute, as “the person who last acquired the land otherwise than by descent.”

2. The second rule is, that inheritances shall lineally descend, in the first place, to the issue of the last purchaser *in infinitum*.

3. The third rule is, that the male issue shall be admitted before the female; where two or more of the male issues are in equal degree of consanguinity to the purchaser, the eldest only shall inherit; but the females shall inherit equally.

4. The fourth rule is, that all lineal descendants *in infinitum* of any person deceased shall represent their ancestor, being preferred among themselves strictly in accordance with the fourth rule.

5. The fifth rule is, that on failure of descendants, or issue of the purchaser, the inheritance shall descend to his nearest lineal ancestor. This rule is materially different from the one that formerly prevailed, as is seen in Blackstone’s account. The old rule was that, on failure of lineal descendants or issue of

§ 294. (a) **First rule: inheritances lineally to issue of person last seised.**—The first rule is, that inheritances shall lineally descend to the issue of the person last actually seised, *in infinitum* (indefinitely); but shall never lineally ascend.

§ 295. (i) **Heirs apparent and presumptive.**—To explain the more clearly both this and the subsequent rules, it must still be observed, that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est hæres viventis* (no one is heir of a living person). Before that time the person who is next in the line of succession is called an heir apparent, or heir presumptive. Heirs apparent are such, whose right of inheritance is indefeasible, provided they outlive the ancestor; as the eldest son or his issue, who must by the course of the common law be heirs to the father whenever he happens to die. Heirs presumptive are such who, if the

the person last seised, the inheritance should descend to his collateral relations, being of the blood of the first purchaser, subject to the three preceding rules. The old law never allowed lineal relations in the ascending line, that is, parents or other ancestors, to succeed as heirs. The father is now heir to each of his children who may die intestate and without issue, as is more clearly indicated by the next rule.

6. The sixth rule is, that among the lineal ancestors of the purchaser, the paternal heir is always preferred to the maternal. This rule is a development of the ancient canon, which required that, in collateral inheritances, the male stocks should always be preferred to the female. The preference of males to females was left untouched in the Inheritance Act.

7. The seventh rule is, that, among collaterals, those of the half blood of the purchaser may inherit, but only after collaterals of the whole blood in the same degree; that is, next after collaterals of the whole blood when the common ancestor is a male, and next after the common ancestor, when the latter is a female. This introduction of the half blood is an innovation, like the introduction of the father and other lineal ancestors. It is a logical consequence of the two preceding rules; one of which admits the lineal ancestor to succeed, and the other recognizes the issue of a deceased person as representing their ancestor. There can, of course, be no half blood as between ancestor and issue; and therefore it became necessary to admit, as heirs of the purchaser, persons who might be of the half blood *to him*. It is said that the Inheritance Act of 1833 has worked so well in practice that decisions upon it are few, and that very little alteration has been made in its provisions. See Williams Real Prop. (21st ed.), 219 ff.; 1 Stephen's Comm. (16th ed.), 302 ff.

ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born: as a brother, or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother, or nephew, or daughter; in the former cases, the estate shall be divested and taken away by the birth of a posthumous child; and, in the latter, it shall also be totally divested by the birth of a posthumous son.<sup>o</sup>

§ 296. (ii) *Seisin necessary in ancestor.*—[209] We must also remember that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seisin of such lands, either by his own entry, or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of the freehold:<sup>p</sup> or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal; such as the receipt of rent, a presentation to the church in case of an advowson,<sup>q</sup> and the like. But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seised. And therefore all the cases which will be mentioned in the present chapter are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seised thereof. For the law requires this notoriety of possession, as evidence that the ancestor had that property in himself, which is now to be transmitted to his heir. Which notoriety hath succeeded in the place of the ancient feudal investiture, whereby, while feuds were precarious, the vassal on the descent of lands was formerly admitted in the lord's court (as is still the practice in Scotland) and there received his seisin, in the nature of a renewal of his ancestors' grant, in the presence of the feudal peers: till at length, when the right of succession became indefeasible, an entry on any part of the lands, within the country (which if disputed was afterwards to be tried by those peers) or

<sup>o</sup> Bro. tit. Descent. 58.

<sup>q</sup> *Ibid.* 11.

<sup>p</sup> Co. Litt. 15.

other notorious possession, was admitted as equivalent to the formal grant of seisin, and made the tenant capable of transmitting his estate by descent. The seisin, therefore, of any person, thus understood, makes him the root or stock, from which all future inheritance by right of blood must be derived: which is very briefly expressed in this maxim, *seisina facit stipitem*.<sup>r</sup>

§ 297. (iii) **Descent from father to son.**—[<sup>210</sup>] When, therefore, a person dies so seised, the inheritance first goes to his issue: as if there be Geoffrey, John, and Matthew, grandfather, father, and son; and John purchases land, and dies; his son Matthew shall succeed him as heir, and not the grandfather Geoffrey; to whom the land shall never ascend, but shall rather escheat to the lord.<sup>s</sup>

§ 298. (aa) **Exclusion of lineal ascent.**—This rule, so far as it is affirmative and relates to lineal descents, is almost universally adopted by all nations; and it seems founded on a principle of natural reason, that (whenever a right of property transmissible to representatives is admitted) the possessions of the parents should go, upon their decease, in the first place to their children, as those to whom they have given being, and for whom they are therefore bound to provide. But the negative branch, or total exclusion of parents and all lineal ancestors from succeeding to the inheritance of their offspring, is peculiar to our own laws, and such as have been deduced from the same original. For, by the Jewish law, on failure of issue, the father succeeded to the son, in exclusion of brethren, unless one of them married the widow and raised up seed to his brother.<sup>t</sup> And, by the laws of Rome, in the first place the children or lineal descendants were preferred; and, on failure of these, the father and mother or lineal ascendants succeeded together with the brethren and sisters;<sup>u</sup> though by the law of the twelve tables the mother was originally, on account of her sex, excluded.<sup>v</sup> Hence this rule of our laws has been censured and declaimed against, as absurd and derogating from the maxims of

<sup>r</sup> Flet. l. 6. c. § 2.

<sup>u</sup> Ff. 38. 15. 1. Nov. 118. 127.

<sup>s</sup> Litt. § 3.

<sup>v</sup> Inst. 3. 3. 1.

<sup>t</sup> Selden. de Success Ebræor. c. 12.



equity and natural justice.<sup>w</sup> Yet that there is nothing unjust or absurd in it, but that, on the contrary, it is founded upon very good reason, may appear from considering as well the nature of the rule itself as the occasion of introducing it into our laws.

[211] We are to reflect, in the first place, that all rules of succession to estates are creatures of the civil polity, and *juris positivi* (of positive law) merely. The right of property, which is gained by occupancy, extends naturally no further than the life of the present possessor: after which the land by the law of nature would again become common, and liable to be seized by the next occupant: but society, to prevent the mischiefs that might ensue from a doctrine so productive of contention, has established conveyances, wills, and successions; whereby the property originally gained by possession is continued, and transmitted from one man to another, according to the rules which each state has respectively thought proper to prescribe. There is certainly, therefore, no injustice done to individuals, whatever be the path of descent marked out by the municipal law.

If we next consider the time and occasion of introducing this rule into our law, we shall find it to have been grounded upon very substantial reasons. I think there is no doubt to be made, but that it was introduced at the same time with, and in consequence of, the feudal tenures. For it was an express rule of the feudal law,<sup>x</sup> that *successionis feudi talis est natura, quod ascendentes non succedunt* (the nature of feudal succession is such that those in the ascending line do not inherit); and therefore the same maxim obtains also in the French law to this day.<sup>y</sup> Our Henry the First, indeed, among other restorations of the old Saxon laws, restored the right of succession in the ascending line:<sup>z</sup> but this soon fell again into disuse; for so early as Glanvill's time, who wrote under Henry the Second, we find it laid down as established law,<sup>a</sup> that *hereditas nunquam ascendit* (the inheritance never ascends); which has remained an invariable maxim ever since. These circumstances evidently show this rule to be of feudal original; and,

<sup>w</sup> Craig. de Jur. Feud. l. 2. t. 13. § 15. Locke on Gov. Part. 1. § 99.

<sup>x</sup> 2 Feud. 50.

<sup>y</sup> Domat. p. 2. l. 2. t. 2. Montesqu. Esp. L. l. 31. c. 33.

<sup>z</sup> LL. Hen. I. c. 70.

<sup>a</sup> l. 7. c. 1.

taken in that light, there are some arguments in its favor, besides those which are drawn [212] merely from the reason of the thing. For if the feud, of which the son died seised, was really *feudum antiquum* (an ancient fee), or one descended to him from his ancestors, the father could not possibly succeed to it, because it must have passed him in the course of descent, before it could come to the son: unless it were *feudum maternum* (a maternal fee), or one descended from his mother, and then for other reasons (which will appear hereafter) the father could in no wise inherit it. And if it were *feudum novum* (a new fee), or one newly acquired by the son, then only the descendants from the body of the feudatory himself could succeed, by the known maxim of the early feudal constitutions;<sup>b</sup> which was founded as well upon the personal merit of the vassal, which might be transmitted to his children but could not ascend to his progenitors, as also upon this consideration of military policy, that the decrepit grandsire of a vigorous vassal would be but indifferently qualified to succeed him in his feudal services. Nay, even if this *feudum novum* (new fee) were held by the son *ut feudum antiquum* (as an ancient fee), or with all the qualities annexed of a feud descended from his ancestors, such feud must in all respects have descended as if it had been really an ancient feud; and therefore could not go to the father, because if it had been an ancient feud, the father must have been dead before it could have come to the son. Thus, whether the feud was strictly *novum*, or strictly *antiquum*, or whether it was *novum* held *ut antiquum*, in none of these cases the father could possibly succeed. These reasons, drawn from the history of the rule itself, seem to be more satisfactory than that quaint one of Bracton,<sup>c</sup> adopted by Sir Edward Coke,<sup>d</sup> which regulates the descent of lands according to the laws of gravitation.

§ 299. (b) **Second rule: males preferred to females.**—A second general rule or canon is, that the male issue shall be admitted before the female.

<sup>b</sup> 1 Feud. 20.

<sup>c</sup> *Descendit itaque jus, quasi ponderosum quid cadens deorsum recta linea, et nunquam reascendit.* l. 2. c. 29. (Therefore the right descends, like a heavy weight falling downwards in a straight line, and never ascends.)

<sup>d</sup> 1 Inst. 11.

[213] Thus sons shall be admitted before daughters; or, as our male lawgivers have somewhat uncomplaisantly expressed it, the worthiest of blood shall be preferred.<sup>e</sup> As if John Stiles hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; first Matthew, and (in case of his death without issue) then Gilbert, shall be admitted to the succession in preference to both the daughters.

This preference of males to females is entirely agreeable to the law of succession among the Jews,<sup>f</sup> and also among the states of Greece, or at least among the Athenians;<sup>g</sup> but was totally unknown to the laws of Rome<sup>h</sup> (such of them, I mean, as are at present extant), wherein brethren and sisters were allowed to succeed to equal portions of the inheritance. I shall not here enter into the comparative merit of the Roman and the other constitutions in this particular, nor examine into the greater dignity of blood in the male or female sex; but shall only observe that our present preference of males to females seems to have arisen entirely from the feudal law. For though our British ancestors, the Welsh, appear to have given a preference to males,<sup>i</sup> yet our subsequent Danish predecessors seem to have made no distinction of sexes, but to have admitted all the children at once to the inheritance.<sup>k</sup> But the feudal law of the Saxons on the Continent (which was probably brought over hither, and first altered by the law of King Canute) gives an evident preference of the male to the female sex. "*Pater aut mater, defuncti, filio non filiæ hæreditatem relinquent. . . . Qui defunctus non filios sed filias reliquerit, ad eas omnis hæreditas pertineat* (The father or mother at their death shall leave their inheritance to their son, not to their daughter. . . . If a man at his death leave no sons, but only daughters, then the whole inheritance shall belong to them.)"<sup>l</sup> It is possible, therefore, that this preference might be a branch of that imperfect system of feuds, which obtained here before the Conquest; especially as it subsists among the customs of gavelkind, and as, in the charter or [214] laws of King Henry the First, it

<sup>e</sup> Hal. H. C. L. 235.

<sup>f</sup> Numb. c. 27.

<sup>g</sup> Petit. LL. Attic. l. 6. t. 6.

<sup>h</sup> Inst. 3. l. 6.

<sup>i</sup> Stat. Wall. 12 Edw. I (1284).

<sup>k</sup> LL. Canut. c. 68.

<sup>l</sup> Tit. 7. § 1 & 4.

is not (like many Norman innovations) given up, but rather enforced.<sup>m</sup> The true reason of preferring the males must be deduced from feudal principles: for, by the genuine and original policy of that constitution, no female could ever succeed to a proper feud,<sup>n</sup> inasmuch as they were incapable of performing those military services, for the sake of which that system was established. But our law does not extend to a total exclusion of females, as the Salic law, and others, where feuds were most strictly retained: it only postpones them to males: for, though daughters are excluded by sons, yet they succeed before any collateral relations: our law, like that of the Saxon feudists before mentioned, thus steering a middle course, between the absolute rejection of females, and the putting them on a footing with males.

§ 300. (c) **Third rule: primogeniture.**—A third rule, or canon of descent, is this: that where there are two or more males in equal degree, the eldest only shall inherit; but the females all together.

As if a man hath two sons, Matthew and Gilbert, and two daughters, Margaret and Charlotte, and dies; Matthew, his eldest son, shall alone succeed to his estate, in exclusion of Gilbert, the second son, and both the daughters; but, if both the sons die without issue before the father, the daughters Margaret and Charlotte shall both inherit the estate as coparceners.<sup>o</sup>

§ 301. (i) **Origin of primogeniture.**—This right of primogeniture in males seems anciently to have only obtained among the Jews, in whose constitution the eldest son had a double portion of the inheritance;<sup>p</sup> in the same manner as with us, by the laws of King Henry the First,<sup>q</sup> the eldest son had the capital fee or principal feud of his father's possessions, and no other pre-eminence; and [215] as the eldest daughter had afterwards the principal mansion, when the estate descended in coparcenary.<sup>r</sup> The Greeks, the Romans, the Britons, the Saxons, and even originally the feudists, divided the lands equally; some among all the children at large, some among the males only. This is certainly the most

<sup>m</sup> C. 70.

<sup>n</sup> 1 Feud. 8.

<sup>o</sup> Litt. § 5. Hale. H. C. L. 238.

<sup>p</sup> Selden. de Succ. Ebr. c. 5.

<sup>q</sup> C. 70.

<sup>r</sup> Glanvill. l. 7. c. 3.

obvious and natural way; and has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice. But when the emperors began to create honorary feuds, or titles of nobility, it was found necessary (in order to preserve their dignity) to make them impartible,<sup>s</sup> or (as they styled them) *feuda individua* (indivisible fees), and in consequence descendible to the eldest son alone. This example was further enforced by the inconveniences that attended the splitting of estates; namely, the division of the military services, the multitude of infant tenants incapable of performing any duty, the consequential weakening of the strength of the kingdom, and the inducing younger sons to take up with the business and idleness of a country life, instead of being serviceable to themselves and the public, by engaging in mercantile, in military, in civil, or in ecclesiastical employments.<sup>t</sup> These reasons occasioned an almost total change in the method of feudal inheritances abroad; so that the eldest male began universally to succeed to the whole of the lands in all military tenures: and in this condition the feudal constitution was established in England by William the Conqueror.

§ 302. (ii) *Primogeniture in socage estates.*—Yet we find that socage estates frequently descended to all the sons equally, so lately as when Glanvill<sup>u</sup> wrote, in the reign of Henry the Second; and it is mentioned in the Mirror<sup>w</sup> as a part of our ancient constitution, that knights' fees should descend to the eldest son, and socage fees should be partible among the male children. However, in Henry the Third's time we find by Bracton<sup>x</sup> that socage lands, in imitation of lands in chivalry, had almost entirely fallen into the right of succession by primogeniture, as the law now stands: [216] except in Kent, where they gloried in the preservation of their ancient gavelkind tenure, of which a principal branch was the joint inheritance of all the sons;<sup>y</sup> and except in some particular manors and townships, where their local customs continued the descent, sometimes to all, sometimes to the youngest son only, or in other more singular methods of succession.

<sup>s</sup> 2 Feud. 55.

<sup>t</sup> Hale. H. C. L. 221.

<sup>u</sup> 1. 7. c. 3.

<sup>w</sup> C. 1. § 3.

<sup>x</sup> 1. 2. c. 30, 31.

<sup>y</sup> Somner. Gavelk. 7.



§ 303. (iii) **Descent as among females.**—As to the females, they are still left as they were by the ancient law: for they were all equally incapable of performing any personal service: and therefore one main reason of preferring the eldest ceasing, such preference would have been injurious to the rest; and the other principal purpose, the prevention of the too minute subdivision of estates, was left to be considered and provided for by the lords, who had the disposal of these female heiresses in marriage. However, the succession by primogeniture, even among females, took place as to the inheritance of the crown;<sup>z</sup> wherein the necessity of a sole and determinate succession is as great in the one sex as the other. And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honor. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters; the eldest shall not, of course, be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honor, may confer it on which of them he pleases.<sup>a</sup> In which disposition is preserved a strong trace of the ancient law of feuds, before their descent by primogeniture even among the males was established; namely, that the lord might bestow them on which of the sons he thought proper—“*progressum est, ut ad filios deveniret, in quem scilicet dominus hoc vellet beneficium confirmare*” (it was customary for it to descend to the sons, that is, to him on whom the lord wished to settle the estate).”<sup>b</sup>

§ 304. (d) **Fourth rule: lineal descendants take by representation.**—A fourth rule, or canon of descents, is this; that the lineal descendants, *in infinitum*, of any person deceased [217] shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living.

Thus the child, grandchild, or great-grandchild (either male or female) of the eldest son succeeds before the younger son, and so *in infinitum*.<sup>c</sup> And these representatives shall take neither more nor less, but just so much as their principals would have done. As if there be two sisters, Margaret and Charlotte; and Margaret

<sup>z</sup> Co. Litt. 165.

<sup>b</sup> 1 Feud. 1.

<sup>a</sup> *Ibid.*

<sup>c</sup> Hale. H. C. L. 236, 237.

dies, leaving six daughters; and then John Stiles, the father of the two sisters, dies, without other issue: these six daughters shall take among them exactly the same as their mother Margaret would have done, had she been living; that is, a moiety of the lands of John Stiles in coparcenary: so that, upon partition made, if the land be divided into twelve parts, thereof Charlotte, the surviving sister, shall have six, and her six nieces, the daughters of Margaret, one apiece.

§ 305. (i) **Called succession in stirpes.**—This taking by representation is called succession *in stirpes*, according to the roots; since all the branches inherit the same share that their root, whom they represent, would have done. And in this manner also was the Jewish succession directed; <sup>a</sup> but the Roman somewhat differed from it. In the descending line the right of representation continued *in infinitum*, and the inheritance still descended *in stirpes*: as if one of three daughters died, leaving ten children, and then the father died: the two surviving daughters had each one-third of his effects, and the ten grandchildren had the remaining third divided between them. And so among collaterals, if any person of equal degree with the persons represented were still subsisting (as if the deceased left one brother, and two nephews the sons of another brother), the succession was still guided by the *roots*: but, if both the brethren were dead leaving issue, then (I apprehend) their representatives in equal degree became themselves principals, [218] and shared the inheritance *per capita* (individually), that is, share and share alike; they being themselves now the next in degree to the ancestor, in their own right, and not by right of representation.<sup>e</sup> So, if the next heirs of *Titius* be six nieces, three by one sister, two by another, and one by a third; his inheritance by the Roman law was divided into six parts, and one given to each of the nieces; whereas the law of England in this case would still divide it only into three parts, and distribute it *per stirpes* (by representation), thus; one-third to the three children who represent one sister, another third to the two who represent the second,

<sup>a</sup> Selden, de Succ. Ebr. c. 1.

<sup>e</sup> Nov. 110. c. 3. Inst. 3. 1. 6.

and the remaining third to the one child who is the sole representative of her mother.<sup>3</sup>

§ 306. (ii) Reason for rule of succession in stirpes.—This mode of representation is a necessary consequence of the double preference given by our law, first to the male issue, and next to the first born among the males, to both which the Roman law is a stranger. For if all the children of three sisters were in England to claim *per capita* in their own right as next of kin to the ancestor, without any respect to the stocks from whence they sprung, and those children were partly male and partly female; then the eldest male among them would exclude not only his own brethren and sisters, but all the issue of the other two daughters; or else the law in this instance must be inconsistent with itself, and depart from the preference which it constantly gives to the males, and the first-born, among persons in equal degree. Whereas, by dividing the inheritance according to the roots, or *stirpes*, the rule of descent is kept uniform and steady: the issue of the eldest son excludes

<sup>3</sup> "Blackstone's discussion of the canons of descent has been by no means free from criticisms. But whether or not he, in this respect, accurately stated the provisions of the civil and of the common law, and the reasons for their distinction, his words are of great importance, because, during the whole formative period of the American law of descent—at least, outside of the original colonies—Blackstone's Commentaries was generally accepted as the embodiment of the common law. Every student resorted to it as teaching the elements of his profession. Most practitioners regarded it as the authoritative statement of the English law at the period of separation. So that those who framed the existing statutes of descent may safely be presumed to have been guided largely by what is there said as to rules of law which they were about to redeclare or alter, and as to the reasons for their existence. Referring to the text in this light, it is significant that in America the most general and earliest departures from the common law were in the abolishment of primogeniture and the preference of males. These changes swept away the reasons given by Blackstone for representation among collaterals, and it must have been in the minds of the framers of the statutes to follow another maxim frequently expressed by Blackstone, and sweep away the law itself, together with the reasons for its existence. (*Knapp v. Windsor*, 6 Cush. (Mass.) 156; *Snow v. Snow*, 111 Mass. 389; *Balch v. Stone*, 149 Mass. 39, 20 N. E. 322.) The significance of these cases is chiefly in the fact that they construe such language as 'next of kin in equal degrees' as implying a taking *per capita* by the class described." *Douglas v. Cameron*, 47 Neb. 358, 66 N. W. 430, 432.

all other pretenders, as the son himself (if living) would have done; but the issue of two daughters divide the inheritance between them, provided their mothers (if living) would have done the same: and among these several issues, or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain, as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. As if a man hath two sons, A and B, and A dies leaving two [219] sons, and then the grandfather dies; now the eldest son of A shall succeed to the whole of his grandfather's estate; and if A had left only two daughters, they should have succeeded also to equal moieties of the whole, in exclusion of B and his issue. But if a man hath only three daughters, C, D, and E; and C dies leaving two sons, D leaving two daughters, and E leaving a daughter and a son who is younger than his sister: here when the grandfather dies, the eldest son of C shall succeed to one-third, in exclusion of the younger; the two daughters of D to another third in partnership; and the son of E to the remaining third, in exclusion of his elder sister. And the same right of representation, guided and restrained by the same rules of descent, prevails downwards in *infinitum*.

§ 307. (iii) **History of rule of succession in stirpes.**—Yet this right does not appear to have been thoroughly established in the time of Henry the Second, when Glanvill wrote; and therefore in the title to the crown especially, we find frequent contests between the younger (but surviving) brother and his nephew (being the son and representative of the elder deceased) in regard to the inheritance of their common ancestor: for the uncle is certainly nearer of kin to the common stock, by one degree, than the nephew; though the nephew, by representing his father, has in him the right of primogeniture. The uncle also was usually better able to perform the services of the fief; and besides had frequently superior interest and strength, to back his pretensions and crush the right of his nephew. And even to this day, in the lower Saxony, proximity of blood takes place of representative primogeniture; that is, the younger surviving brother is admitted to the inheritance before the son of an elder deceased: which occasioned the disputes

between the two houses of Meeklenburg, Schwerin, and Strelitz, in 1692.<sup>f</sup> Yet Glanvill, with us, even in the twelfth century, seems<sup>g</sup> to declare for the right of the nephew by representation; provided the eldest son had not received a provision in lands from his father (or as the civil law would call it), had not been forisfamiliarated, [220] in his lifetime. King John, however, who kept his nephew Arthur from the throne, by disputing this right of representation, did all in his power to abolish it throughout the realm:<sup>h</sup> but in the time of his son, King Henry the Third, we find the rule indisputably settled in the manner we have here laid it down,<sup>i</sup> and so it has continued ever since. And thus much for lineal descents.

§ 308. (e) **Fifth rule: collateral descent to blood of first purchaser.**—A fifth rule is, that on failure of lineal descendants, or issue, of the person last seised, the inheritance shall descend to the blood of the first purchaser; subject to the three preceding rules.

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles, his son, and John dies seised thereof without issue; whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family.<sup>k</sup> The first purchaser, *perquisitor*, is he who first acquired the estate to his family, whether the same was transferred to him by sale, or by gift, or by any other method, except only that of descent.

§ 309. (i) **Rule peculiar to English law.**—This is a rule almost peculiar to our own laws, and those of a similar original. For it was entirely unknown among the Jews, Greeks, and Romans: none of whose laws looked any further than the person himself who died seised of the estate: but assigned him an heir, without considering by what title he gained it, or from what ancestor he derived it. But the law of Normandy<sup>l</sup> agrees with our law in this respect: nor indeed is that agreement to be wondered at, since the law of descents in both is of feudal original; and this rule or canon cannot otherwise be accounted for than by recurring to feudal principles.

<sup>f</sup> Mod. Un. Hist. xlii. 334.

<sup>g</sup> l. 7. c. 3.

<sup>h</sup> Hale. H. C. L. 217. 229.

<sup>i</sup> Bracton. l. 2. c. 30. § 2.

<sup>k</sup> Co. Litt. 12.

<sup>l</sup> Gr. Coustum. c. 25.



§ 310. (ii) **Origin of the rule.**—When feuds first began to be hereditary, it was made a necessary qualification of the heir, who would succeed to a feud, that he should be of the blood of, that is lineally [221] descended from, the first feudatory or purchaser. In consequence whereof, if a vassal died possessed of a feud of his own acquiring, or *feudum novum* (a new fee), it could not descend to any but his own offspring; no, not even to his brother, because he was not descended, nor derived his blood, from the first acquirer. But if it was *feudum antiquum* (an ancient fee), that is, one descended to the vassal from his ancestors, then his brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. To this purpose speaks the following rule; “*frater fratri sine legitimo hærede defuncto, in beneficio quod eorum patris fuit, succedat: sin autem unus e fratribus a domino feudum acceperit, eo defuncto sine legitimo hærede, frater ejus in feudum non succedit* (a brother may succeed to his brother dying without a lawful heir, in the estate which was their father’s: but if one of the brothers shall have received the fee from his lord, and die without a lawful heir, his brother does not succeed.)”<sup>m</sup> The true feudal reason for which rule was this; that what was given to a man, for his personal service and personal merit, ought not to descend to any but the heirs of his person. And therefore, as in estates-tail, (which a proper feud very much resembled), so in the feudal donation, “*nomen hæredis, in prima investitura expressum, tantum ad descendentes ex corpore primi vasalli extenditur; et non ad collaterales, nisi ex corpore primi vasalli sive stipitis descendant* (the name of heir expressed in the first investiture extends only to the descendants of the body of the first vassal, and not to the collaterals unless they descend from the body of the first vassal or stock)”<sup>n</sup>: the will of the donor, or original lord (when feuds were turned from life estates into inheritances), not being to make them absolutely hereditary, like the Roman *allodium*, but hereditary only *sub modo* (in a particular way); not hereditary to the collateral relations, or lineal ancestors, or husband, or wife of the feudatory, but to the issue descended from his body only.

<sup>m</sup> 1 Feud. l. 1. § 2.

<sup>n</sup> Crag. l. 1. t. 9. § 36.

§ 311. (iii) *Feudum novum* to be held *ut feudum antiquum*. However, in process of time, when the feudal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance, by granting him a *feudum novum* to hold *ut feudum antiquum*; that is, with all the qualities annexed of a feud derived from his ancestors; and then the collateral relations were admitted to succeed even *in infinitum*, because they might have been of the blood of, that is, descended from, the first imaginary purchaser. For [222] since it is not ascertained in such general grants whether this feud shall be held *ut feudum paternum* (as a paternal fee), or *feudum avitum* (an ancestral fee), but *ut feudum antiquum* (as an ancient fee) merely; as a feud of indefinite antiquity; that is, since it is not ascertained from which of the ancestors of the grantee this feud shall be supposed to have descended; the law will not ascertain it, but will suppose *any* of his ancestors, *pro re nata* (for the occasion as it may arise), to have been the first purchaser: and therefore it admits *any* of his collateral kindred (who have the other necessary requisites) to the inheritance, because every collateral kinsman must be descended from some one of his lineal ancestors.

Of this nature are all the grants of fee simple estates of this kingdom; for there is now in the law of England no such thing as a grant of a *feudum novum*, to be held *ut novum*; unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted; but every grant of lands in fee simple is with us a *feudum novum* to be held *ut antiquum*, as a feud whose antiquity is indefinite: and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance.

Yet, when an estate hath really descended in a course of inheritance to the person last seised, the strict rule of the feudal law is still observed; and none are admitted, but the heirs of those through whom the inheritance hath passed: for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother, Lucy Baker, no relation of his father (as

such) shall ever be his heir of these lands; and, *vice versa*, if they descend from his father, Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto; for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood. And so, if the estate descended from his father's father, George Stiles; the relations of [223] his father's mother, Cecilia Kempe, shall for the same reason never be admitted, but only those of his father's father. This is also the rule of the French law,<sup>o</sup> which is derived from the same feudal fountain.

Here we may observe, that so far as the feud is really *antiquum*, the law traces it back, and will not suffer any to inherit but the blood of those ancestors, from whom the feud was conveyed to the late proprietor. But when, through length of time, it can trace it no farther; as if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christian Smith, or if it appear that his grandfather was the first grantee, and so took it (by the general law) as a feud of indefinite antiquity; in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate: because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

§ 312. (iv) The principle of collateral inheritance. — This, then, is the great and general principle, upon which the law of collateral inheritances depends; that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor, from whom it either really has, or is supposed by fiction of law to have originally descended: according to the rule laid down in the Year-Books,<sup>p</sup> Fitzherbert,<sup>q</sup> Brook,<sup>r</sup> and Hale;<sup>s</sup> “that he who would have been heir to the father of the deceased” (and,

<sup>o</sup> Domat. part. 2. pr.

<sup>r</sup> *Ibid.* 38.

<sup>p</sup> M. 12 Edw. IV. 14 (1472).

<sup>s</sup> H. C. L. 243.

<sup>q</sup> Abr. t. Descent. 2.

of course, to the mother, or any other purchasing ancestor) "shall also be heir to the son." \*

The remaining rules are only rules of evidence, calculated to investigate who that purchasing ancestor was; which [224] *in feudis vere antiquis* (in fees really ancient) has in process of time been forgotten, and is supposed to be in feuds that are held *ut antiquis*.

§ 313. (f) **Sixth rule: next collateral kinsman of the whole blood.**—A sixth rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.

§ 314. (i) **Who is next collateral kinsman.**—First, he must be his next collateral kinsman, either personally or *jure representationis* (by right of representation); which proximity is reckoned according to the canonical degrees of consanguinity before mentioned. Therefore, the brother being in the first degree, he and his descendants shall exclude the uncle and his issue, who is only in the second. And herein consists the true reason of the different methods of computing the degrees of consanguinity, in the civil law on the one hand, and in the canon law and common law on the other. The civil law regards consanguinity principally with respect to successions, and therein very naturally considers only the person deceased, to whom the relation is claimed: it therefore counts the degrees of kindred according to the number of persons through whom the claim must be derived from him; and makes not only his great-nephew but also his first cousin to be both related to him in the fourth degree; because there are three persons between him and each of them. The canon law regards consanguinity principally with a view to prevent incestuous marriages, between those who have a large portion of the same blood running in their respective veins; and therefore looks up to the author of that blood, or the common ancestor, reckoning the degrees from him: so that the great-nephew is related in the third canonical

\* Ninth edition adds, "a maxim, that will hold universally except in the case of a brother or sister of the half blood, which exception (as we shall see hereafter) depends upon very special grounds."

degree to the person proposed, and the first cousin in the second; the former being distant three degrees from the common ancestor, and therefore deriving only one-fourth of his blood from the same fountain with the *propositus*; the latter and also the *propositus* being each of them distant only two degrees from the common ancestor, and therefore having one-half of each of their bloods the same. The common law regards consanguinity principally with respect to descents; and, having therein the same object in view as the civil, it may seem as if it ought [225] to proceed according to the civil computation. But as it also respects the purchasing ancestor, from whom the estate was derived, it therein resembles the canon law, and therefore counts its degrees in the same manner. Indeed, the designation of person (in seeking for the next of kin) will come to exactly the same end (though the degrees will be differently numbered), whichever method of computation we suppose the law of England to use; since the right of representation (of the father by the son, etc.) is allowed to prevail *in infinitum*. This allowance was absolutely necessary, else there would have frequently been many claimants in exactly the same degree of kindred, as (for instance) uncles and nephews of the deceased; which multiplicity though no inconvenience in the Roman law of partible inheritances, yet would have been productive of endless confusion where the right of sole succession, as with us, is established. The issue or descendants, therefore, of John Stiles' brother are all of them in the first degree of kindred with respect to inheritances, as their father also, when living, was: those of his uncle in the second, and so on, and are severally called to the succession in right of such their representative proximity.

The right of representation being thus established, the former part of the present rule amounts to this; that on failure of issue of the person last seised, the inheritance shall descend to the issue of his next immediate ancestor. Thus, if John Stiles dies without issue, his estate shall descend to Francis, his brother, who is lineally descended from Geoffrey Stiles, his next immediate ancestor, or father. On failure of brethren, or sisters, and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. Very similar to which was the law of inheritance among the ancient Germans, our pro-



genitors: "*hæredes successorisque, sui cuique liberi, et nullum testamentum: si liberi non sunt, proximus gradus in possessione, fratres, patrui avunculi* (every man's children are his heirs and successors if there be no will; if there be no children the next in degree shall be seised, as brothers, uncles on the father's side, uncles on the mother's side)."<sup>t</sup>

§ 315. (ii) Lineal ancestors are the common stocks.—[226] Now, here it must be observed, that the lineal ancestors, though (according to the first rule) incapable themselves of succeeding to the estate, because it is supposed to have already passed them, are yet the common stocks from which the next successor must spring. And therefore in the Jewish law, which in this respect entirely corresponds with ours,<sup>u</sup> the father or other lineal ancestor is himself said to be the heir, though long since dead, as being represented by the persons of his issue; who are held to succeed not in their own rights, as brethren, uncles, etc., but in right of representation, as the offspring of the father, grandfather, etc., of the deceased.<sup>w</sup> But, though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to *name* him in making out the pedigree or descent. For the descent between two brothers is held to be an *immediate* descent: and therefore title may be made by one brother or his representatives *to or through* another, without mentioning their common father.<sup>x</sup> If Geoffrey Stiles hath two sons, John and Francis, Francis may claim as heir to John, without naming their father Geoffrey; and so the son of Francis may claim as cousin and heir to Matthew, the son of John, without naming the grandfather; viz., as son of Francis, who was the brother of John, who was the father of Matthew. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood: and therefore in order to ascertain the collateral heir of John Stiles, it is in the first place necessary to recur to his ancestors in the first degree; and if they have left any other issue

<sup>t</sup> Tacitus de Mor. Germ. 21.

<sup>u</sup> Numb. c. 27.

<sup>w</sup> Selden. de Succ. Ebr. c. 12.

<sup>x</sup> 1 Sid. 196. 1 Vent. 423. 1 Lev. 60. 12 Mod. 619.

besides John, that issue will be his heir. On default of such, we must ascend one step higher to the ancestors in the second degree, and then to those in the third, and fourth, and so upwards *in infinitum*; till some ancestors be found, who have other issue descending from them besides the deceased, in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent; and in such derivation the same rules must be observed, with regard to sex, [227] primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor.

§ 316. (iii) **Exclusion of the half blood.**—But, secondly, the heir need not be nearest kinsman absolutely, but only *sub modo* (in a particular way); that is, he must be the nearest kinsman of the *whole* blood; for, if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded.

A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. For, as every man's own blood is compounded of the bloods of his respective ancestors, he only is properly of the whole or entire blood with another, who hath (so far as the distance of degrees will permit) all the same ingredients in the composition of his blood that the other hath. Thus, the blood of John Stiles being composed of those of Geoffrey Stiles, his father, and Lucy Baker, his mother, therefore his brother Francis, being descended from both the same parents, hath entirely the same blood with John Stiles; or he is his brother of the whole blood. But if, after the death of Geoffrey, Lucy Baker, the mother, marries a second husband, Lewis Gay, and hath issue by him; the blood of this issue, being compounded of the blood of Lucy Baker (it is true) on the one part, but that of Lewis Gay (instead of Geoffrey Stiles) on the other part, it hath therefore only half the same ingredients with that of John Stiles; so that he is only his brother of the half blood, and for that reason they shall never inherit to each other. So also, if the father has two sons, A and B, by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to

the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue: still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised: but,\* had A died without entry, then B might have inherited; not as [228] heir to A, his half-brother, but as heir to their common father, who was the person last actually seised.†

§ 317. (aa) Reason for excluding half blood.—This total exclusion of the half blood from the inheritance, being almost peculiar to our own law, is looked upon as a strange hardship by such as are unacquainted with the reasons on which it is grounded.<sup>4</sup> But these censures arise from a misapprehension of the rule, which is not so much to be considered in the light of a rule of descent, as of a rule of evidence; an auxiliary rule, to carry

\* Ninth edition inserts, "It shall descend to a sister (if any) of the whole blood to A: for in such cases the maxim is, that the seisin or *possessio fratris facit sororem esse hæredem* (the seisin of the brother makes the sister heir). Yet."

† Hale H. C. L. 238.

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4 Exclusion of the half blood.—The exclusion of the half blood seems to rest upon a notion of relationship quite different from any we now entertain, but which is by no means unreasonable, if we rightly comprehend it. It is that all inheritance must be traced to the same marriage—to the same pair of ancestors, not merely to a single common ancestor. In the direct line this, of course, has no meaning: descent can never be of the half blood. But in collateral lines it makes a broad distinction. Each couple have a separate progeny, and the connection between them is not legally significant: it is only an accident, so to speak.

"To be of the blood of G. is either to be immediately descended from him or to be descended from the same couple of common ancestors. Two persons are *consanguinei* who are descended from the same two ancestors. The heir and ancestor *must* not only have two common ancestors with the original purchasers of the estate, but must have two common ancestors with each other; and therefore if the son purchases lands, and dies without issue, and it descends to any heir on the part of the father, if the line of the father should afterwards become extinct, it cannot pass to the line of the mother." (Christian, citing Hale's History of C. L., p. 246; Y. B. 49 Ed. III, 12.)

Blackstone himself has shown that a kinsman of the whole blood is derived from the same *couple* of ancestors (text, p. \*227); and it seems singular that he should have overlooked the bearing of this on the exclusion of the half

a former into execution. And here we must again remember, that the great and most universal principle of collateral inheritances being this, that an heir to a *feudum antiquum* must be of the blood of the first feudatory or purchaser, that is, derived in a lineal descent from him; it was originally requisite, as upon gifts in tail it still is, to make out the pedigree of the heir from the first donee or purchaser, and to show that such heir was his lineal representative. But when, by length of time and a long course of descents, it came (in those rude and unlettered ages) to be forgotten who was really the first feudatory or purchaser, and thereby the proof of an actual descent from him became impossible: then the law substituted what Sir Martin Wright<sup>2</sup> calls a *reasonable*, in the stead of an *impossible*, proof: for it remits the proof of an actual descent from the first purchaser; and only requires in lieu of it, that the claimant be next of the whole blood to the person last in possession (or derived from the same couple of ancestors); which will probably answer the same end as if he could trace his pedigree in a direct line from the first purchaser. For he who is my kinsman of the whole blood can have no ancestors beyond or higher than the common stock, but what are equally my ancestors also; and mine are *vice versa* his: he therefore is very likely to be derived from that unknown ancestor of mine, from whom the inheritance descended. But a kinsman of the half blood has but one-half of his ancestors above the common stock the same as mine; and therefore there is not the same probability of that standing requisite in the law, that he be derived from the blood of the first purchaser.

[229] To illustrate this by example. Let there be John Stiles, and Francis, brothers by the same father and mother, and another son of the same mother by Lewis Gay a second husband. Now, if John dies seised of lands, but it is uncertain whether they de-

<sup>2</sup> Tenures. 186.

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blood, and followed Wright's very inconclusive explanation of it as a mere rule of evidence.

But Blackstone could know nothing of the many illustrations of the true force of that principle in the Germanic law of the Continent first made known by recent study; such as the rule requiring a father to divide property with his children by first wife, before proceeding to a second marriage, etc.—HAMMOND.

scended to him from his father or mother; in this case his brother Francis, of the whole blood, is qualified to be his heir; for he is sure to be in the line of descent from the first purchaser, whether it were the line of the father or the mother. But if Francis should die before John, without issue, the mother's son by Lewis Gay (or brother of the half blood) is utterly incapable of being heir; for he cannot prove his descent from the first purchaser, who is unknown, nor has he that fair probability which the law admits as presumptive evidence, since he is to the full as likely *not to be* descended from the line of the first purchaser, as *to be* descended: and therefore the inheritance shall go to the nearest relation possessed of this presumptive proof, the whole blood.

And, as this is the case *in feudis antiquis* (in ancient fees), where there really did once exist a purchasing ancestor, who is forgotten; it is also the case *in feudis novis* (in new fees) held *ut antiquis*, where the purchasing ancestor is merely ideal, and never existed but only in fiction of law. Of this nature are all grants of lands in fee simple at this day, which are inheritable as if they descended from some uncertain indefinite ancestor, and therefore any of the collateral kindred of the real modern purchaser (and not his own offspring only) may inherit them, provided they be of the whole blood; for all such are, in judgment of law, likely enough to be derived from this indefinite ancestor: but those of the half blood are excluded, for want of the same probability. Nor should this be thought hard, that a brother of the purchaser, though only of the half blood, must thus be disinherited, and a more remote relation of the whole blood admitted, merely upon a supposition and fiction of law; since it is only upon a like supposition and fiction, that brethren of purchasers (whether of the whole or half blood) are entitled to inherit at all: for we have seen that *in feudis stricto novis* (in fees strictly new) neither brethren nor any other collaterals [230] were admitted. As therefore *in feudis antiquis* we have seen the reasonableness of excluding the half blood, if by a fiction of law a *feudum novum* be made descendible to collaterals as if it was *feudum antiquum*, it is just and equitable that it should be subject to the same restrictions as well as the same latitude of descent.

Perhaps by this time the exclusion of the half blood does not appear altogether so unreasonable as at first sight it is apt to do. It



is certainly a very fine-spun and subtle nicety: but, considering the principles upon which our law is founded, it is not an injustice, nor always a hardship; since even the succession of the whole blood was originally a beneficial indulgence, rather than the strict right of collaterals: and, though that indulgence is not extended to the demi-kindred, yet they are rarely abridged of any right which they could possibly have enjoyed before. The doctrine of the whole blood was calculated to supply the frequent impossibility of proving a descent from the first purchaser, without some proof of which (according to our fundamental maxim) there can be no inheritance allowed of. And this purpose it answers, for the most part effectually enough. I speak with these restrictions, because it does not, neither can any other method, answer this purpose entirely. For though all the ancestors of John Stiles, above the common stock, are also the ancestors of his collateral kinsman of the whole blood; yet, unless that common stock be in the first degree (that is, unless they have the same father and mother), there will be intermediate ancestors below the common stock, that may belong to either of them respectively, from which the other is not descended, and therefore can have none of their blood. Thus, though John Stiles and his brother of the whole blood can each have no other ancestors than what are in common to them both; yet with regard to his uncle, where the common stock is removed one degree higher (that is, the grandfather and grandmother), one-half of John's ancestors will not be the ancestors of his uncle: his *patruus*, or father's brother, derives not his descent from John's maternal ancestors; nor his *avunculus*, or mother's brother, from those in the paternal line. Here, then, <sup>[231]</sup> the supply of proof is deficient, and by no means amounts to a certainty: and, the higher the common stock is removed, the more will even the probability decrease. But it must be observed, that (upon the same principles of calculation) the half blood have always a much less chance to be descended from an unknown indefinite ancestor of the deceased, than the whole blood in the same degree. As, in the first degree, the whole brother of John Stiles is sure to be descended from that unknown ancestor; his half-brother has only an even chance, for half John's ancestors are not his. So, in the second degree, John's uncle of the whole blood has an even chance; but

the chances are three to one against his uncle of the half blood, for three-fourths of John's ancestors are not his. In like manner, in the third degree, the chances are only three to one against John's great-uncle of the whole blood, but they are seven to one against his great-uncle of the half blood, for seven-eighths of John's ancestors have no connection in blood with him. Therefore, the much less probability of the half blood's descent from the first purchaser, compared with that of the whole blood, in the several degrees, has occasioned a general exclusion of the half blood in all.

§ 318. (bb) Unjust extension of rule excluding half blood.—

But, while I thus illustrate the reason of excluding the half blood in general, I must be impartial enough to own, that, in some instances, the practice is carried further than the principle upon which it goes will warrant. Particularly, when a kinsman of the whole blood in a remoter degree, as the uncle or great-uncle, is preferred to one of the half blood in a nearer degree, as the brother: for the half-brother hath the same chance of being descended from the purchasing ancestor as the uncle; and a thrice better chance than the great-uncle, or kinsman in the third degree. It is also more especially overstrained, when a man has two sons by different venters, and the estate on his death descends from him to the eldest, who enters, and dies without issue; in which case the younger son cannot inherit this estate, because he is not of the whole blood to the last proprietor.\* This, it must be [232] owned, carries a hardship with it, even upon feudal principles: for the rule was introduced only to supply the proof of a descent from the first purchaser; but here, as this estate notoriously descended from the father, and as both the brothers confessedly sprung from

\* A still harder case than this happened, M. 10 Edw. III (1335). On the death of a man, who had three daughters by a first wife, and a fourth by another, his lands descended equally to all four as coparceners. Afterwards the two eldest died without issue; and it was held, that the third daughter alone should inherit their shares, as being their heir of the whole blood; and that the youngest daughter should retain only her original fourth part of their common father's lands. (10 Ass. 27.) And yet it was clear law in M. 19 Edw. II (1325) that, where, lands had descended to two sisters of the half blood, as coparceners, each might be heir of those lands to the other. (Mayn. Edw. II. 628. Fitzh. Abr. t. Quare Impedit. 177.)

him, it is demonstrable that the half-brother must be of the blood of the first purchaser, who was either the father or some of the father's ancestors. When, therefore, there is actual demonstration of the thing to be proved, it is hard to exclude a man by a rule substituted to supply that proof when deficient. So far as the inheritance can be evidently traced back, there seems no need of calling in this presumptive proof, this rule of probability, to investigate what is already certain. Had the elder brother indeed been a purchaser, there would have been no hardship at all, for the reasons already given: or had the *frater uterinus* only, or brother by the mother's side, been excluded from an inheritance which descended from the father, it had been highly reasonable.

Indeed, it is this very instance of excluding a *frater consanguineus*, or brother by the father's side, from an inheritance which descended *a patre* (from the father), that Craig<sup>b</sup> has singled out, on which to ground his strictures on the English law of half blood. And, really, it should seem, as if the custom of excluding the half blood in Normandy<sup>c</sup> extended only to exclude a *frater uterinus*, when the inheritance descended *a patre*, and *vice versa*: and possibly in England also; as even with us it remained a doubt, in the time of Bracton,<sup>d</sup> and of Fleta;<sup>e</sup> whether the half blood on the father's side were excluded from the inheritance which originally descended from the common father, or only from such as descended from the respective mothers, and from newly purchased lands. And the rule of law, as laid [233] down by our Fortescue,<sup>f</sup> extends no further than this; *frater fratri uterino non succedet in hæreditate paterna* (a brother shall not succeed in the paternal inheritance to his brother by the mother's side). It is, moreover, worthy of observation, that by our law, as it now stands, the crown (which is the highest inheritance in the nation) may descend to the half blood of the preceding sovereign,<sup>g</sup> so as it be the blood of the first monarch, purchaser (or in the feudal language), conqueror, of the reigning family. Thus it actually did descend from King Edward the Sixth to Queen Mary, and from her to Queen Elizabeth, who were respectively of the half blood to each other.

<sup>b</sup> 1. 2. t. 15. § 14.

<sup>c</sup> Gr. Coustum. c. 25.

<sup>d</sup> 1. 2. c. 30. § 3.

<sup>e</sup> 1. 6. c. 1. § 14.

<sup>f</sup> De Laud. LL. Angl. 5.

<sup>g</sup> Plowd. 245. Co. Litt. 15.

For, the royal pedigree being always a matter of sufficient notoriety, there is no occasion to call in the aid of this presumptive rule of evidence, to render probable the descent from the royal stock, which was formerly King William the Norman, and is now (by act of parliament<sup>b</sup>) the Princess Sophia of Hanover. Hence also it is, that in estates-tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent:<sup>c</sup> because, when the lineage is clearly made out, there is no need of this auxiliary proof. How far it might be desirable for the legislature to give relief, by amending the law of descents in one or two instances, and ordaining that the half blood might always inherit, where the estate notoriously descended from its own proper ancestor, and, in cases of new-purchased lands or uncertain descents, should never be excluded by the whole blood in a remoter degree; or how far a private inconvenience should be submitted to, rather than a long established rule should be shaken, it is not for me to determine.

§ 319. (cc) **Summary of reasons for rule.**—The rule, then, together with its illustration, amounts to this: that, in order to keep the estate of John Stiles as nearly as possible in the line of his purchasing ancestor, it must descend to the issue of the nearest couple of ancestors that have left descendants behind them; because the descendants of one ancestor only are not so likely to be in the line of that purchasing ancestor, as those who are descended from two.

[234] But here another difficulty arises. In the second, third, fourth, and every superior degree, every man has many couples of ancestors, increasing according to the distances in a geometrical progression upwards,<sup>k</sup> the descendants of all which respective couples are (representatively) related to him in the same degree. Thus in the second degree, the issue of George and Cecilia Stiles and of Andrew and Esther Baker, the two grandsires and grandmothers of John Stiles, are each in the same degree of propinquity; in the third degree, the respective issues of Walter and Christian

<sup>b</sup> 12 Will. III. c. 2 (Act of Settlement, 1700).

<sup>c</sup> Litt. §§ 14, 15.

<sup>k</sup> See pag. 204.

Stiles, of Luke and Frances Kempe, of Herbert and Hannah Baker, and of James and Emma Thorpe, are (upon the extinction of the two inferior degrees) all equally entitled to call themselves the next kindred of the whole blood to John Stiles. To which, therefore, of these ancestors must we first resort, in order to find out descendants to be preferably called to the inheritance? In answer to this, and to avoid the confusion and uncertainty that might arise between the several stocks, wherein the purchasing ancestor may be sought for.\*

§ 320. (g) **Seventh rule: preference of male stocks in collateral descent.**—The seventh and last rule or canon is, that in collateral inheritances the male stock shall be preferred to the female (that is, kindred derived from the blood of the male ancestors shall be admitted before those from the blood of the female) unless where the lands have, in fact, descended from a female.

Thus the relations on the father's side are admitted *in infinitum*, before those on the mother's side are admitted at all;<sup>1</sup> and the relations of the father's father, before those of the father's mother; and so on. And in this the English law is not singular, but warranted by the examples of the Hebrew and Athenian laws, as stated by Selden,<sup>m</sup> and Petit;<sup>n</sup> though among the Greeks in the time of Hesiod,<sup>o</sup> when a man died without wife or children, all his kindred (without any distinction) [235] divided his estate among them. It is likewise warranted by the example of the Roman laws: wherein the *agnati*, or relations by the father, were preferred to the *cognati*, or relations by the mother, till the edict of the Emperor Justinian<sup>p</sup> abolished all distinction between them. It is also conformable to the customary law of Normandy,<sup>q</sup> which indeed in most respects agrees with our English law of inheritance.

\* Ninth edition adds, "another qualification is requisite, besides the *proximity* and *entirety*, which is that of *dignity* or *worthiness*, of blood. For."

<sup>1</sup> Litt. § 4.

<sup>m</sup> De Succ. Ebræor. c. 12.

<sup>n</sup> LL. Attic. l. 1. t. 5.

<sup>o</sup> Θεογ. 606.

<sup>p</sup> Nov. 118.

<sup>q</sup> Gr. Coustum. c. 25.



§ 321. (i) Reasons for rule preferring male stocks.—However, I am inclined to think, that this rule of our laws does not owe its immediate original to any view of conformity to those which I have just now mentioned; but was established in order to effectuate and carry into execution the fifth rule or canon before laid down; that every heir must be of the blood of the first purchaser. For, when such first purchaser was not easily to be discovered after a long course of descents, the lawyers not only endeavored to investigate him by taking the next relation of the whole blood to the person last in possession; but also considering that a preference had been given to males (by virtue of the second canon) through the whole course of lineal descent from the first purchaser to the present time, they judged it more likely that the lands should have descended to the last tenant from his male than from his female ancestors; from the father (for instance) rather than from the mother; from the father's father, rather than the father's mother: and therefore they hunted back the inheritance (if I may be allowed the expression) through the male line; and gave it to the next relations on the side of the father, the father's father, and so upwards; imagining with reason that this was the most probable way of continuing it in the line of the first purchaser. A conduct much more rational than the preference of the *agnati*, by the Roman laws: which, as they gave no advantage to the males in the first instance or direct lineal succession, had no reason for preferring them in the transverse collateral one: upon which account this preference was very wisely abolished by Justinian.

[236] That this was the true foundation of the preference of the *agnati* or male stocks, in our law, will further appear, if we consider, that, whenever the lands have notoriously descended to a man from his mother's side, this rule is totally reversed, and no relation of his by the father's side, as such, can ever be admitted to them; because he cannot possibly be of the blood of the first purchaser. And so, *e converso*, if the lands descended from the father's side, no relation of the mother, as such, shall ever inherit. So, also, if they in fact descended to John Stiles from his father's mother, Cecilia Kempe; here not only the blood of Lucy Baker, his mother, but also of George Stiles, his father's father, is perpetually excluded. And, in like manner, if they be known to have

descended from Frances Holland, the mother of Cecilia Kempe, the line not only of Lucy Baker, and of George Stiles, but also of Luke Kempe, the father of Cecilia, is excluded. Whereas, when the side from which they descended is forgotten, or never known (as in the case of an estate newly purchased to be holden *ut feudum antiquum*), here the right of inheritance first runs up all the father's side, with a preference to the male stocks in every instance; and, if it finds no heirs there, it then, and then only, resorts to the mother's side; leaving no place untried, in order to find heirs that may by possibility be derived from the original purchaser. The greatest possibility of finding such was among those descended from the male ancestors; but, upon failure of issue there, they may possibly be found among those derived from the females.

This I take to be the true reason of the constant preference of the agnatic succession, or issue derived from the male ancestors, through all the stages of collateral inheritance; as the ability for personal service was the reason for preferring the males at first in the direct lineal succession. We see clearly, that, if males had been perpetually admitted, in utter exclusion of females, the tracing the inheritance back through the male line of ancestors must at last have inevitably brought us up to the first purchaser: but, as males have not been *perpetually* <sup>[237]</sup> *admitted*, but only *generally preferred*; as females have not been *utterly excluded*, but only *generally postponed* to males; the tracing the inheritance up through the male stocks will not give us absolute demonstration, but only a strong probability, of arriving at the first purchaser: which, joined with the other probability, of the wholeness or entirety of blood, will fall little short of a certainty.

§ 322. (4) *Tracing a pedigree.*—Before we conclude this branch of our inquiries, it may not be amiss to exemplify these rules by a short sketch of the manner in which we must search for the heir of a person, as *John Stiles*, who dies seised of land which he acquired, and which therefore he held as a feud of indefinite antiquity.<sup>r</sup>

In the first place succeeds the eldest son, Matthew Stiles, or his issue: (No. 1.)—if his line be extinct, then Gilbert Stiles and the

<sup>r</sup> See the table of descents annexed. [See p. 987 of this edition.]

other sons, respectively, in order of birth, or their issue; (No. 2.)—in default of these, all the daughters together, Margaret and Charlotte Stiles, or their issue; (No. 3.)—on failure of the descendants of *John Stiles* himself, the issue of Geoffrey and Lucy Stiles, his parents, is called in: viz., first, Francis Stiles, the eldest brother of the whole blood, or his issue; (No. 4.)—then Oliver Stiles, and the other whole brothers, respectively, in order of birth or their issue; (No. 5.)—then the sisters of the whole blood all together, Bridget and Alice Stiles, or their issue; (No. 6.)—in defect of these, the issue of George and Cecilia Stiles, his father's parents; respect being still had to their age and sex; (No. 7.)—then the issue of Walter and Christian Stiles, the parents of his paternal grandfather; (No. 8.)—then the issue of Richard and Anne Stiles, the parents of his paternal grandfather's father; (No. 9.)—and so on in the paternal grandfather's paternal line, or blood of Walter Stiles, *in infinitum*. In defect of these, the issue of William and Jane Smith, the parents of his paternal grandfather's mother: (No. 10.)—and so on in the paternal grandfather's maternal line, or blood of Christian Smith, *in infinitum*; till both the [238] immediate bloods of George Stiles, the paternal grandfather, are spent. Then we must resort to the issue of Luke and Frances Kempe, the parents of *John Stiles*' paternal grandmother: (No. 11.)—then to the issue of Thomas and Sarah Kempe, the parents of his paternal grandmother's father: (No. 12.)—and so on in the paternal grandmother's paternal line, or blood of Luke Kempe, *in infinitum*. In default of which we must call in the issue of Charles and Mary Holland, the parents of his paternal grandmother's mother: (No. 13.)—and so on in the paternal grandmother's maternal line, or blood of Frances Holland, *in infinitum*; till both the immediate bloods of Cecilia Kempe, the paternal grandmother, are also spent. Whereby the paternal blood of *John Stiles* entirely failing, recourse must then, and not before, be had to his maternal relations; or the blood of the Bakers (No. 14, 15, 16), Willis's (No. 17), Thorpes (No. 18, 19), and Whites (No. 20); in the same regular successive order as in the paternal line.

The student should, however, be informed, that the class, No. 10, would be postponed to No. 11, in consequence of the doctrine laid down, *arguendo* (in the course of argument), by Justice Manwoode,

in the case of Clere and Brooke;\* from whence it is adopted by Lord Bacon<sup>t</sup> and Sir Matthew Hale.<sup>u</sup> And yet, notwithstanding these respectable authorities, the compiler of this table hath ventured to give the preference therein to No. 10 before No. 11; for the following reasons: 1. Because this point was not the principal question in the case of Clere and Brooke; but the law concerning it is delivered *obiter* (cursorily) only, and in the course of argument, by Justice Manwoode; though afterwards said to be confirmed by the three other justices in separate, extrajudicial, conferences with the reporter. 2. Because the chief justice, Sir James Dyer, in reporting the resolution of the court in what seems to be the same case,<sup>w</sup> takes no notice of this doctrine. 3. Because it appears from Plowden's report, that very many gentlemen of the law were dissatisfied [239] with this position of Justice Manwoode. 4. Because the position itself destroys the otherwise entire and regular symmetry of our legal course of descents, as is manifest by inspecting the table; and destroys also that constant preference of the male stocks in the law of inheritance, for which an additional reason is before given, besides the mere dignity of blood. 5. Because it introduces all that uncertainty and contradiction, which is pointed out by an ingenious author;<sup>x</sup> and establishes a collateral doctrine, incompatible with the principal point resolved in the case of Clere and Brooke, viz., the preference of No. 11 to No. 14. And, though that learned writer proposes to rescind the principal point then resolved, in order to clear this difficulty; it is apprehended, that the difficulty may be better cleared, by rejecting the collateral doctrine, which was never yet resolved at all. 6. Because by the reason that is given for this doctrine, in Plowden, Bacon, and Hale (viz., that in any degree, paramount the first, the law respecteth proximity, and not dignity of blood), No. 18 ought also to be preferred to No. 16; which is directly contrary to the eighth rule laid down by Hale himself.<sup>y</sup> 7. Because this position

<sup>s</sup> Plowd. 450.

<sup>t</sup> Elem. c. 1.

<sup>u</sup> H. C. L. 240. 244.

<sup>w</sup> Dyer. 314.

<sup>x</sup> Law of Inheritances. 2d edit. pag. 30. 38. 61. 62. 66.

<sup>y</sup> Hist. C. L. 247.

seems to contradict the allowed doctrine of Sir Edward Coke;<sup>z</sup> who lays it down (under different names) that the blood of the Kempes (*alias* Sandies) shall not inherit till the blood of the Stiles (*alias* Fairfields) fail. Now, the blood of the Stiles does certainly not fail, till both No. 9 and No. 10 are extinct. Wherefore, No. 11 (being the blood of the Kempes) ought not to inherit till then. 8. Because in the case, Mich. 12 Edw. IV, 14<sup>a</sup> (1472) (much relied on in that of Clere and Brooke), it is laid down as a rule, that "*cestuy, que doit inheriter al pere, doit inheriter al fits* (he who should inherit from the father should inherit from the son)." And so Sir Matthew Hale<sup>b</sup> says "that though the law excludes the father from inheriting, yet it substitutes and directs the descent, as it should have been, had the father inherited." Now, it is settled, by the resolution in Clere [240] and Brooke, that No. 10 should have inherited to Geoffrey Stiles, the father, before No. 11; and therefore No. 10 ought also to be preferred in inheriting to *John Stiles*, the son.

In case *John Stiles* was not himself the purchaser, but the estate in fact came to him by descent from his father, mother, or any higher ancestor, there is this difference; that the blood of that line of ancestors, from which it did not descend, can never inherit. Thus, if it descended from Geoffrey Stiles, the father, the blood of Lucy Baker, the mother, is perpetually excluded: and so, *vice versa*, if it descended from Lucy Baker, it cannot descend to the blood of Geoffrey Stiles. This, in either case, cuts off one-half of the table from any possible succession. And further, if it can be shown to have descended from George Stiles, this cuts off three-fourths; for now the blood, not only of Lucy Baker, but also of Cecilia Kempe, is excluded. If, lastly, it descended from Walter Stiles, this narrows the succession still more, and cuts off seven-eighths of the table; for now neither the blood of Lucy Baker, nor of Cecilia Kempe, nor of Christian Smith, can ever succeed to the inheritance. And the like rule will hold upon descents from any other ancestors.

<sup>z</sup> Co. Litt. 12. Hawk. Abr. in Loc.

<sup>a</sup> Fitzh. Abr. tit. Descent. 2. Bro. Abr. t. Descent. 3.

<sup>b</sup> Hist. C. L. 243.



The student should bear in mind, that, during this whole process, *John Stiles* is the person supposed to have been last actually seised of the estate. For if ever it comes to vest in any other person, as heir to *John Stiles*, a new order of succession must be observed upon the death of such heir; since he, by his own seisin, now becomes himself an ancestor, or *stipes*, and must be put in the place of *John Stiles*. The figures, therefore, denote the order in which the several classes would succeed to *John Stiles*, and not to each other: and before we search for an heir in any of the higher figures (as No. 8), we must be first assured that all the lower classes (from No. 1 to No. 7) were extinct at *John Stiles*' decease.

## OF TITLE BY PURCHASE, AND FIRST BY ESCHEAT.

§ 323. **Definition of purchase.**—Purchase, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton;<sup>a</sup> the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate, but merely that by inheritance: wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.<sup>b</sup>

§ 324. **Legal conception of purchase.**—Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land, as are obtained by way of bargain and sale, for money, or some other valuable consideration. But this falls far short of the legal idea of purchase: for, if I *give* land freely to another, he is in the eye of the law a purchaser;<sup>c</sup> and falls within Littleton's definition, for he comes to the estate by his own agreement, that is, he consents to the gift. A man who has his father's estate settled upon him in tail, before he was born, is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir at law by will, with other limitations or in any other shape than the course of descents would direct, such heir shall take by purchase.<sup>d</sup> But if a man, seised in fee, devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the [242] devise than he would have done without it, he shall be adjudged to take by descent,<sup>e</sup> even though it be charged with encumbrances,<sup>f</sup> for the benefit of creditors, and others, who have demands on the estate of the ancestor. If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but, if he dies during the continuance of

<sup>a</sup> § 12.<sup>b</sup> Co. Litt. 18.<sup>c</sup> *Ibid.*<sup>d</sup> Lord Raym. 728.<sup>e</sup> 1 Roll. Abr. 626.<sup>f</sup> Salk. 241. Lord Raym. 728.

the particular estate, his heirs shall take as purchasers.<sup>g</sup> But, if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent: for it is an ancient rule of law, that wherever the ancestor takes an estate for life, the heir cannot by the same conveyance take an estate in fee by *purchase*, but only by *descent*.<sup>h</sup> And, if A dies before entry, still his heir shall take by descent, and not by purchase; for, where the heir takes anything that might have vested in the ancestor, he takes by way of descent.<sup>i</sup> The ancestor, during his life, beareth in himself all his heirs;<sup>k</sup> and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself: and the word "heirs" in this case is not esteemed a word of *purchase*, but a word of *limitation*, inuring so as to increase the estate of the ancestor from a tenancy for life to a fee simple.<sup>1</sup> And, had it been otherwise, had the heir (who is uncertain till the death of the ancestor) been allowed to take as a purchaser originally nominated in the deed, as must have been the case if the remainder had been expressly limited to Matthew or Thomas by name; then, in the times of strict feudal tenure, the lord would have been defrauded by such a limitation of the fruits of his seigniory, arising from a descent to the heir.

§ 325. 1. "Conquest" of the feudists.—What we call *purchase*, *perquisitio*, the feudists called *conquest*, *conquæstus*, or *conquisitio*:<sup>1</sup> both denoting any means of acquiring an estate out of the common course of inheritance. And this is still the proper phrase in the law of Scotland:<sup>m</sup> as it was among the Norman jurists, who styled [243] the purchaser (that is, he who brought the estate into the family which at present owns it) the conqueror or *conquereur*.<sup>n</sup> Which seems to be all that was meant by the appellation which was given to William the Norman, when his manner of ascending the throne of England was, in his own and his successors' charters, and by the historians of the times, entitled

<sup>g</sup> 1 Roll. Abr. 627.<sup>1</sup> Crag. l. 1. t. 10. § 18.<sup>h</sup> 1 Rep. 104. 2 Lev. 60. Raym. 334.<sup>m</sup> Dalrymple of Feuds. 210.<sup>i</sup> 1 Rep. 98.<sup>n</sup> Gr. Coustum. Gloss. c. 25. pag. 40.<sup>k</sup> Co. Litt. 22.<sup>1</sup> For discussion of the Rule in Shelley's Case, see note 7, c. 11, *ante*.

*conquæstus*, and himself *conquæstor* or *conquisitor*;<sup>o</sup> signifying that he was the first of his family who acquired the crown of England, and from whom therefore all future claims by descent must be derived: though now, from our disuse of the feudal sense of the word, together with the reflection on his forcible method of acquisition, we are apt to annex the idea of *victory* to this name of *conquest* or *conquisition*: a title which, however just with regard to the *crown*, the conqueror never pretended with regard to the realm of England; nor, in fact, ever had.<sup>p</sup>

§ 326. Differences between descent and purchase.—The difference, in effect, between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor. For, when a man takes an estate by purchase, he takes it not *ut feudum*, *paternum* or *maternum* (as a fee paternal or maternal), which would descend only to the heirs by the father's or the mother's side: but he takes it *ut feudum antiquum* (as an ancient fee), as a feud of indefinite antiquity; whereby it becomes inheritable to his heirs general, first of the paternal, and then of the maternal line.<sup>q</sup> 2. An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will. For, if the ancestor by any deed, obligation, covenant, or the like, bindeth himself and his heirs, and he dieth; this deed, obligation, or covenant, shall be binding upon the heirs so far forth only as he had any estate of inheritance vested in him (or in some other in trust for him<sup>r</sup>) by descent [244] from that ancestor, sufficient to answer the charge;<sup>s</sup> whether he remains in possession, or hath aliened it before action brought;<sup>t</sup> which sufficient estate is in the law called *assets*; from the French word "*assez*," enough.<sup>u</sup> Therefore, if a man cove-

<sup>o</sup> Spelm. Gloss. 145.

<sup>p</sup> See Book I. c. 3.

<sup>q</sup> See pag. 236.

<sup>r</sup> Stat. 29 Car. II. c. 3 (Statute of Frauds, 1677).

<sup>s</sup> 1 P. Wms. 777.

<sup>t</sup> Stat. 3 & 4 W. & M. c. 14 (Fraudulent Devises, 1691).

<sup>u</sup> Finch. Law. 119.

nants, for himself and his heirs to keep my house in repair, I can then (and then only) compel his heir to perform this covenant, when he has an estate sufficient for this purpose, or *assets*, by descent from the covenantor: for though the covenant descends to the heir, whether he inherits any estate or no, it lies dormant, and is not compulsory, until he has assets by descent.<sup>v</sup>

§ 327. **Five modes of acquiring title by purchase.**—This is the legal signification of the word "*perquisitio*," or purchase; and in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture, 5. Alienation. Of all these in their order.

§ 328. **I. Escheat.**—Escheat, we may remember,<sup>w</sup> was one of the fruits and consequences of feudal tenure. The word itself is originally French or Norman,<sup>x</sup> in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure, by some unforeseen contingency: in which case the land naturally results back, by a kind of reversion, to the original grantor or lord of the fee.<sup>y</sup>

§ 329. **1. Requisites of escheat.**—Escheat, therefore, being a title frequently vested in the lord by inheritance, as being the fruit of a seigniorship to which he was entitled by descent (for which reason the lands escheated shall attend the seigniorship, and be inheritable by such only of his heirs as are capable of inheriting the other<sup>z</sup>), it may seem in such cases to fall more properly under the former general head of acquiring title to estates, viz., by descent (being vested in him by act of law, and not by his own act [245] or agreement), than under the present, by purchase. But it must be remembered that, in order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out

<sup>v</sup> Finch. Rep. 86.

<sup>w</sup> See Pag. 72.

<sup>x</sup> *Eschet* or *chet*, formed from the verb *eschoir* or *choir*, to happen.

<sup>y</sup> 1 Feud. 86. Co. Litt. 13.

<sup>z</sup> Co. Litt. 13.



a writ of *escheat*:<sup>a 2</sup> on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred.<sup>b</sup> It is therefore in some respect a title acquired by his own act, as well as by act of law.<sup>3</sup> Indeed, this may also be said

<sup>a</sup> Bro. Abr. tit. Escheat. 26.

<sup>b</sup> *Ibid.* tit. Acceptance. 25. Co. Litt. 268.

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<sup>2</sup> It is said in Digby, *Hist. of Real Prop.* (5th ed.), 425 n, that "this necessity for the lord to do some act on his part induced Blackstone to class escheat under title by purchase." On the other hand, it is said in 1 Stephen's Comm. (16th ed.), 301, that "Blackstone, somewhat unaccountably, treats escheat as a branch of purchase. At any rate since the passing of the Inheritance Act, 1833, this view can no longer be maintained."

<sup>3</sup> **Escheat, feudal and modern.**—The difficulty which has been found, not by Blackstone only, but by many later writers, in assigning escheat to a particular class of titles, arises from the fact that it is not, strictly speaking, a title at all. No new estate is given by it. The lord or king who takes possession by escheat on the termination of a fee simple is, or stands in place of, the person (feoffor) by whom that fee simple was first created; and he claims under his former title, and not under that of the escheat. He is in the same position, as to this, with the landlord who retakes his land when a tenant's term expires. "When there is no longer any tenant, the land returns by reason of tenure to the lord by whom, or by whose predecessors in title, the tenure was created." (*Attorney General of Ontario v. Mercer*, L. R. 8 App. Cas. 767, 772.) (Only the word "tenure" here is used in different senses in this short extract. If "subtenure" were the word used in the last line it would be clear.)

Escheat resembles a reversion; but the latter can only take place after an estate less than a fee simple, while escheat always follows the end of a fee simple, never of a less estate. It is produced by act of the law, and thus differs from all other cases of purchase; but it differs also from descent, because the lord is not seised, like the heir of the same estate which the ancestor had, but of one paramount to it. He comes in, not in the *per* but in the *post*.

It is this connection with tenure that requires the limitation of escheat to legal estates in land. The equitable estate of *cestui que use* or *cestui que trust* being only "collateral to the land" and not a tenement cannot escheat, as was correctly held by the equity judges in *Burgess v. Wheate*, 1 Eden, 177, against the dissent of Lord Mansfield, the head of the common-law courts. (See, also, *Sir George Sand's Case*, 2 Freem. 129; *Henchman v. Attorney General*, 3 Mylne & K. 485; *Taylor v. Hayzarth*, 14 Sim. 8; *Beale v. Symonds*, 16 Beav. 406.) But in 1884 the rule was changed by the Intestate Estates Act, 47 & 48 Vict., c. 71, section 4, extending the law of escheat to equitable estates in land, and to any estate, legal or equitable, in incorporeal heredita-

of descents themselves in which an entry or other seisin is required, in order to make a complete title: and therefore this distribution by our legal writers seems in this respect rather inaccurate: for, as escheats must follow the nature of the seigniorship to which they belong, they may vest by either purchase or descent, according as the seigniorship is vested. And, though Sir Edward Coke considers the lord by escheat as in some respects the assignee of the last tenant,<sup>c</sup> and therefore taking by purchase; yet, on the other hand, the lord is more frequently considered as being *ultimus hæres* (the last heir), and therefore taking by descent in a kind of caducary succession.

• 1 Inst. 215.

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ments. In America there are weighty opinions in favor of the same holding, without the aid of statute, upon the general change in the nature of equitable estates, and of the doctrine of escheat now to be mentioned.

At common law there was no such thing as escheat to the sovereign, state, or king, as such. When the king took an escheat, it was only as the lord of whom it was holden. But after the statute of *quia emptores* forbade the creation of new tenures by subjects it became in every century more difficult to determine who was the immediate lord of whom a fee was holden. And as all land was holden mediately or immediately of the king, the result was to give every escheat, not shown to belong to some mesne lord, to the king. In the older states of the Union there might also be tenures of mesne lords, especially where the statute of *quia emptores* was not held to be in force, as in New York and Pennsylvania, etc. There have been a few cases of such escheats in our books. But for the most part, the same presumption of holding directly of the state exists, as in England of the king: and in all the newer states where the federal government is actually the source of all titles, the right of escheat is uniformly held to be in the state where the land lies. Thus in England and the United States alike, the doctrine of escheat in its practical consequences comes to coincide with the doctrine of eminent domain, familiar in public law to all Christian nations, by which the state or nation is the ultimate owner of all individual property within it, and in particular is entitled to *bona vacantia*, or all goods and lands which by the death of the owner without heirs, or otherwise, are left without individual owners. Applying alike to all property, real or personal, legal or equitable, this is evidently destined to absorb the limited and technical doctrine of escheat, and the American statutes and decisions show that it has already begun to do so. For its effect in English law see an article in 4 L. Q. R. 318, July, 1888, on the Law of Escheat, by F. W. Hardman, esp. pp. 334-336, and note 6, c. 1, *ante*.—HAMMOND.

§ 330. 2. Principle of escheat. — The law of escheats is founded upon this single principle, that the blood of the person last seised in fee simple is, by some means or other, utterly extinct and gone: and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that when such blood is extinct, the inheritance itself must fail; the land must become what the feudal writers denominate *feudum apertum* (an open fee); and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

§ 331. 3. Failure of hereditary blood. — Escheats are frequently divided into those *propter defectum sanguinis* (through failure of issue) and those *propter delictum tenentis* (through the fault of the tenant): the one sort, if the tenant dies without heirs; the other, if his blood be attainted.<sup>d</sup> But both these species may well be comprehended [246] under the first denomination only; for he that is attainted suffers an extinction of his blood, as well as he that dies without relations. The inheritable quality is expunged in one instance, and expires in the other; or, as the doctrine of escheats is very fully expressed in Fleta,<sup>e</sup> “*dominus capitalis feodi loco hæredis habetur, quoties per defectum vel delictum extinguitur sanguis tenentis* (the chief lord of the fee is accounted heir whenever the blood of the tenant is extinct either by failure of issue or corruption).”

§ 332. a. Cases of failure of hereditary blood. — Escheats, therefore, arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several cases wherein hereditary blood may be deficient, than by any other method whatsoever.

<sup>d</sup> Co. Litt. 13. 92.

<sup>e</sup> l. 6. c. 1.

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<sup>4</sup> After considerable modifications by statute of the doctrine of attainder, the recent Statute 33 & 34 Vict., c. 23 (Forfeiture, 1870), has totally abolished forfeiture, and escheat (except when forfeiture is consequent upon outlawry), and provides instead for the appointment of an administrator to the property of the convict, and for the vesting of his property in such administrator during the continuance of his punishment.—DIGBY, Hist. Real Prop. (5th ed.), 426.

§ 333. (1) Tenant dying without any relations at all; (2) Tenant dying without relations representing ancestor from whom estate descended; (3) Tenant dying without relations of whole blood.—The first three cases, wherein inheritable blood is wanting, may be collected from the rules of descent laid down and explained in the preceding chapter, and therefore will need very little illustration or comment. First, when the tenant dies without any relations on the part of any of his ancestors: secondly, when he dies without any relations on the part of those ancestors from whom his estate descended: thirdly, when he dies without any relations of the whole blood. In two of these cases the blood of the first purchaser is certainly, in the other it is probably, at an end; and therefore in all of them the law directs that the land shall escheat to the lord of the fee: for the lord would be manifestly prejudiced, if, contrary to the inherent condition tacitly annexed to all feuds, any person should be suffered to succeed to the lands, who is not of the blood of the first feudatory, to whom for his personal merit the estate is supposed to have been granted.

§ 334. (4) Monsters.—A monster, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage: but, although it hath deformity in any part of its body, yet if it [247] hath human shape, it may be heir.<sup>f</sup> This is a very ancient rule in the law of England;<sup>g</sup> and its reason is too obvious, and too shocking, to bear a minute discussion. The Roman law agrees with our own

<sup>f</sup> Co. Litt. 7, 8.

<sup>g</sup> *Qui contra formam humani generis converso more procreantur, ut si mulier monstrosum vel prodigiosum enixa sit, inter liberos non computentur. Partus tamen, cui natura aliquantulum addiderit vel diminuerit, ut si sex vel tantum quatuor digitos habuerit, bene debet inter liberos connumerari: et, si membra sint inutilia aut tortuosa, non tamen est partus monstrosus.* (Those who are born with a form not human are not considered children; as when a woman by a perversion of nature brings forth something monstrous or prodigious. Nevertheless the offspring to which nature has only added, or from which withheld something, as if it should have six or only four fingers, ought to be reckoned among children; and though its limbs be useless or distorted, yet it is not a monstrous birth.) Bracton l. 1. c. 6. & l. 5. tr. 5. c. 30.

in excluding such births from successions: <sup>h</sup> yet accounts them, however, children in some respects, where the parents, or at least the father, could reap any advantage thereby; <sup>i</sup> (as the *jus trium liberorum* (the right of three children), and the like) esteeming them the misfortune, rather than the fault, of that parent. But our law will not admit a birth of this kind to be such an issue as shall entitle the husband to be tenant by the curtesy; <sup>k</sup> because it is not capable of inheriting. And therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.

§ 335. (5) Bastards.—Bastards are incapable of being heirs.<sup>5</sup> Bastards, by our law, are such children as are not born either in lawful wedlock, or within a competent time after its determination.<sup>1</sup> Such are held to be *nullius filii*, the sons of nobody: for the maxim of law is, *qui ex damnato coitu nascuntur, inter liberos non computantur* (those who are the offspring of an illicit connection are not reckoned as children).<sup>m</sup> Being thus the sons of nobody, they have no blood in them, at least no inheritable blood; consequently, none of the blood of the first purchaser;<sup>6</sup> and therefore, if there be no other claimant than such

<sup>h</sup> FF. 1. 5. 11.

<sup>i</sup> FF. 50. 16. 135. Paul. 4. sent. 9. § 63.

<sup>k</sup> Co. Litt. 29.

<sup>1</sup> See Book I. ch. 16.

<sup>m</sup> Co. Litt. 8.

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<sup>5</sup> In most states of the Union, illegitimate children inherit the mother's estate with the legitimate children, share and share alike. In a few states, they are heirs of the mother, and inherit real and personal property in default of lawful issue. In many states, they both inherit from the mother and represent her so as to inherit from her kin share and share alike with the legitimate children. But in many others, bastards do not *represent* the mother so as to claim any intestate estate from her kindred, either lineal or collateral. In several states bastards may inherit from their fathers. Stimson, Am. Stat. Law, § 3151; *Sanford v. Marsh*, 180 Mass. 210, 62 N. E. 268; *Ford v. Boone*, 32 Tex. Civ. App. 550, 75 S. W. 353; *Cox v. Rash*, 82 Ind. 519; *Cope v. Cope*, 137 U. S. 682, 34 L. Ed. 832, 11 Sup. Ct. Rep. 222.

<sup>6</sup> For the right of illegitimate children to inherit from or through mother, see note in Ann. Cas. 1914D, 577, to the case of *Barron v. Zimmerman*, 117 Md. 296, Ann. Cas. 1914D, 574, 83 Atl. 258.



illegitimate children, the land shall escheat to the lord.<sup>n</sup> The civil law differs from ours in this point, and allows a bastard to succeed to an inheritance, if after its birth the mother was married to the father;<sup>o</sup> <sup>7</sup> and also, if the father had no lawful wife or child, then, even if the concubine was never married to the father, yet she and her bastard son were admitted each to one-twelfth of the inheritance:<sup>p</sup> and a bastard was likewise [248] capable of succeeding to the whole of his mother's estate, although she was never married; the mother being sufficiently certain, though the father is not.<sup>q</sup> But our law, in favor of marriage, is much less indulgent to bastards.

§ 336. (a) Case of bastard *eignè* and *mulier puisnè*.—There is indeed one instance in which our law has shown them some little regard; and that is usually termed the case of *bastard eignè* (an elder son, born before the marriage of his parents) and *mulier puisnè* (a legitimate son, whose elder brother is illegitimate). This happens when a man has a bastard son, and afterwards marries the mother, and by her has a legitimate son, who in the language of the law is called a *mulier*, or, as Glanvill<sup>r</sup> expresses it in his Latin, *filius mulieratus*; the woman before marriage being *concubina* (a concubine), and afterwards *mulier* (wife).

<sup>n</sup> Finch. Law. 117.

<sup>q</sup> Cod. 6. 57. 5.

<sup>o</sup> Nov. 89. c. 8.

<sup>r</sup> l. 7. c. 1.

<sup>p</sup> *Ibid.* c. 12.

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7 Inheritance of a legitimated child.—This legitimation by subsequent marriage, as it is technically called, is now the law of Virginia and many other states, by statute.

It is also the law of Scotland: and is there limited, as by the canonists, to cases where no marriage of either with other persons intervened. (7 Clark & F. 842.) Whether such a limitation or others familiar to students of the civil and canon laws would be attached by interpretation in this country, has not yet been decided.

The law of England still adheres so firmly to the *nolumus* of the barons, that even a child born in Scotland, or America, as a bastard, and so legitimated in the country of his birth, will not be regarded as lawful heir of lands in England; although it is the general rule that legitimacy depends on the law of the domicile. (*Birtwhistle v. Vardell*, 5 Barn. & C. 238.) By which rule, a child so legitimated by the law of Scotland cannot inherit there if his domicile be in England. (6 Bligh, 468, 2 Ves. & B. 127.)—HAMMOND.

Now, here the eldest son is bastard, or *bastard eignè*; and the younger son is legitimate, or *mulier puisnè*. If, then, the father dies, and the *bastard eignè* enters upon his land, and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue; in this case the *mulier puisnè*, and all other heirs (though minors, feme coverts, or under any incapacity whatsoever), are totally barred of their right.<sup>s</sup> And this, 1. As a punishment on the *mulier* for his negligence in not entering during the *bastard's* life, and evicting him. 2. Because the law will not suffer a man to be bastardized after his death, who entered as heir and died seised, and so passed for legitimate in his lifetime. 3. Because the canon law (following the civil) did allow such *bastard eignè* to be legitimate, on the subsequent marriage of his mother: and therefore the laws of England (though they would not admit either the civil or canon law to rule the inheritances of this kingdom, yet) paid such a regard to a person thus peculiarly circumstanced, that, after the land had descended to his issue, they would not unravel the matter again, and suffer his estate to be shaken. But this indulgence was shown to no other kind of bastard; for, if the mother was never married to the father, such bastard could have no colorable title at all.<sup>t</sup><sup>8</sup>

§ 337. (b) Bastards have no collateral kindred.—[249] As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. For, as all collateral kindred consists in being derived from the same common ancestor, and as a bastard has no legal ancestors, he can have no collateral kindred; and, consequently, can have no legal heirs, but such as claim by a lineal descent from himself. And therefore if a bastard purchases land, and dies seised thereof without issue, and intestate, the land shall escheat to the lord of the fee.<sup>u</sup>

<sup>s</sup> Litt. § 399. Co. Litt. 244.

<sup>u</sup> Bract. l. 2. c. 7. Co. Litt. 244.

<sup>t</sup> Litt. § 400.

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<sup>8</sup> It is said that probably with the abolition of seisin as the basis of inheritance by the Inheritance Act, 1833, this whole doctrine of *bastard eignè* as set forth by Blackstone, though never formally repealed, has ceased to be applicable. 1 Stephen's Comm. (16th ed.), 330.

§ 338. (6) **Aliens.**—Aliens also are incapable of taking by descent, or inheriting: <sup>w</sup> for they are not allowed to have any inheritable blood in them; rather, indeed, upon a principle of national or civil policy, than upon reasons strictly feudal. Though, if lands had been suffered to fall into their hands who owe no allegiance to the crown of England, the design of introducing our feuds, the defense of the kingdom, would have been defeated. Wherefore if a man leaves no other relations but aliens, his land shall escheat to the lord.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase,<sup>x</sup> they are under still greater disabilities. And, as they can neither hold by purchase nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden,<sup>y</sup> because they have not in them any inheritable blood.

§ 339. (a) **Denizens.**—And further, if an alien be made a denizen by the king's letters patent, and then purchases lands (which the law allows such a one to do), his son, born before his denization, shall not (by the common law) inherit those lands; but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son; but by denization it acquires [250] an hereditary quality, which will be transmitted to his subsequent posterity. Yet, if he had been naturalized by act of parliament, such eldest son might then have inherited; for that cancels all defects, and is allowed to have a retrospective energy, which simple denization has not.<sup>z</sup>

§ 340. (b) **Direct descent between brothers.**—Sir Edward Coke<sup>a</sup> also holds that if an alien cometh into England, and there hath issue two sons, who are thereby natural-born subjects; and one of them purchases land, and dies; yet neither of these brethren can be heir to the other. For the *commune vinculum*, or common

<sup>w</sup> Co. Litt. 8.

<sup>z</sup> Co. Litt. 129.

<sup>x</sup> *Ibid.* 2.

<sup>a</sup> 1 Inst. 8.

<sup>y</sup> *Ibid.* 1 Lev. 59.

stock of their consanguinity, is the father; and as he had no inheritable blood in him, he could communicate none to his sons; and, when the sons can by no possibility be heirs to the father, the one of them shall not be heir to the other. And this opinion of his seems founded upon solid principles of the ancient law; not only from the rule before cited,<sup>b</sup> that *cestuy, que doit inheriter al pere, doit inheriter al fits* (he who should inherit from the father should inherit from the son); but also because we have seen that the only feudal foundation, upon which newly purchased land can possibly descend to a brother, is the supposition and fiction of law, that it descended from some one of his ancestors: but in this case as the immediate ancestor was an alien, from whom it could by no possibility descend, this should destroy the supposition, and impede the descent, and the land should be inherited *ut feudum stricte novum* (as a fee strictly new); that is, by none but the lineal descendants of the purchasing brother; and on failure of them, should escheat to the lord of the fee. But this opinion hath been since overruled:<sup>c</sup> and it is now held for law, that the sons of an alien, born here, may inherit to each other. And reasonably enough upon the whole; for, as (in common purchases) the whole of the supposed descent from indefinite ancestors is but fictitious, the law may as well suppose the requisite ancestor as suppose the requisite descent.

§ 341. (c) **Descent through an alien.**—<sup>[251]</sup> It is also enacted, by the statute 11 & 12 W. III, c. 6 (Aliens, 1700), that all persons, being natural-born subjects of the king, may inherit and make their titles by descent from any of their ancestors, lineal or collateral; although their father, or mother, or other ancestor, by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance. But inconveniences were afterwards apprehended, in case persons should thereby gain a future capacity to inherit, who did not exist at the death of the person last seised. As, if Francis, the elder brother of John Stiles, be an alien, and Oliver, the younger, be a natural-born subject, upon John's death without issue his lands will descend to Oliver, the younger brother: now, if afterwards Francis has a child born in

<sup>b</sup> See pag. 223 and 239.

<sup>c</sup> 1 Ventr. 413. 1 Lev. 59. 1 Sid. 193.

England, it was feared that, under the statute of King William, this new-born child might defeat the estate of his uncle, Oliver. Wherefore it is provided, by the statute 25 Geo. II, c. 39 (Title by Descent, 1751), that no right of inheritance shall accrue by virtue of the former statute to any persons whatsoever, unless they are in being and capable to take as heirs at the death of the person last seised:—with an exception, however, to the case, where lands shall descend to the daughter of an alien; which descent shall be divested in favor of an after-born brother, or the inheritance shall be divided with an after-born sister or sisters, according to the usual rule<sup>d</sup> of descents by the common law.<sup>9</sup>

§ 342. (7) **Attainder.**—By attainder, also, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer inheritable.<sup>10</sup>

Great care must be taken to distinguish between forfeiture of lands to the king, and this species of escheat to the lord; which, by reason of their similitude in some circumstances, and because the crown is very frequently the immediate lord of the fee, and therefore entitled to both, have been often confounded together. Forfeiture of lands, and of whatever else the offender possessed, was the doctrine of the old Saxon law,<sup>e</sup> as a part of punishment for the offense; [252] and does not at all relate to the feudal system, nor is the consequence of any seigniori or lordship para-

<sup>d</sup> See pag. 208 and 214.

<sup>e</sup> LL. Ælfred. c. 4. LL. Canut. c. 54.

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<sup>9</sup> By the Naturalization Act, 1870, it is now provided, with regard to all titles accruing after May 14th, 1870, that real property of every description may be taken, acquired, held, and disposed of by an alien, in the same manner in all respects as by a natural-born British subject, and that a title thereto may be devised through, from, or in succession to an alien, as if he had been a natural-born British subject.

<sup>10</sup> The constitution of the United States (art. III, § 3), declares that “no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted.” An act of Congress of July 17, 1862, provided for the seizure and condemnation of enemies’ estates. This act was held as not in conflict with the above section, on the ground that the forfeiture was only during the life of the offender. *Bigelow v. Forrest*, 9 Wall. (U. S.) 339, 19 L. Ed. 696; *Miller v. United States*, 11 Wall. (U. S.) 268, 20 L. Ed. 135; *Day v. Micou*, 18 Wall. (U. S.) 156, 21 L. Ed. 860.



mount:<sup>f</sup> but, being a prerogative vested in the crown, was neither superseded nor diminished by the introduction of the Norman tenures; a fruit and consequence of which, escheat must undoubtedly be reckoned. Escheat therefore operates in subordination to this more ancient and superior law of forfeiture.

§ 343. (a) **Doctrine of escheat upon attainder.**—The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised<sup>g</sup>), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit* (whilst he shall have conducted himself well). Upon the thorough demonstration of which guilt, by legal attainder, the feudal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feudal escheat was brought into England at the Conquest; and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revert in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage; in case of treason, forever; in case of other felony, for only a year and a day, after which time it goes to the lord in a regular course of escheat,<sup>h</sup> as it would have done to the heir of the felon in case the feudal tenures had never been introduced. And that this is the true operation and genuine history of escheats will most evidently appear from this incident to gavelkind lands (which seems to be the old Saxon tenure), that they are in no case subject to escheat for felony, though they are liable to forfeiture for treason.<sup>i</sup>

[253] As a consequence of this doctrine of escheat, all lands of inheritance immediately revesting in the lord, the wife of the felon

<sup>f</sup> 2 Inst. 64. Salk. 85.

<sup>g</sup> 3 Inst. 15. Stat. 25 Edw. III. c. 2. § 12 (Treason, 1351).

<sup>h</sup> 2 Inst. 36.

<sup>i</sup> Somner. 53. Wright, Ten. 118.

was liable to lose her dower, till the statute 1 Edw. VI, c. 12 (Dower, 1547), enacted, that albeit any person be attainted of misprision of treason, murder, or felony, yet his wife shall enjoy her dower. But she has not this indulgence where the ancient law of forfeiture operates, for it is expressly provided by the statute 5 & 6 Edw. VI, c. 11 (Treason, 1551), that the wife of one attaint of high treason shall not be endowed at all.

§ 344. (b) **Corruption of blood.**—Hitherto we have only spoken of estates vested in the offender, at the time of his offense or attainer. And here the law of forfeiture stops; but the law of escheat pursues the matter still further. For, the blood of the tenant being utterly corrupted and extinguished, it follows, not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting anything for the future. This may further illustrate the distinction between forfeiture and escheat. If, therefore, a father be seised in fee, and the son commits treason and is attainted, and then the father dies: here the land shall escheat to the lord; because the son, by the corruption of his blood, is incapable to be heir, and there can be no other heir during his life: but nothing shall be forfeited to the king, for the son never had any interest in the lands to forfeit.<sup>k</sup> In this case the escheat operates, and not the forfeiture; but in the following instance the forfeiture works, and not the escheat. As where a new felony is created by act of parliament, and it is provided (as is frequently the case) that it shall not extend to corruption of blood: here the lands of the felon shall not escheat to the lord, but yet the profits of them shall be forfeited to the king so long as the offender lives.<sup>1</sup>

There is yet a further consequence of the corruption and extinction of hereditary blood, which is this: that the person [254] attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity, in all cases where they are obliged to derive their title through him from any remoter ancestor. The channel, which conveyed the hereditary blood from his ancestors to him, is not only exhausted for the

<sup>k</sup> Co. Litt. 13.

<sup>1</sup> 3 Inst. 47.

present, but totally dammed up and rendered impervious for the future. This is a refinement upon the ancient law of feuds, which allowed that the grandson might be heir to his grandfather, though the son in the intermediate generation was guilty of felony.<sup>m</sup> But, by the law of England, a man's blood is so universally corrupted by attainder, that his sons can neither inherit to him nor to any other ancestor;<sup>n</sup> at least on the part of their attainted father.

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender; but cannot abolish the private right, which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned: but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If, therefore, a man hath a son, and is attainted, and afterwards pardoned by the king; this son can never inherit to his father, or father's ancestors; because his paternal blood being once thoroughly corrupted by his father's attainder, must continue so: but if the son had been born after the pardon, he might inherit; because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children.<sup>o</sup>

Herein there is, however, a difference between aliens and persons attainted. Of aliens, who could never by any possibility be heirs, the law takes no notice: and therefore we have [255] seen that an alien elder brother shall not impede the descent to a natural-born younger brother. But in attainders it is otherwise: for if a man hath issue a son, and is attainted, and afterwards pardoned, and then hath issue a second son, and dies; here the corruption of blood is not removed from the eldest, and therefore he cannot be heir: neither can the youngest be heir, for he hath an elder brother living, of whom the law takes notice, as he once had a possibility of being heir; and therefore the younger brother shall not inherit, but the land shall escheat to the lord: though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no

<sup>m</sup> Van Leeuwen in 2 Feud. 31.

<sup>o</sup> *Ibid.* 392.

<sup>n</sup> Co. Litt. 351.

corruption of blood.<sup>p</sup> So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son: for the issue of the elder, which had once a possibility to inherit, shall impede the descent to the younger, and the land shall escheat to the lord.<sup>q</sup> Sir Edward Coke in this case allows,<sup>r</sup> that if the ancestor be attainted, his sons born before the attainder may be heirs to each other, and distinguishes it from the case of the sons of an alien, because in this case the blood was inheritable when imparted to them from the father: but he makes a doubt (upon the same principles, which are now overruled<sup>s</sup>) whether sons, born after the attainder, can inherit to each other, for they never had any inheritable blood in them.

Upon the whole it appears that a person attainted is neither allowed to retain his former estate, nor to inherit any future one, nor to transmit any inheritance to his issue, either immediately from himself, or mediately through himself from any remoter ancestor; for his inheritable blood, which is necessary either to hold, to take, or to transmit any feudal property, is blotted out, corrupted, and extinguished forever: the consequence of which is, that estates, thus impeded in their descent, result back and escheat to the lord.

[256] This corruption of blood, thus arising from feudal principles, but perhaps extended further than even those principles will warrant, has been long looked upon as a peculiar hardship: because the oppressive parts of the feudal tenures being now in general abolished, it seems unreasonable to reserve one of their most inequitable consequences; namely, that the children should not only be reduced to present poverty (which, however severe, is sufficiently justified upon reasons of public policy), but also be laid under future difficulties of inheritance, on account of the guilt of their ancestors. And therefore in most (if not all) of the new felonies created by parliament since the reign of Henry the Eighth, it is declared that they shall not extend to any corruption of blood: and by the statute 7 Ann., c. 21 (Treason, 1708), (the operation

<sup>p</sup> Co. Litt. 8.

<sup>q</sup> Dyer. 48.

<sup>r</sup> Co. Litt. 8.

<sup>s</sup> 1 Hal. P. C. 357.

of which is postponed by the statute 17 Geo. II, c. 39, 1743), it is enacted, that, after the death of the late pretender, and his sons no attainder for treason shall extend to the disinheriting any heir: nor the prejudice of any person, other than the offender himself: which provisions have indeed carried the remedy farther than was required by the hardship above complained of; which is only the future obstruction of descents, where the pedigree happens to be deduced through the blood of an attainted ancestor.<sup>11</sup>

§ 345. 4. Exception to rule of escheat: corporations.—Before I conclude this head of escheat, I must mention one singular instance in which lands held in fee simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation; for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat; which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told,<sup>t</sup> doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved, the donor or grantor shall re-enter; for the cause of the gift or grant [257] faileth.<sup>12</sup> This

<sup>t</sup> Co. Litt. 13.

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<sup>11</sup> Corruption of blood abolished.—These, however, were all practically superseded by the Forfeiture Act, 1870, which provides that no confession, verdict, inquest, conviction, or judgment for any treason or felony or *felo de se*, after the 4th day of July, 1870, is to cause any attainder or corruption of blood, or any forfeiture or escheat. (The act preserves untouched the law of forfeiture consequent on *outlawry*; but inasmuch as *outlawry* in all civil proceedings has been abolished by the Civil Procedure Acts Repeal Act, 1879, the exception of *outlawry* can now only refer to criminal proceedings.) The act provides that the property of a convict shall vest in an administrator to be appointed by the crown. But in the case of a trustee or mortgagee becoming a convict within the meaning of the act, it has now been provided by the Trustee Act, 1893, following older legislation, that the legal estate shall remain in such convict, or survive to his cotrustee or cotrustees, or descend to his representative, as if he had not become a convict.—STEPHEN, 1 Comm. (16th ed.), 334.

On *outlawry*, see article in 18 Law Quart. Rev. 297, "Is *Outlawry* Obsolete?"

<sup>12</sup> Estate of a corporation.—The long discussions whether this is a reversion or a possibility of reverter—or even an escheat, as was said by Vavissour, J.,



is indeed founded upon the self-same principle as the law of escheat: the heirs of the donor being only substituted instead of the chief lord of the fee: which was formerly very frequently the case in subinfeudations, or alienations of lands by a vassal to be holden as of himself; till that practice was restrained by the statute of *quia emptores*, 18 Edw. I, st. 1 (1290), to which this very singular instance still in some degree remains an exception.

§ 346. 5. Question of nonjuring papists.—There is one more incapacity of taking by descent, which, not being productive of any

and Danby, J., in Y. B. Trin. 5 Hen. VII, fol. 37—might have been ended if recent writers had noticed Blackstone's remark, that "this very singular instance remains an exception to the statute of *quia emptores*": by which statute the distinction between escheat and reversion first became important. The donor's title depends on the fact that the estate granted by him has expired: and as neither donor nor donee now holds of the chief lord any more than one holds of the other, the question is meaningless. (See Viner, Escheat A. 2, 3, 4; vol. 10, p. 139; Co. Litt. 13 b, and Hargrave's note 2; 2 Dr. & Stud., c. 35; Challis, 31, 174.)

The practical importance of the question is in its bearing on Blackstone's and Coke's doctrine of a reversion to the donor: when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every grant for life. (1 Comm. 484.)

Chitty confirms this by 9 Mod. 326, and says "the lands will revert to the donor and not escheat," making the modern distinction between the two. So they would have done, as a life estate, after the statute of *quia emptores*. But as a freehold or fee they would not have returned to the donor if granted over to another: for which he cites cases in Bacon's Abr., Corporations, J., and 1 Roll. 816, 1, 10, 20. And if the corporation takes a fee (and it may certainly convey one to another) there seems no reason in the present law why the land should revert to the donor, since it is no longer held of him.

Upon the view taken by Blackstone it would be a more important question, practically, whether a corporation, the existence of which is limited to twenty, fifty, or any determinate number of years (as in the case of most American corporations under the general incorporation acts) can take a fee simple, or freehold estate of any kind. That it can sell again and give to an individual grantee such a fee simple, may be taken for granted, provided it has a freehold of any kind. This is "having a fee simple for the purpose of alienation, but only a determinable fee for the purpose of enjoyment," as Mr. Preston said long ago. (1 Abstracts of Title, 272.) But can its estate be even a *determinable* fee, when the life of the owner is limited to a term? Could the fact that the corporation may be renewed for any number of such terms, one after another, make it a fee, any more than the right of indefinite renewal in a lease?—HAMMOND.

escheat, is not properly reducible to this head, and yet must not be passed over in silence. It is enacted by the statute 11 & 12 Will. III, c. 4 (1700), that every papist who shall not abjure the errors of his religion by taking the oaths to the government, and making the declaration against transubstantiation, within six months after he has attained the age of eighteen years, shall be incapable of inheriting, or taking, by descent as well as purchase, any real estates whatsoever; and his next of kin being a Protestant, shall hold them to his own use till such time as he complies with the terms imposed by the act. This incapacity is merely personal; it affects himself only, and does not destroy the inheritable quality of his blood, so as to impede the descent to others of his kindred. In like manner as, even in the times of popery, one who entered into religion and became a monk professed was incapable of inheriting lands, both in our own<sup>u</sup> and the feudal law; *eo quod desiit esse miles seculi qui factus est miles Christi; nec beneficium pertinet ad eum qui non debet gerere officium* (he who becomes a soldier of Christ hath ceased to be a soldier of the world, nor is he entitled to any reward who acknowledges no duty).<sup>w</sup> But yet he was accounted only *civiliter mortuus* (dead in law); he did not impede the descent to others, but the next heir was entitled to his or his ancestor's estate.<sup>13</sup>

These are the several deficiencies of hereditary blood, recognized by the law of England; which, so often as they happen, occasion lands to escheat to the original proprietary or lord.

<sup>u</sup> Co. Litt. 132.

<sup>w</sup> 2 Feud. 21.

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<sup>13</sup> **Abolition of laws against Roman Catholics and Jews.**—In 1832 Roman Catholics were placed on a level with Protestant dissenters in respect of their schools, churches and charitable institutions, and also in respect of the property held in trust for such purposes. In 1846 the same legal status was accorded to Jewish endowments; and partly in that year, partly in 1844, a clean sweep was made of all the remaining acts directed against Roman Catholics, which the Relief Act of 1829 had left in existence, perhaps from inadvertence, owing to their being practically obsolete.—SIR R. KNYVET WILSON, *Hist. of Mod. Eng. Law*, 259.

## OF TITLE BY OCCUPANCY.

§ 347. II. Occupancy.—Occupancy is the taking possession of those things which before belonged to nobody.<sup>1</sup> This, as we have seen,<sup>a</sup> is the true ground and foundation of all property, or of holding those things in severalty, which by the law of nature, unqualified by that of society, were common to all mankind. But, when once it was agreed that everything capable of ownership

<sup>a</sup> See pag. 3 & 8.

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1 Original occupation obsolete in England.—Original occupation of land is not now (as to the old law of occupancy in an estate *pur auter vie*, see Co. Litt. 41 b, Blackst., ii, 258) practically possible in England. One can enter on land either under a lawful title to possess it, or in some public or particular right, such as the use of a highway or exercise of an easement, which is consistent with the rightful possession, or under the authority or license, express or implied, of the person entitled to possess, or by authority of law. There is no other kind of lawful entry, and whoever enters otherwise is a trespasser. Legal theory has nothing to do with the fact that a great deal of trespassing is tolerated by reasonable owners and occupiers as being substantially harmless, or with the difficulty that may sometimes be found in drawing the line between such toleration and a tacit but real license. We shall have something to say hereafter of the relation of seisin to possession. For the present it is enough to say that (subject to one exceptional state of things to be mentioned) the whole soil of England is in law possessed by occupying owners or other occupiers for various estates and interests, or by the crown if there is no estate of freehold or possessory interest in any subject. Even the unauthorized appropriation of new foreshore created by a permanent receding of the low-water mark at any part of the coast would in modern law be a trespass against the crown.

The exceptional case above indicated is when the freehold is in abeyance (see Challis on Real Property, p. 78. It should seem that section 30 of the Conveyancing Act, 1881, has *per incuriam* introduced a new occasion of abeyance, viz., when a sole trustee dies intestate. See per Pearson, J., Pilling's Trust, [1884] 26 Ch. D., at p. 433), and no tenant in possession. It seems that a person entering without title during such abeyance would acquire a wrongful possession without disseising or dispossessing anyone. He would not even infringe any existing right to possession. And it seems that he could not be made liable in an action founded on the actual possession as distinct from the title of the plaintiff, such as trespass *qu. cl. fr.*—POLLOCK & WRIGHT, Possession in the Common Law, p. 45.

should have an owner, natural reason suggested, that he who could first declare his intention of appropriating anything to his own use, and, in consequence of such intention, actually took it into possession, should thereby gain the absolute property of it; according to that rule of the law of nations, recognized by the laws of Rome,<sup>b</sup> *quod nullius est, id ratione naturali occupanti conceditur* (that which belongs to no one, is by natural reason granted to the occupant thereof).<sup>2</sup>

<sup>b</sup> Ff. 41. 1. 3.

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**2 Title by occupancy, prescription, and limitation.**—Title by occupancy, title by prescription, and title by limitation are treated as distinct topics in all the books. But I see no reason why all three may not be considered as different applications of the same principle. That principle is, that quiet possession shall not only be protected by the state against violence, but that after the lapse of a certain time, this protection shall become absolute, and no inquiry be permitted with regard to its origin.

It is true that occupancy as a source of title in natural law assumes that the property has no individual owner, and that the occupant, therefore, acquires a title which is valid from the moment of taking possession; while prescription, on the other hand, assumes that there is a superior right in someone else, and only recognizes a title after the lapse of a certain time. But this distinction does not go to the essence of the right.

In an established state it can hardly be certain of any piece of property that there are not outlying dormant titles, and even if there are not, the state itself must be regarded as the owner of all vacant land within its limits.

Consequently the question in all cases resolves itself into this: to what extent will the state protect the mere possession of land, not based on any derivative title, and on what terms will this possession become absolute and conclusive?

Now, if we say that the state will protect a peaceably acquired possession in all cases, until a superior title is shown, and that after a certain period of limitation it will refuse to allow any such superior title to be shown, we give a rule that applies equally to occupation, prescription, and limitation. All the other distinctions that can be stated between them refer rather to the evidence of title and the effect of such evidence, than to the title itself.

In all these cases the title is original and not derivative. The fact that there is another and conflicting title is purely accidental, and has nothing to do with the reasons for which the title given by the state vests.

It is true that prescription at common law was supposed to rest on the fiction of a lost grant. But this was a mere fiction, and may now be entirely dispensed with, and the true reason of the law recognized, as it is in the analogous case of the statute of limitations to debts.

“Formerly it was thought that the statute of limitations was designed to raise a presumption of payment or adjustment from the lapse of time, but the

§ 348. 1. **Occupancy of estate per auter vie.**—This right of occupancy, so far as it concerns real property (for of personal chattels I am not in this place to speak), hath been confined by the laws of England within a very narrow compass; and was extended only to a single instance: namely, where a man was tenant *per auter vie*, or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie*, or him by whose life it was holden: in this case he, that could first enter on the land, might lawfully retain the possession so long as *cestuy que vie* lived, by right of occupancy.<sup>c</sup>

<sup>c</sup> Co. Litt. 41.

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better view is now the prevailing one, that it is a statute of repose, and intended to afford security against stale demands when the circumstances would be unfavorable to just examination and decision." (Per Graves, J., in *Jenny v. Perkins*, 17 Mich. 28, 33, 1868.)

"The gradual change of opinion here noticed has been attended by a corresponding one in the application of the statute, and in the administration of those principles of equity which have the same foundation. The policy of the statute as now considered so harmonizes with the kindred doctrine of the court of equity, that in many cases they seem to be nearly blended." Upon the general subject of title by prescription, limitation, or possession, see 3 Washburn, c. 2, §§ 3, 7; 2 Hilliard, c. 75, 76; 3 Kent, pp. \*441-443; Wharton on Conv. Trac., tit. 4, c. 3; 2 Smith's Leading Cases, \*466, *Nepean v. Doe*; Taylor v. Horde.—HAMMOND.

**Pre-emption and homestead rights.**—Under this head seems to be the proper place to speak of those interests in the *public lands* which are acquired by actual settlers, viz., pre-emption and homestead rights (not to be confounded with homestead rights under state law).

I do not see why these are not perfectly legitimate examples of the "taking possession of those things which formerly belonged to nobody." (2 Blackst. 258.) It is true that in most cases occupancy alone does not vest a complete title. It is necessary either that a certain price should be paid, or certain conditions of residence, etc., fulfilled before the settler's title becomes a fee simple. But he has some rights recognized and protected by law, immediately on taking possession; and these rights cannot well be traced to any source but occupancy.

It is not inconsistent with this that such rights are recognized by the law, only when they arise by virtue of some express statute. This is only equivalent to saying that the government, which is the entire owner of all the public lands, will not recognize individual occupancy except in cases where the proper per-



§ 349. a. **Common and special occupant.**—<sup>[259]</sup> This seems to have been recurring to first principles, and calling in the law of nature to ascertain the property of the land, when left without a legal owner. For it did not revert to the grantor, though formerly<sup>cc</sup> held so to do; for he had parted with all his interest, so long as *cestuy que vie* lived: it did not escheat to the lord of the fee; for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it; much less of so minute a remnant as this; it did not belong to the grantee; for he was dead: it did not descend to his heirs; for there were no words of inheritance in the grant: nor could it vest in his executors; for no executors could succeed to a freehold. Belonging, therefore, to

<sup>cc</sup> Bract. 1. 2. c. 9. l. 4. tr. 3. c. 9. § 4. Flet. 1. 3. c. 12. § 6. l. 5. c. 5. § 15.

mission has been given. The statute does not create a right of occupancy: it only regulates it. But the rule that no pre-emption right exists, unless given by some special statutory enactment, is well settled. (*Perrin v. Griffith*, 13 Iowa, 151; *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668.)

A much more difficult and important question is as to the nature of the estate thus acquired, prior to the completion of the title. What is a claim, personal or real estate, a chattel interest or freehold? The decisions on this point are conflicting. In Iowa it was expressly decided that it is not an inheritable estate. *Bowers v. Keesecker*, 14 Iowa, 301, followed in *Corbett v. Berryhill*, 29 Iowa, 157, and overruling *Davis v. O'Ferrall*, 4 G. Greene (Iowa), 358, so far as the same held that a widow was entitled to dower in such a claim, as real estate. The opinion in *B. v. K.*, claims to be supported by *Davenport v. Farrar*, 1 Scam. (2 Ill.) 315; *Harrington v. Sharp*, 1 G. Greene (Iowa), 131, 48 Am. Dec. 365; *Delaunay v. Burnett*, 4 Gilm. (9 Ill.) 454; *Brown v. Throckmorton*, 11 Ill. 529; *Clark v. Shultz*, 4 Mo. 235. *Stewart v. Chadwick*, 8 Iowa, 463, discusses the same question, and seems to decide the same way, though some of the reasoning (see p. 467) is very ambiguous.

But in Illinois, *Lester v. White's Heirs*, 44 Ill. 464, 1867, is express, that "this right is not a mere chattel interest. The pre-emption laws grant to the pre-emptor an estate in land upon conditions which become[s] absolute upon the performance of those conditions. (*Jackson v. Wilcox*, 1 Scam. (2 Ill.) 344; *Isaacs v. Steel*, 3 Scam. (4 Ill.) 97; *Bruner v. Manlove*, 3 Scam. (4 Ill.) 339, 36 Am. Dec. 551.) It has been said by this court in subsequent cases that the interest acquired by a pre-emption right is not an estate, within any definition known to the common law. It is not an interest in the legal title, but merely a right of occupancy for the time being, with the privilege of purchasing at some future period, at a stipulated price. Such interests, however, are regarded by the courts of this state as property which may pass by deed

nobody, like the *hæreditas jacens* (inheritance not yet vested) of the Romans, the law left it open to be seized and appropriated by the first person that could enter upon it, during the life of *cestuy que vie*, under the name of an occupant. But there was no right of occupancy allowed, where the king had the reversion of the lands; for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred: against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi* (time runs not against the king).<sup>d</sup> And, even in the case of a subject, had the estate *pur antier vie*, being granted to a man and his heirs during the life of *cestuy que*

<sup>d</sup> Co. Litt. 41.

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or other transfer (*Delaunay v. Burnett*, 4 Gilm. (9 Ill.) 454; *May v. Symms*, 20 Ill. 95), and is liable to be taken and sold under execution, and of passing to an assignee under a decree of bankruptcy. (*Turney v. Saunders*, 4 Scam. (5 Ill.) 527; *French v. Carr*, 2 Gilm. (7 Ill.) 664.) The interest in the land occupied by the pre-emption is such an interest as descends to the heir at law, and does not go to the executor." (*Lester v. White's Heirs*, 44 Ill. 466, 467.) *Phelps v. Kellogg*, 15 Ill. 131, held that pre-emption gave no title to the land, and yet recognizes the pre-emption right as the subject of a sale. *Thredgill v. Pintard*, 12 How. 24, 13 L. Ed. 877, is an authority on the latter point.

In the recent case of *Frisbie v. Whitney*, 9 Wall. 187, 19 L. Ed. 668, and 4 West. Jur. 69, 1870, the supreme court of the United States decides that while occupation and improvement on the public lands with a view to pre-emption do not confer a vested right in the land so occupied [against the United States is clearly the meaning], they do confer a preference over others in the purchase of such lands by the *bona fide* settler, which will enable him to perfect his possession against other individuals, and which the land officers are bound to respect. This inchoate right may be protected by the courts against the claims of other persons who have not an equal or superior right, though it is not valid against the United States.

But this limitation or denial of right against the United States is consistent with good right against all other individuals, which may as well be of the nature of a freehold as a chattel. For analogies in this respect, see the case of possession of crown lands, *Harper v. Charlesworth*, 4 Barn. & C. 474.

The true classification of a claim seems to be among equitable estates, not legal, and this at once disposes of most of the arguments by which it is denied to be a fee. Then the question recurs, As an equitable estate, what would be its nature and place in the system? and to answer it, we need only ask what would be the estate of such a vendee in possession under the offer of a private

*vie*, there the heir might, and still may, enter and hold possession, and is called in law a *special occupant*; as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *hereditas jacens*, during the residue of the estate granted: though some have thought him so called with no very great propriety; \* and that such estate is rather a descendible freehold.<sup>3</sup>

§ 350. b. Common occupancy abolished; special occupancy devisable.—But the title of common occupancy is now reduced almost to nothing by two statutes: the one, 29 Car. II, c. 3. (Statute of Frauds, 1677), which enacts (according to the ancient rule of law<sup>f</sup>) that where there is no special occupant, in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall [260] go to the executors or administrators and be assets in their hands for payment of debts: the other that of 14 Geo. II, c. 20 (Common Recoveries, 1740), which enacts that the surplus of such estate *pur auter vie*, after payment of debts, shall go in a course of distribution like a chattel interest.

By these two statutes the title of *common* occupancy is utterly extinct and abolished: though that of *special* occupancy by the

\* Vaugh. 201.

<sup>f</sup> Bract. *Ibid.* Flet. *Ibid.*

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owner. Plainly that which he anticipates having at law when the transaction is complete—a fee. Properly speaking, therefore, a pre-emption claim should be treated as an equitable fee conditional.

And this seems to be Washburn's view when he says: "It constitutes an equity in favor of the occupant, located upon, and identified and attached to the particular quarter section occupied and cultivated by the claimant . . . in a court of equity, the person who has first appropriated the land has the best title."

Hunt v. Wickliffe, 2 Pet. (U. S.) 201, 7 L. Ed. 397 (by Marshall, C. J.), holds expressly that an entry in the name of "heirs" is good, i. e., that the claim passes to heirs and that it is an equitable title, though no point was made on the latter. That a pre-emption right descends to heirs was expressly held in Johnson v. Collins, 12 Ala. 322, cited 3 Washburn, 183.—HAMMOND.

<sup>3</sup> By the Land Transfer Act, 1897, it is presumed that estates *pur autre vie* will, even though there be a special occupant, pass, in the first instance, to the personal representatives of the tenant on his decease. 1 Stephen's Comm. (16th ed.), 337.

heir at law continues to this day; <sup>4</sup> such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant, specially marked out and appointed by the original grant. But, as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like<sup>g</sup> (because, with respect to them, there could be no actual entry made, or corporal seisin had; and therefore by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined), so now, I apprehend, notwithstanding these statutes, such grant would be determined likewise; and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution. For these statutes must not be construed so as to create any new estate, or keep that alive which by the common law was determined, and thereby to defer the grantor's reversion; but merely to dispose of an interest in being, to which by law there was no owner, and which, therefore, was left open to the first occupant. When there is a residue left, the statutes give it to the executors and administrators, instead of the first occupant; but they will not *create* a residue on purpose to give it to either.<sup>h</sup> They only meant to provide an appointed instead of a casual, a certain instead of an uncertain, owner, of lands which before were nobody's; and thereby to supply this *casus omissus* (omitted case), and render the disposition of law in all respects entirely uniform:

<sup>g</sup> Co. Litt. 41. Vaugh. 201.

<sup>h</sup> See the statute 5 Geo. III. c. 17 (Leases, 1765), which makes leases for one, two, or three lives by *ecclesiastical* persons or any *eleemosynary* corporation of tithes or other incorporeal hereditaments, as good and effectual *to all intents and purposes* as leases of corporeal possessions.

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<sup>4</sup> **Special occupancy.**—Blackstone's doctrine that executor cannot take as special occupant even by force of the statutes was sustained by Lord Redesdale in *Campbell v. Sandys*, 1 Schoales & L. 289; but is controverted by Professor Wooddesson's Lectures, ii. 163, by Sugden, Powers, 198, and by *Ripley v. Waterworth*, 7 Ves. 425. (See Cruise's Digest, tit. 3, c. 1, §§ 53, 59.)

In America the question is of no practical importance. By statutes in most states the executor, or even the administrator, takes all such estates by occupancy. and as there is now no difference between the heirs of realty and the next of kin entitled to personalty, there is no dispute to be litigated by the persons beneficially entitled.—HAMMOND.

this being the only instance wherein a title to a real estate could ever be acquired by occupancy.<sup>5</sup>

[261] This, I say, was the only instance; for I think there can be no other case devised wherein there is not some owner of the land appointed by the law. In the case of a sole corporation, as a parson of a church, when he dies or resigns, though there is no *actual* owner of the land till a successor be appointed, yet there is a *legal, potential* ownership, subsisting in contemplation of law; and when the successor is appointed, his appointment shall have a retrospect and relation backwards, so as to entitle him to all the profits from the instant that the vacancy commenced. And, in all other instances, when the tenant dies intestate, and no other owner of the lands is to be found in the common course of descents, there the law vests an ownership in the king, or in the subordinate lord of the fee by escheat.

§ 351. 2. Islands; alluvion; dereliction.—So, also, in some cases, where the laws of other nations give a right by occupancy, as in lands newly created, by the rising of an island in a river, or by the alluvion or dereliction of the sea; in these instances the law of England assigns them an immediate owner.<sup>6</sup> For Brac-

5 The Wills Act of 1837 provides that every estate *pur autre vie*, of whatever tenure, and whether it be a corporeal or incorporeal hereditament, may be devised by will; that if no disposition by will be made of an estate *pur autre vie* of a freehold nature, it shall be chargeable in the hands of the heir (if it comes to him by reason of special occupancy) as assets by descent, as in the case of freehold land in fee simple; and that, in case there shall be no special occupant of an estate *pur autre vie*, of whatever tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant, and that it shall in every case be assets of the deceased, to be applied and distributed in the same manner as personal estate.—STEPHEN, 1 Comm. (16th ed.), 337.

6 Islands—Alluvion—Avulsion.—The owner in fee of the bed of a river or other submerged land is the owner of any bar, island, or dry land which may be formed therein. *St. Louis v. Rutz*, 138 U. S. 226, 34 L. Ed. 941, 11 Sup. Ct. Rep. 337. Where an island arises in a navigable river and by accretion is united to the shores of the mainland, the owner of the mainland is not entitled to the island, but only to such accretion as formed on his land. *Cooley v. Golden*, 117 Mo. 33, 21 L. R. A. 300, 23 S. W. 100. If an island arises in a navigable stream, it belongs to the state, and not to the owner of the land on either side. If the accretion had been to the plaintiff's land and had gradually



ton tells us,<sup>1</sup> that if an island arise in the *middle* of a *river*, it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore: which is agreeable to, and probably copied from, the civil law.\* Yet this seems only to be reasonable, where the soil of the river is equally divided between the owners of the opposite shores: for if the whole soil is the freehold of any one man, as it must be whenever a several fishery is

<sup>1</sup> 1. 2. c. 2.

\* Inst. 2. 1. 22.

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extended to the island, the plaintiff would have acquired both accretions and island. *Glassell v. Hansen*, 135 Cal. 547, 67 Pac. 964.

As defined in the Roman law, alluvion is an addition of soil to land by a river, so gradual that in short periods the change is imperceptible; or, to use a common expression, a latent addition (*Gaius. Inst.*, ii, § 70); and Justinian says (*Inst.* ii, 1, § 20) that that is added by alluvion, which is added so gradually that no one can perceive at what moment of time it is added. The same rule was introduced into English law, Bracton repeating the language of the Roman law. The test as to what is gradual and imperceptible in the sense of the rule is that the witnesses could see from time to time what progress had been made in the formation of the land, but could not perceive it while the process of formation was going on. The land thus formed belongs to the proprietor of the adjacent land to which it is attached. Title by alluvion is a purely accessory right, attaching exclusively to riparian proprietorship, and incapable of existing without it. *Jefferies v. East Omaha Land Co.*, 134 U. S. 178, 33 L. Ed. 872, 10 Sup. Ct. Rep. 518; *Kansas v. Meriwether*, 182 Fed. 457, 106 C. C. A. 191; *Wilson v. Watson*, 144 Ky. 352, Ann. Cas. 1913A, 774, 138 S. W. 283; *Adams v. Frothingham*, 3 Mass. 352, 3 Am. Dec. 151; *Cook v. McClure*, 58 N. Y. 437, 17 Am. Rep. 270; *White v. Leovy*, 49 La. Ann. 1660, 22 South. 931.

While alluvion is the gradual and imperceptible accretion of the soil to one side of a stream or the shore of the mainland, avulsion is the sudden and perceptible removal of a considerable quantity of the soil from the land of one man and its deposit upon or annexation to the land of another. In such case the property continues to belong to the first owner. *Bouvier v. Stricklett*, 40 Neb. 792, 59 N. W. 550; *Chicago v. Ward*, 169 Ill. 392, 61 Am. St. Rep. 185, 38 L. R. A. 849, 48 N. E. 927. For instance, avulsion by the Missouri river, the middle of whose channel forms the boundary line between the states of Missouri and Nebraska, works no change in such boundary, but leaves it in the center line of the old channel. *Missouri v. Nebraska*, 196 U. S. 23, 49 L. Ed. 372, 25 Sup. Ct. Rep. 155.

claimed,<sup>17</sup> there it seems just (and so is the usual practice) that the eyotts or little islands, arising in any part of the river, shall be the property of him who owneth the piscary and the soil. However, in case a new island rise in the sea, though the civil law gives it to the first occupant,<sup>m</sup> yet ours gives it to the king.<sup>n</sup> And as to lands gained from [262] the sea, either by *alluvion*, by the washing up of sand and earth, so as in time to make *terra firma*; or by *dereliction*, as when the sea shrinks back below the usual water-mark; in these cases the law is held to be, that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining.<sup>o</sup> For *de minimis non curat lex* (the law takes not cognizance of small things): and, besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But, if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king; for, as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil, when the water has left it dry.<sup>p</sup> So that the quantity of ground gained, and the time during which it is gaining, are what make it either the king's or the subject's property. In the same manner if a river, running between two lordships by degrees gains upon the one, and thereby leaves the other dry; the owner who loses his ground thus imperceptibly has no remedy: but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, he shall have what the river has left in any other place, as a recompense for this sudden loss.<sup>q</sup><sup>8</sup> And this law of alluvions and derelictions, with regard to *rivers*, is nearly the same in the imperial law;<sup>r</sup> from whence indeed those our determinations seem to have been drawn and adopted: but we our-

1 Salk. 637.

p Callis. 24. 28.

m Inst. 2. 1. 18.

q *Ibid.* 28.

n Bract. 1. 2. c. 2. Callis of Sewers.

r Inst. 2. 1. 20, 21, 22, 23, 24.

o 2 Roll. Abr. 170. Dyer. 326.

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7 A several fishery is the exclusive right of fishing arising from ownership of the soil or from private grant.

8 *Hindson v. Ashby*, [1896] 1 Ch. 78.

selves. as islanders, have applied them to *marine* increases; and have given our sovereign the prerogative he enjoys, as well upon the particular reasons before mentioned, as upon this other general ground of prerogative, which was formerly remarked,<sup>s</sup> that whatever hath no other owner is vested by law in the king.

<sup>s</sup> See Book I. pag. 298.

## [263] CHAPTER THE SEVENTEENTH.

### OF TITLE BY PRESCRIPTION.

§ 352. III. Prescription.—A third method of acquiring real property by purchase is that by *prescription*; as when a man can show no other title to what he claims than that he, and those under whom he claims, have immemorially used to enjoy it.<sup>1</sup> Concerning customs, or immemorial usages, in general, with the several requisites and rules to be observed, in order to prove their existence and validity, we inquired at large in the preceding part of

**1 Prescription and limitation; occupying claimants.**—Prescription and limitation, strictly speaking, in the language of the older books differ between themselves in this. Prescription applies only to incorporeal hereditaments, and by common law furnishes a positive title. Limitation refers to corporeal hereditaments; is based entirely on the statutes; and does not furnish a positive title but only a negative one. The statute of limitations in respect to lands operates as an extinguishment of the remedy of the one, though not a gift of the estate to the other. Whereas the enjoyment of an incorporeal hereditament for the requisite period of time raises a conclusive presumption of a right or a grant, as the case may be. (3 Washburn, p. 52, citing *Davenport v. Tyrrel*, 1 W. Black. 575; *Tyler v. Wilkinson*, Fed. Cas. No. 14,312, 4 Mason, 397, 402; 2 Greenleaf's Evidence, § 579.) But these distinctions have lost their importance. Our statutes of limitation apply to both corporeal and incorporeal hereditaments alike. The abolition of forms of action has taken away the importance of the distinction between positive and negative titles. Even so long ago as when Cruise's Digest was written, the title prescription was made to cover the acquisition of land by possession or limitation. (See tit. 31, c. 2; also c. 1, §§ 5, 6. And as to the analogy between them, see Hilliard, c. 76, §§ 1, 4.) Wharton on Conveyancing, tract 4, c. 3, pp. 587, 588, uses prescription in the same way, but distinguishes positive prescription or prescription proper from negative prescription or the effect of the statutes of limitations.

Title by possession, then, may be divided into three branches, for the purpose of retaining the old and familiar distinctions.

*First.* Title by occupancy, or such rights as accrue from the commencement of possession, as to which see note 2 to preceding chapter.

*Second.* Title by negative prescription, or such title as accrues when all conflicting rights are cut off by statute: now confined to the case of statutory limitations upon actions to recover money and the like.

*Third.* Positive prescription, where the title itself is directly affirmed.

An incidental advantage of this arrangement will be, that it enables us to place properly a class of questions which have not been satisfactorily classified

these. Commentaries.<sup>a</sup> At present, therefore, I shall only, first, distinguish between *custom*, strictly taken, and *prescription*; and then show, what sort of things may be prescribed for.

§ 253. 1. *Distinction between custom and prescription.*—And, first, the distinction between custom and prescription is this; that custom is properly a *local* usage, and not annexed to any *person*: such as a custom in the manor of Dale that lands shall descend to the youngest son: prescription is merely a *personal* usage; as,

<sup>a</sup> See Book I. pag. 75, etc.

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before. These relate to the rights of *occupying claimants*, sometimes called *betterment* rights. They resemble our first class in this, that they accrue from the beginning of the occupancy, but they usually attach to such titles as require a certain period of time to become perfect. And in this fact we have another argument in favor of uniting all these titles under one head. As to occupying claimants, see a valuable account of the origin and growth of the doctrine by Judge Dillon, in *Parsons v. Moses*, 16 Iowa, 440.

But the distinction, as to all specific property at least, made between the second and third classes, seems to have only a historical value. A title by statute of limitation is now held to be as positive as one by any other mode of acquisition.

“A legal title is equally valid when once acquired, whether it be by disseisin or by deed: it will vest the fee simple, although the modes of proof adduced to establish it may differ. Nor is a judgment at law necessary to perfect a title by disseisin, any more than one by deed. In either case, when the title is in controversy, it is to be shown by legal proof; and a continued disseisin for twenty years [i. e., for whatever term the statute of the state may require], is as effectual for that purpose as a deed duly executed. The title is created by the existence of the facts, and not by the exhibition of them in evidence. An open, notorious, exclusive, and adverse possession for twenty years operates to convey a complete title to the plaintiffs, as much so as any written conveyance. And such title is not only an interest in the land, but it is one of the highest character, the absolute dominion over it.” (Per Wells, J., in *School District No. 4 v. Benson*, 31 Me. 381, 384, 52 Am. Dec. 618, quoted in 3 Washburn on Real Property, 145, [\*514], and see, also, authorities cited in note 1, on page 146; *Bowen v. Preston*, 48 Ind. 367; 2 Cent. L. J. 251, 1875.)

But such a title does not cut off the right of the widow of disseisee to dower, provided it is not begun until after the inchoate right has accrued. An adverse occupation of the premises during her husband's life will not affect her rights. The statute does not begin to run against her until his death. (2 Scribner on Dower, 542; *May v. Fletcher*, 40 Ind. 575; *Bowen v. Preston*, *supra*.) As to the effect of a change in the statute between the conveyance and death, see *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200; *Harrow v. Myers*, 29 Ind. 469.—

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that Sempronius, and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege.<sup>b</sup> As for example: if there be a usage in the parish of Dale, that all the inhabitants of that parish may dance on a certain close, at all times, for their recreation (which is held<sup>c</sup> to be a lawful usage); this is strictly a custom, for it is applied to the *place* in general, and not to any particular *persons*: but if the [264] tenant, who is seised of the manor of Dale in fee, alleges that he and his ancestors, or all those whose estate he hath in the said manor, have used time out of mind to have common of pasture in such a close, this is properly called a prescription; for this is a usage annexed to the *person* of the owner of this estate. All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath;<sup>d</sup> which last is called prescribing in a *que estate*.<sup>2</sup> And formerly a man might, by the common law, have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it has been suspended<sup>e</sup> for an indefinite series of years. But by the statute of limitations, 32 Hen. VIII, c. 2 (Prescription, 1540), it is enacted, that no person shall make any prescription by the seisin or possession of his ancestor or predecessor, unless such seisin or possession hath been within three-score years next before such prescription made.<sup>f 3</sup>

<sup>b</sup> Co. Litt. 113.

<sup>c</sup> 1 Lev. 176.

<sup>d</sup> 4 Rep. 32.

<sup>e</sup> Co. Litt. 113.

<sup>f</sup> This title, of prescription, was well known in the Roman law by the name of *usucapio* (Ff. 41. 3. 3.); so called, because a man, that gains a title by prescription, may be said *usu rem capere* (to take the thing by use).

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<sup>2</sup> Rights of common, other than those enjoyed by freehold tenants of a manor as such, created by grant or prescription and attached to the ownership of lands, are called rights of "common appurtenant." Where, as is usually the case, the claim rests on prescription, it is said in technical language that the tenant in fee of the lands and all those whose estate he has (technically called prescribing in a *que estate*) have enjoyed the right from time whereof the memory of man runneth not to the contrary, or during the period required by the Prescription Act (2 and 3 Will. IV, c. 71, 1832).—DIGBY, Hist. Law Real Prop. (5th ed.), 194.

<sup>3</sup> The Prescription Act of 1832.—The Prescription Act, 1832, which is described as an act for shortening the time of prescription in certain cases, is

§ 354. 2. Rules governing prescription—a. Incorporeal hereditaments.—Secondly, as to the several species of things which may, or may not, be prescribed for: we may in the first place, observe, that nothing but incorporeal hereditaments can be claimed by prescription; as a right of way, a common, etc.; but that no prescription can give a title to lands, and other corporeal substances, of which more certain evidence may be had.<sup>§</sup> For no man can be said to prescribe that he and his ancestors have immemorially used to hold the castle of Arundel: for this is clearly another sort of title; a title of corporal seisin and inheritance, which is more permanent, and therefore more capable of proof, than that of prescription. But, as to a right of way, a common, or the like,

§ Dr. & St. dial. l. c. 8. Finch, 132.

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chiefly concerned with the periods of user necessary to found a claim by prescription under the act; but, incidentally, the statute made so many other alterations in the law, that a summary of its provisions will be useful.

The Prescription Act classifies the rights with which it deals under the three heads of (a) profits *à prendre*, (b) easements other than rights of light, and (c) rights of light. With regard to the first, it provides that where there shall have been enjoyment of them by any person claiming right thereto, without interruption, for thirty years next before the commencement of any action upon the subject, the claim shall no longer be defeated, by showing only that the enjoyment commenced at a period subsequent to the era of legal memory; but that it may be defeated in any other way in which it was defeasible before the statute passed. So that, e. g., a claim founded on thirty years' enjoyment would still be satisfactorily answered, by showing that the enjoyment was without knowledge of the adverse party, or that it was by his mere license or permission. For it is to be understood, though the act does not lay down any express rules on the subject, that "enjoyment," for purposes of the act, like "long user" at the common law, must, to be a ground of prescription, be open, continuous, peaceful, and as of right. (*Dalton v. Angus*, [1881] L. R. 6 App. Cas., at p. 812, per Lord Blackburn.) But it is provided by the act that nothing is to be deemed an *interruption* of the right, unless it shall have been submitted to or acquiesced in for the space of one year; a mere cessation of the enjoyment being neither an interruption nor a discontinuance of the right. (*Hollins v. Verney*, [1884] 13 Q. B. D. 304.)

The act also provides, that the time during which the adverse party shall have been an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action as to the claim shall have been pending and diligently prosecuted, shall be excluded in the computation of the period of thirty years; but that where there has been an enjoyment for *sixty* years, the claim

a man may be allowed to prescribe; for of these there is no corporal seisin, the enjoyment will be frequently by intervals, and therefore the right to enjoy them can depend on nothing else but immemorial usage.

§ 355. **b. In tenant of the fee.**—2. A prescription must always be [265] laid in him that is tenant of the fee. A tenant for life, for years, at will, or a copyholder, cannot prescribe, by reason of the imbecility of their estates.<sup>h</sup> For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe, whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the ten-

<sup>h</sup> 4 Rep. 31, 32.

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shall be absolute and indefeasible, unless proof is given that the enjoyment took place under some consent or agreement in writing, expressly given for the purpose.

With regard to ways and other easements, watercourses, and the use of water, not being claims to lights, the act contains similar provisions; but the periods conferring a prescriptive right in the case of ways and other easements, watercourses and waters, are *twenty* and *forty* years (in lieu of thirty and sixty years) respectively. But, when the land or water as against which the claim is made has been held for a term of life or for a term exceeding three years, such term is to be excluded from the computation of the forty years, in the event of the person who may be entitled in reversion resisting the claim within three years after the term expires. (S. 8.) (A curious omission in this section has raised a doubt as to whether it applies to easements other than ways and watercourses. It obviously does not apply to profits *à prendre*.)

Finally, as regards the valuable easement of lights, the act provides that the uninterrupted enjoyment of these for *twenty* years shall constitute at once an absolute and indefeasible right to them, any local usage or custom to the contrary notwithstanding; but, of course, even as regards lights, the claim may be defeated by showing that the enjoyment took place under some agreement in writing, inconsistent with its continuance. It is further to be noticed that whereas, in regard to other easements and profits *à prendre*, no person can, by the ordinary principles of tenure, acquire a right by prescription against his own landlord (e. g., by walking over an adjacent tenement belonging to him). (*Gayford v. Moffatt*, [1868] L. R. 4 Ch. App. 133; *Kilgour v. Gaddess*, [1904] 1 K. B. 457), yet, by virtue of the express words of the section which deals with lights, it has been held possible for a claim of light to be substantiated by similar user; even though the servient tenement was not in the occupation

ant in fee simple. As, if tenant for life of a manor would prescribe for a right of common as appurtenant to the same, he must prescribe under cover of the tenant in fee simple; and must plead that John Stiles and his ancestors had immemorially used to have this right of common, appurtenant to the said manor, and that John Stiles demised the said manor, with its appurtenances, to him, the said tenant, for life.

§ 356. *c. Prescription presupposes a grant.*—3. A prescription cannot be for a thing which cannot be raised by grant. For

of the landlord himself, but of another of his tenants (*Morgan v. Fear*, [1907] App. Cas. 425; *Richardson v. Graham*, [1908] 1 K. B. 39). A claim of light by prescription under the act does not, however, bind the crown (*Wheaton v. Maple*, [1893] 3 Ch. 48).—STEPHEN, 1 Comm. (16th ed.), 296.

**Prescription in the United States.**—Properly speaking, prescription applies only to incorporeal hereditaments. *Ferris v. Brown*, 3 Barb. (N. Y.) 105. Thus, to easements of various kinds: *Foster v. Sebago Imp. Co.*, 100 Me. 196, 60 Atl. 894; *Princeton v. Gustavson*, 241 Ill. 566, 89 N. E. 653; *Anthony v. Kennard Bldg. Co.*, 188 Mo. 704, 87 S. W. 921; *Christ Church v. Lavezzolo*, 156 Mass. 89, 30 N. E. 471. The elements necessary to a prescriptive right or prescription to the use of an irrigating ditch are held to be that the user by the claimant during the irrigation season be actual, open, and notorious; that it be hostile; that it be under claim of title; that it be continuous and uninterrupted for the statutory period of five years; and that the right must have been asserted with the knowledge and acquiescence of the owner and permitted to the commencement of the action. *Silva v. Hawn*, 10 Cal. App. 544, 102 Pac. 952; *Strong v. Baldwin*, 137 Cal. 432, 438, 70 Pac. 288.

While the term "prescription" is more properly confined to the case of incorporeal hereditaments, it is also very commonly used as equivalent to the term "limitations" as occurring in American statutes, and means the time prescribed by statute within which title to property may be acquired by adverse possession. *Brook v. Kirkpatrick*, 69 S. C. 231, 48 S. E. 72; *Choctaw, O. & G. R. Co. v. Rice*, 7 Ind. Ter. 514, 104 S. W. 819. The distinction is sometimes marked, both in England and in the United States, by calling prescription proper "positive prescription," and the limitation of actions as "negative prescription." The principle is this: Possession may ripen into ownership; and this result may be produced either positively by the law declaring that the possessor is fully entitled after a certain time, or negatively by depriving adverse claimants of their remedies if during a certain time they omit to exercise them.

An instructive comparison of the English and Roman law on the subject may be found in Markby's *Elements of Law* (3d ed.), c. xiii. And Professor Hammond has a learned note on prescription in corporeal hereditaments at the common law. (*Hammond's Bl.* 422.)

the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers; for, as such claim could never have been good by any grant, it shall not be good by prescription.<sup>1</sup>

§ 357. d. No prescription in matter of record.—4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like.<sup>4</sup> These, not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by any inferior title. But the franchises of treasure-trove, waifs, estrays, and the like may be claimed by prescription; for they arise from private contingencies, and not from any matter of record.<sup>5</sup>

§ 358. e. Prescription in a *que estate*.—5. Among things incorporeal, which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing; that is, whether a man shall prescribe in a *que estate*, or in himself and his ancestors. For, if a man prescribes in a *que estate* (that is, in himself and those whose estate he holds), nothing [266] is claimable by this prescription, but such things as are incident, appendant, or appurtenant to lands; for it would be absurd to claim anything as the consequence, or appendix, of an estate, with which the thing claimed has no connection: but, if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant; not only things that are appurtenant, but also such as may be in gross.<sup>1</sup> Therefore a man may prescribe that he, and those whose estate he hath in the manor of Dale, have used to hold the advowson of Dale, as *appendant* to that manor: but, if the advowson be a distinct inheritance, and not appendant, then he can only prescribe in his ancestors. So, also, a man may

<sup>1</sup> 1 Ventr. 387.

<sup>1</sup> Litt. § 183. Finch. L. 104.

<sup>5</sup> Co. Litt. 114.

<sup>4</sup> Deodands, it will be remembered, were abolished by the Deodands Act, 1846, and forfeitures for felony by the Forfeiture Act, 1870.



prescribe in a *que estate* for a common *appurtenant* to a manor; but if he would prescribe for a common *in gross*, he must prescribe in himself and his ancestors.<sup>5</sup>

§ 359. f. Descent of estates prescribed.—6. Lastly, we may observe that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition, than as an acquisition *de novo*: and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes; the prescription in this case being indeed a species of descent. But if he prescribes for it in a *que estate*, it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase: for every accessory followeth the nature of its principal.

<sup>5</sup> There are two kinds of prescription: Prescription in a man or his ancestors, which is generally referred to as prescription in gross, and prescription in a man and those whose estate he has, which is generally referred to as prescription in a *que estate*. *Austin v. Amburst*, [1877] 7 Ch. D. 689, 692, per Fry, J.

## CHAPTER THE EIGHTEENTH.

### OF TITLE BY FORFEITURE.

§ 360. **IV. Forfeiture.**—Forfeiture is a punishment annexed by law to some illegal act, or negligence, in the owner of lands, tenements, or hereditaments; whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained.<sup>1</sup>

**1 Forfeiture in America—Military occupation.**—The English doctrine of forfeiture of lands to the state for crime or corruption of blood is generally if not universally done away with in this country. (3 Washburn on Real Property, 47; 4 Kent, 425; 3 Greenleaf's Cruise, 398, n.; U. S. Const., art. 3, § 3.) Forfeiture of land by illegal alienation is repealed by implication at least, and may even be regarded as obsolete. Of the other cases of forfeiture enumerated by Blackstone one only seems to be still recognized by our laws. Statutes usually provide that a guardian, tenant, joint tenant, or tenant in common is not only liable for waste in treble damages, but that when such damages amount to two-thirds the value of his interest, the reversioner may have judgment of forfeiture and eviction. But the power of forfeiture seems to be only a single application of the broader power discussed in recent books under the title of the police power, which is itself only a branch of the power of eminent domain in the wider sense of the words, though to be carefully distinguished from the power of taking private property for public use (eminent domain in narrower sense), inasmuch as the police power is not dependent in its exercise upon the payment of compensation. It is the power which every government possesses to regulate the use of all private property, so as to prevent each citizen from making his own a means of injury to his neighbor or to the whole community. When this is done by taking away the property as a punishment for misuse, it is a case of forfeiture: when restrictions are imposed in advance upon its use, or when infractions of ordinary private rights become necessary to the public welfare, such cases are included under the general term of "police power." (Cooley's Constitutional Limitations, c. 16, pp. 472-597; Sedgwick's Statutory and Constitutional Law, 2d ed., pp. 434-441; Dillon on Municipal Corporations.) The power belongs to the states of the Union and cannot be assumed by the federal government. (United States v. De Witt, 9 Wall. 41, 19 L. Ed. 593; License Cases, 5 How. 504, 12 L. Ed. 256; Passenger Cases, 7 How. 283, 12 L. Ed. 702; License Tax Cases, 5 Wall. 462, 471, 18 L. Ed. 497, 501.) See remarks on this subject by Judge Cooley, Constitutional Limitations, p. 574.

A military commander may, under circumstances of necessity, take the private property of the citizen without being liable personally, in which case the

§ 361. 1. **Causes of forfeiture.**—Lands, tenements, and hereditaments may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By nonpresentation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 5. By nonperformance of condition. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

§ 362. a. **Forfeitures for crimes and misdemeanors.**—The foundation and justice of forfeitures for *crimes and misdemeanors*, and the several degrees of those forfeitures, proportioned to the several offenses, have been hinted at in the preceding volume;<sup>a</sup> but will be more properly considered, and more at large, in the fourth book of these Commentaries. At present I shall only observe in general that the offenses which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Misprision of treason. 4. *Præmunire*. 5. Drawing [268] a weapon on a judge, or striking any-

<sup>a</sup> Vol. I. pag. 299.

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owner must look to the government for compensation. The necessity must be actual and urgent; and its existence is for the jury to determine. (Holmes v. Sheridan, Fed. Cas. No. 6644, 1 Dill. 351, citing Mitchell v. Harmony, 13 How. 115, 135, 14 L. Ed. 75; Wellman v. Wickerman, 44 Mo. 484.) Police regulations of this character are uniformly held legal and binding, because they are for the general benefit, and do not proceed to the length of impairing any private right in the proper sense of that term. The sovereign power in a community may prescribe the manner of exercising individual rights over property. They may prohibit the erection of wooden buildings, the keeping of gunpowder and other dangerous combustibles for sale within the city in greater than specified quantities, fix market places and regulate the times when they shall be open, and prohibit the sale of market produce at other places; and, on the same principles and for the same reasons, may establish and regulate wharves and landings, regulate the anchorage of all boats, rafts, or other vessels landing within its limits, and as a necessary incident to this power, may prohibit the landing of such boats and rafts at any other places than are prescribed in the ordinances or by-laws made for that purpose. The powers rest upon the implied right and duty of the supreme power to protect all by statutory regulations, so that, on the whole, the benefit of all is promoted. (Vanderbilt v. Adams, 7 Cow. (N. Y.) 349; Bertholf v. O'Reilly, 74 N. Y. 509. 30 Am. Rep. 323; also in 18 Am. Law Reg. 111; Commonwealth v. Alger, 7 Cush. (Mass.) 53, 84; State v. Paul, 5 R. I. 185.)—HAMMOND.

one in the presence of the king's principal courts of justice. 6. Popish recusancy, or nonobservance of certain laws enacted in restraint of papists. But at what time they severally commence, how far they extend, and how long they endure, will with greater propriety be reserved as the object of our future inquiries.

§ 363. *b. Forfeiture for alienation contrary to law.*—Lands and tenements may be forfeited by *alienation*, or conveying them to another, contrary to law. This is either alienation in *mortmain*, alienation to an *alien*, or alienation by *particular tenants*; in the two former of which cases the forfeiture arises from the incapacity of the alienee to take; in the latter from the incapacity of the alienor to grant.

§ 364. (1) *Alienation in mortmain.*—Alienation in *mortmain*, in *mortua manu* (in dead-hand), is an alienation of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal.<sup>2</sup> But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead-hand, this hath occasioned the general appellation of mortmain to be applied to such alienations,<sup>b</sup> and the religious houses themselves to be principally considered in forming

<sup>b</sup> See Book I. pag. 479.

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<sup>2</sup> The word "*mortmain*" is a transcription rather than translation of the Latin *manus mortua*, a term probably used, as Mr. Digby suggests, because the regular clergy against whose endowment this legislation was chiefly directed were treated for legal purposes as dead, "*civiliter mortui*." Coke's explanation (after mentioning two or three wild ones "*framed out of wit and invention*") is that "the lands were said to come to dead-hands as to their lords, for that by alienation in mortmain they lost wholly their escheats, and in effect their knight services for the defense of the realm, wards, marriages, reliefs, and the like; and therefore [it] was called a dead-hand, for that a dead-hand yieldeth no service." Whatever be its exact derivation, the expression was felt to be forcible and appropriate, and has passed into common speech. Of late years it has been inexactly made use of in reference to family settlements, as if the "*dead-hand*" were the hand of the settler by whose grant the successive interests are limited, to use a technical, but in this connection an easily understood, word.—POLLOCK, *Land Laws*, 90.

the statutes of mortmain:<sup>3</sup> in deducing the history of which statutes it will be matter of curiosity to observe the great address and subtle contrivance of the ecclesiastics in eluding from time to time the laws in being, and the zeal with which successive parliaments have pursued them through all their finesses: how new remedies were still the parents of new evasions; till the legislature at last, though with difficulty, hath obtained a decisive victory.

**3 The saint as owner of church property.**—The dead-hand is that of the saint to whom the religious property was dedicated. From Pollock & Maitland's *History of English Law* (2d ed., vol. I, p. 499), we extract the following:

"The early history of church property in England has never yet been written, and we cannot aspire to write it. We do not, for example, know how the parish church became an owning unit with rights distinct from those of the bishop and his cathedral church on the one hand and from those of the founder or patron on the other. But there is a supernatural element in the story. Great changes take place behind a mystic veil. At least for the purposes of popular thought and speech, God and the saints become the subjects of legal rights, if not of legal duties. 'God's property and the church's twelve-fold': such were the first written words of English law. In the old land-books this notion is put before us in many striking phrases. In the oldest of them the newly converted Aethelbert says, 'To thee Saint Andrew and to thy church at Rochester where Justus the Bishop presides do I give a portion of my land.' The saint is the owner; his church at this place or that is mentioned because it is necessary to show of which of his many estates the gift is to form part. If a man will give land to the chief of the Apostles he should give it to St. Peter and his church at Gloucester, or to St. Peter and his church at Westminster; Justinian himself had been obliged to establish a rule for the interpretation of testaments by which the Savior or some archangel or martyr was nominated heir and no church or monastery was named. The Anglo-Saxon charters and Domesday Book seem to suppose even a physical connection between the land given to a saint and the particular church with which it is, or is to be, legally connected; geography must yield to law; the acres may be remote from the hallowed spot, nevertheless they 'lie in the church.' Just as the earl or thegn may have many manors and a piece of land remote from the manorial center may 'lie in' or 'be of' one of those manors, so the saint will have many churches each with land belonging to it. Gradually (if we may so speak) the saint retires behind his churches; the church rather than the saint is thought of as the holder of lands and chattels. When it comes to precise legal thinking the saint is an impracticable person, for if we ascribe rightful, we may also have to ascribe wrongful possession to him, and from this we shrink, though Domesday Book courageously charges St. Paul with an 'invasion' of land that is not his own. But how is the church conceived? In the first instance very grossly as a structure of wood and stone. Land belongs to a church, is an appurtenance of a church, just as other land belongs to or is appurtenant



§ 365. (a) **Licenses in mortmain.**—By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feudal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary<sup>c</sup> for corporations to have a license in mortmain [269] from the crown, to enable them to purchase lands: for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feudal profits, by the vesting of lands in tenants that can never be attainted or die. And such licenses of mortmain seem to have been necessary among the Saxons, above sixty years before the Norman Conquest.<sup>d</sup> But, besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there

<sup>c</sup> F. N. B. 121.

<sup>d</sup> Selden. Jan. Angl. l. 2. § 45.

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to some hall or dwelling-house. But, as the saint retires, the idea of the church is spiritualized; it becomes a person and, we may say, an ideal, juristic person.

"All this while there are human beings who are directing the affairs of the saint and the church, receiving, distributing, enjoying the produce of the land. They are the saint's administrators; they are the *rectores* of his church. Some of them, notably the bishops, since their powers of administration are very large, may be spoken of as landholders; but still the land which the bishop has as bishop is hardly his own; when he demands it, he demands it not *ut ius suum*, but *ut ius ecclesiæ suæ*.

"Very often in Domesday Book the saint is the land owner; Saint Paul holds land, Saint Constantine holds land, the Count of Mortain holds land of Saint Petroe. Leofstan held land under 'the glorious King Edmund.' Often a particular *ecclesia*, or an *abbatia*, holds land. Sometimes the land is described as that of the saint, but the church is said to hold it; sometimes this relation is reversed, the land is the land of the church but the saint holds it. Often, again, the land is spoken of as that of the ruler of the church; this is frequently the case when a bishop is concerned: the land is the land of the Bishop of Exeter and the Bishop of Exeter holds it. Still this is no invariable rule; the Church of Worcester, an episcopal church, has lands and St. Mary of Worcester holds them; and it is not the Bishop of Rome, but the Roman church of St. Peter the Apostle who holds land in Somerset. Sometimes the abbey holds land, sometimes the abbot, sometimes again a distinction is drawn between abbey and abbot; the demesne manors are held by the church itself, but the manors given to knights are held of the abbot. There are cases (not very many) in which groups of canons are said to hold lands, to hold them in common."

was a mesne or intermediate lord between the king and the alienor, to obtain his license also (upon the same feudal principles) for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the lands so aliened in mortmain as a forfeiture. The necessity of this license from the crown was acknowledged by the constitutions of Clarendon,\* in respect of advowsons, which the monks always greatly coveted, as being the groundwork of subsequent appropriations.†

§ 366. (b) **Evasions of rule by clergy.**—Yet such were the influence and ingenuity of the clergy, that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the Conquest. And (when a license could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant, who meant to alienate first conveyed his lands to the religious house, and instantly took them back again, to hold as tenant to the monastery; which kind of instantaneous seisin was probably held not to occasion any forfeiture: and then, by pretext of some other forfeiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired seigniory, as immediate lords of the fee.

§ 367. (c) **Prohibition in Magna Carta.**—But, when these dotations began to grow numerous, it was observed that the feudal services, ordained for the defense of the kingdom, were every day visibly withdrawn; that the circulation of landed property from man to man began to [270] stagnate; and that the lords were curtailed of the fruits of their seigniories, their escheats, wardships, reliefs, and the like: and therefore, in order to prevent this, it was ordained by the second of King Henry III's great charters,‡ and afterwards by that printed in our common statute-books, that all

\* *Ecclesiæ de feudo domini regis non possunt in perpetuum dari, absque assensu et consensione ipsius.* (Advowsons, of which the king has the fee, cannot be given in perpetuity without his consent and approval.) c. 2. A. D. 1164.

† See Vol. I. p. 384.

‡ A. D. 1217. cap. 43. edit. Oxon.

such attempts should be void, and the land forfeited to the lord of the fee.<sup>b</sup>

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies (who, Sir Edward Coke observes,<sup>1</sup> in this were to be commended, that they ever had of their counsel the best learned men that they could get) found many means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms, for a thousand or more years, which are now so frequent in conveyances.

§ 368. (d) *Statute De Religiosis*, 1279.—This produced the statute *de religiosis* (of religious persons), 7 Edw. I (1279); which provided, that no *person*, religious or other whatsoever, should buy, or sell, or receive, under pretense of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself, any lands or tenements in mortmain; upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as a forfeiture.

§ 369. (e) *Common recoveries*.—This seemed to be a sufficient security against all alienations in mortmain: but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an

<sup>b</sup> *Non licet alicui de cætero dare terram suam alicui domui religiosæ, ita quod illam resumat tenendam de eadem domo; nec liceat alicui domui religiosæ terram alicujus sic accipere, quod tradat illam ei a quo ipsum recepit tenendam; si quis autem de cætero terram suam domui religiosæ sic dederit, et super hoc convincatur, donum suum penitus cassetur, et terra illa domino suo illius feodi incurratur.* (It is not lawful for anyone to give his land to a religious house for the purpose of taking it again to hold of that house; neither is it lawful for any religious house thus to receive land in order to restore it to its original owner to hold of that house: but if anyone shall have so given his land, and can be convicted of the fact, his gift shall be utterly void, and the land escheat to the lord of the fee.) Mag. Cart. 9 Hen. III. c. 36.

<sup>1</sup> 2 Inst. 75.

[271] action to recover it against the tenant; who, by fraud and collusion made no defense, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. And thus they had the honor of inventing those fictitious adjudications of right which are since become the great assurance of the kingdom, under the name of *common recoveries*. But upon this the statute of Westminster the Second, 13 Edw. I, c. 32 (Mortmain, 1285), enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. And the like provision was made by the succeeding chapter,<sup>k</sup> in case the tenants set up crosses upon their lands (the badges of knights templars and hospitalers) in order to protect them from the feudal demands of their lords, by virtue of the privileges of those religious and military orders. And so careful was this provident prince to prevent any future evasions, that when the statute of *quia emptores*, 18 Edw. I (1290), abolished all subinfeudations, and gave liberty for all men to alienate their lands to be holden of their next immediate lord,<sup>l</sup> a proviso was inserted<sup>m</sup> that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's license by writ of *ad quod damnum* (at what loss)<sup>4</sup> was marked out, by the statute 27 Edw. I, st. 2 (1298), it was further provided by statute 34 Edw. I, st. 3 (1306), that no such license should be effectual, without the consent of the mesne or intermediate lords.

§ 370. (f) *Invention of uses*.—Yet still it was found difficult to set bounds to ecclesiastical ingenuity: for when they were driven out of all their former holds, they devised a new method of con-

<sup>k</sup> Cap. 33.

<sup>m</sup> Cap. 3.

<sup>l</sup> 2 Inst. 501.

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<sup>4</sup> The name is derived from the characteristic words denoting the nature of the writ, to inquire how great an injury it will be to the king to grant the favor asked. 1 Bouvier's Law Dict. (Rawle's 3d Rev.), 132.

veyance, by which the lands were granted, not to themselves directly, but to nominal feoffees *to the use of* the religious houses; thus distinguishing between the *possession* and the *use*, and receiving [272] the actual profits, while the seisin of the lands remained in the nominal feoffee; who was held by the courts of equity (then under the direction of the clergy) to be bound in conscience to account to his *cestuy que use* (he who benefits by the use) for the rents and emoluments of the estate. And it is to these inventions that our practicers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for the statute 15 Rich. II, c. 5 (Mortmain, 1391), enacts that the lands which had been so purchased to uses should be amortized by license from the crown, or else be sold to private persons; and that for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of churchyards, such subtle imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies; or were made liable in the hands of heirs and devisees to the charge of obits, chanteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the Reformation, the statute 23 Hen. VIII, c. 10 (Mortmain, 1531), declares, that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

§ 371. (g) Power of crown to remit forfeitures.—But, during all this time, it was in the power of the crown, by granting a license of mortmain, to remit the forfeiture, so far as related to its own rights; and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity: which



prerogative is declared and confirmed by the statute 18 Edw. III, st. 3, c. 3 (Mortmain, 1344). But, as doubts were conceived at the time of the revolution how far such license was valid,<sup>p</sup> since the king had no <sup>[273]</sup> power to dispense with the statutes of mortmain by a clause of *non obstante*,<sup>o</sup> <sup>5</sup> which was the usual course, though it seems to have been unnecessary:<sup>p</sup> and as, by the gradual declension of mesne seigniories through the long operation of the statute of *quia emptores* (1290), the rights of intermediate lords were reduced to a very small compass; it was therefore provided by the statute 7 & 8 W. III, c. 37 (Mortmain, 1696), that the crown for the future at its own discretion may grant licenses to alien or take in mortmain, of whomsoever the tenements may be holden.

§ 372. (h) **Suspension of statutes of mortmain.**—After the dissolution of monasteries under Henry VIII, though the policy of the next popish successor affected to grant a security to the possessors of abbey lands, yet, in order to regain so much of them as either the zeal or timidity of their owners might induce them to part with, the statutes of mortmain were suspended for twenty years by the statute 1 & 2 P. & M., c. 8 (Mortmain, 1554), and, during that time, any lands or tenements were allowed to be granted to any spiritual corporation without any license whatsoever. And, long afterwards, for a much better purpose, the augmentation of poor livings, it was enacted by the statute 17 Car. II, c. 3 (Mortmain, 1665), that appropriators may annex the great tithes to the vicarages; and that all benefices under 100*l. per annum* may be augmented by the purchase of lands, without license of mortmain in either case: and the like provision hath been since made, in favor of the governors of Queen Anne's bounty.<sup>q</sup>

§ 373. (1) **Charitable uses.**—It hath also been held,<sup>r</sup> that the statute 23 Hen. VIII (Mortmain, 1531), before mentioned did **not**

<sup>n</sup> 2 Hawk. P. C. 391.

<sup>o</sup> Stat. 1 W. & M. st. 2. c. 2.

<sup>p</sup> Co. Litt. 99.

<sup>q</sup> Stat. 2 & 3 Ann. c. 11 (Public Accountants, 1703).

<sup>r</sup> 1 Rep. 24.

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<sup>5</sup> These words, which literally signify *notwithstanding*, were used to express the act of the English king by which he dispensed with the law, that is, authorized its violation. Bouvier's Law Dict. (Rawle's 3d Rev.), 2357.

extend to anything but *superstitious* uses; and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses.<sup>6</sup> But as it was apprehended from recent experience that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain; it is therefore enacted by the statute 9 Geo. II, c. 36 (*Charitable Uses*, 1736), that no lands or tenements, or money to be laid out thereon, shall be given for or charged [274] with any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the court of chancery within six months after its execution (except stocks in the public funds, which may be transferred within six months previous to the donor's death), and unless such gift be made to take effect immediately, and be without power of revocation: and that all other gifts shall be void. The two universities, their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act: but such exemption was granted with this proviso, that no college shall be at liberty to purchase more advowsons, than are equal in number to one moiety of the fellows or students, upon the respective foundations.<sup>7</sup>

<sup>6</sup> An interesting review of the history of Charitable Uses may be found in the opinion of Bradley, J., *Mormon Church v. United States*, 136 U. S. 1, 34 L. Ed. 481, 10 Sup. Ct. Rep. 792.

<sup>7</sup> **Mortmain Act of 1888.**—It has for centuries been the policy of English law to prohibit the accumulation of lands by individuals or bodies who would withdraw it from circulation. The various ecclesiastical foundations were the first great offenders in this respect, and there can be no doubt that they are the delinquents aimed at in the earlier mortmain statutes (9 Hen. III [1225], st. I, c. 36; 7 Edw. I [1279], st. II, preamble, etc.). Religious foundations rarely parted with lands which came to them (e. g., It was very doubtful if they had power to do so [Stat. West. II, 13 Edw. I [1285], c. 41]); and, what was at first even more important to the crown and other great land owners, they gave no opportunities for claiming escheats, wardships, marriages, reliefs, and many of the other feudal incidents which formed at one time an important part of a great land owner's revenue. Later on, it was discovered that the same unfortunate consequences resulted from the acquisition of

§ 374. (2) **Alienation to an alien.**—Secondly, alienation *to an alien* is also a cause of forfeiture to the crown of the lands so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land,<sup>s</sup> but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property; as was observed in the preceding volume.<sup>t</sup>

<sup>s</sup> See pag. 249, 250.

<sup>t</sup> Book I. pag. 372.

lands by trade guilds, municipal burgesses, colleges, and other bodies, whose common characteristic was that they had perpetual succession and a fictitious personality, which enabled them, though really composite bodies, to act more or less as individuals. And so the prohibition against alienation in *mortmain*, which at first had only referred to the “dead-hand” of the saint, was gradually extended to cover all cases in which land was alienated to a *corporation*, i. e., a body having perpetual succession, and a fictitious personality. (It would, of course, be a gross anachronism to speak of a “corporation” in connection with statutes of the thirteenth century. But the important notion of “corporateness” is clearly recognized by the mortmain statute of 1391 [15 Rich. II, c. 5].)

The prohibition against mortmain was from the first capable of being relaxed, by the license of the crown and all the mesne lords of the estate which was proposed to be “amortized”; and this rule has been retained by recent legislation, with the exception that the license of the mesne lords is no longer necessary. (Apparently Edward I had to promise to grant no licenses without the consent of the mesne lords (so-called statute of 34 Edw. I, st. III, ann. 1306). But the same reasons which led to the loss of escheats by mesne lords rendered it difficult to prove their rights in the matter of mortmain, and they were abolished by 7 & 8 Will. [1696], c. 37.) By the Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict., c. 42, § 1), it is now provided that upon any assurance of land “to or for the benefit of . . . any corporation in mortmain” (not duly authorized by license), the land shall be forfeited to Her Majesty. But the *prima facie* right of the crown may be defeated by entry on the land by a mesne lord of whom the land is directly held, if such entry is made within twelve months of the date of the assurance; and, if the land is held of more than one mesne lord in gradation, each mesne after the direct lord has six months in which to enforce his claim, after the expiry of the right of his inferior. It is expressly provided by the act that rents and services due in respect of the forfeited land are not to be extinguished by the forfeiture. (*Ib.* § 3.)—JENKS, *Modern Land Law*, 217.

**Charitable Uses: Acts of 1888 and 1891.**—An assurance of land, even though made to noncorporate persons, was, until recently, *prima facie* irregular, if it contemplated the devotion of the land or proceeds of it to a charitable

§ 375. (3) *Tortious alienation by particular tenants.*—Lastly, alienations *by particular tenants*, when they are greater than the law entitles them to make, and divest the remainder or reversion,<sup>u</sup> are also forfeitures to him whose right is attacked thereby. As, if tenant for his own life aliens by feoffment or fine for the life of another, or in tail, or in fee; these being estates, which either must or may last longer than his own, the creating them is not only beyond his power, and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion.<sup>v</sup> For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feudal connection and dependence; it implies a refusal to perform the due

<sup>u</sup> Co. Litt. 251.

<sup>v</sup> Litt. § 415.

purpose, unless the assurance were made in a particular form. (9 Geo. II [1736], c. 36.) But the effect of the irregularity was merely to render the attempted assurance inoperative, not to work a forfeiture; and herein it differed completely from the effect of an assurance in mortmain. (Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict., c. 42), § 4 (1).) The object of the special forms was, undoubtedly, to secure a fair and impartial consideration of the consequences of the assurance by the alienor, uninfluenced by circumstances likely to cause a hasty determination. The rules laid down by the Mortmain and Charitable Uses Act, for an assurance to charitable objects, are as follows:

(a) It must be made to take effect in possession immediately, without power of revocation or other provision for the benefit of the assurer, except such provisions as are expressly authorized by the act.

(b) It must be made by deed executed in the presence of two witnesses.

(c) It must, unless made in good faith for full and valuable consideration, be executed at least twelve months before the death of the assurer.

(d) It must be enrolled within six months after its execution in the central office of the supreme court.

But these provisions of the act of 1888 have been greatly modified by the amending act of 1891 (54 & 55 Vict., c. 73, § 5), which authorizes the assurance *by will* of land for charitable purposes, without any restrictions as to amount, date of execution, or formality, other than the formalities required by the Wills Act. Inasmuch as, previously to 1891, land could not be devised at all for charitable purposes, it is obvious that the recent statute has effected a complete change of policy. But the tying up of land devised for charities is still prohibited by the clause of the act which directs, that all such land shall be sold within a year of the testator's death, or such extended period as the court may allow. Any land not so sold vests in the official trustee of

renders and services to the lord of [275] the fee, of which fealty is constantly one; and it tends in its consequence to defeat and divest the remainder or reversion expectant: as, therefore, that is put in jeopardy, by such act of the particular tenant, it is but just that, upon discovery, the particular estate should be forfeited and taken from him, who has shown so manifest an inclination to make an improper use for it. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest; and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. The same law, which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail aliens in fee, this is no immediate forfeiture to the remainderman, but a mere *discontinuance* (as it is called <sup>w</sup>) of the estate-tail, which the issue may afterwards avoid by due course of law: <sup>x</sup> for he in remainder or reversion hath only a very remote and barely possible interest therein, until the issue in tail is extinct. But, in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law.<sup>y</sup> For the law will not hurt an innocent lessee for the fault of his lessor; nor permit the lessor, after he has granted a good and lawful estate, by his own act to avoid it, and defeat the interest which he himself has created.<sup>8</sup>

<sup>w</sup> See Book III, c. 10.

<sup>y</sup> Co. Litt. 233.

<sup>x</sup> Litt. § 595, 6, 7.

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charity lands, and must forthwith be sold under the direction of the Charity Commissioners, for the benefit of the charity. A bequest of personalty to a charity, accompanied by a direction to invest in land, will be treated as a bequest of the personalty unfettered by such direction. But where any land devised to a charity, or directed to be purchased with a bequest, is required for actual occupation by the charity, the court or the Charity Commissioners may sanction the retention or acquisition of such land. The act of 1891 only applies to the wills of persons dying after August 4, 1891; but it applies to them whether they were executed before or after the passing of the act.—JENKS, *Modern Land Law*, 291.

<sup>8</sup> The subject of forfeiture upon a wrongful alienation has now lost much of its importance. For fines and recoveries were abolished by the Fines and



§ 376. (4) **Disclaimer of tenure.**—Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of *disclaimer*; as where a tenant, who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord. Which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord,<sup>z</sup> upon reasons most apparently feudal. And so, likewise, if in any court of record the [276] particular tenant does any act which amounts to a virtual disclaimer; if he claims any greater estate than was granted him at the first infeudation, or takes upon himself those rights which belong only to tenants of a superior class;<sup>a</sup> if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like;<sup>b</sup> such behavior amounts to a forfeiture of his particular estate.<sup>9</sup>

§ 377. **c. Right of lapse.**—Lapse is a species of forfeiture, whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan. For it being for the interest of religion, and the good of the public, that the church should be provided with an officiating

<sup>z</sup> Finch. 270, 271.

<sup>b</sup> *Ibid.* 253.

<sup>a</sup> Co. Litt. 252.

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Recoveries Act, 1833; and by the Real Property Act, 1845, it is provided, that a feoffment made after October 1, 1845, shall not have any tortious operation. STEPHEN, 1 Comm. (16th ed.), 350.

<sup>9</sup> **Disclaimer of title in United States.**—A disclaimer of title, as distinguished from a mere denial by a tenant, is his setting up a claim of ownership in himself, in opposition to the landlord. *Doe v. Evans*, 9 Mees. & W. 48; *Willison v. Watkins*, 3 Pet. (U. S.) 43, 7 L. Ed. 596; *De Lancey v. Ganong*, 9 N. Y. 1. The general rule in the United States to-day is that an attempted disclaimer, whether by matter of record or by mere oral statement, may result in a forfeiture of the lease; and the landlord may eject the tenant. But in some states, such as New York, this is not the effect, unless the disclaimer is by matter of record. *Willison v. Watkins*, 3 Pet. (U. S.) 43, 7 L. Ed. 596; *Newman v. Rutter*, 8 Watts (Pa.), 51, 55; *Zeller v. Eckert*, 4 How. (U. S.) 289, 11 L. Ed. 979; *North v. Barnum*, 10 Vt. 220; *Doty v. Burdick*, 83 Ill. 473; *Abbey v. Homestead Assn. v. Willard*, 48 Cal. 614; 2 Reeves, Real Prop., 899.

minister, the law has therefore given this right of lapse, in order to quicken the patron; who might otherwise, by suffering the church to remain vacant, avoid paying his ecclesiastical dues, and frustrate the pious intentions of his ancestors. This right of lapse was first established about the time (though not by the authority <sup>c</sup>) of the council of Lateran,<sup>d</sup> which was in the reign of our Henry the Second, when the bishops first began to exercise universally the right of institution to churches.<sup>e</sup> And therefore, where there is no right of institution, there is no right of lapse: so that no donative can lapse to the ordinary,<sup>f</sup> unless it hath been augmented by the queen's bounty.<sup>g</sup> But no right of lapse can accrue, when the original presentation is in the crown.<sup>h</sup>

The term, in which the title to present by lapse accrues from the one to the other successively, is six *calendar* months<sup>i</sup> (following in this case the computation of the church, and not the usual one of the common law); and this exclusive of <sup>[277]</sup> the day of the avoidance.<sup>k</sup> But, if the bishop be both patron and ordinary, he shall not have a double time allowed him to collate in;<sup>l</sup> for the forfeiture accrues by law, whenever the negligence has continued six months in the same person. And also if the bishop doth not collate his own clerk immediately to the living, and the patron presents, though after the six months are lapsed, yet his presentation is good, and the bishop is bound to institute the patron's clerk.<sup>m</sup> For as the law only gives the bishop this title by lapse, to punish the patron's negligence, there is no reason that, if the bishop himself be guilty of equal or greater negligence, the patron should be deprived of his turn. If the bishop suffer the presentation to lapse to the metropolitan, the patron also has the same advantage if he presents before the archbishop has filled up the

<sup>c</sup> 2 Roll. Abr. 336. pl. 10.

<sup>d</sup> Bracton. l. 4. tr. 2. c. 3.

<sup>e</sup> See pag. 23.

<sup>f</sup> Bro. Abr. tit. Quar. Imped. 3 Cro. Jac. 518.

<sup>g</sup> Stat. 1 Geo. I. st. 2. c. 10 (Queen Anne's Bounty, 1714).

<sup>h</sup> Stat. 17 Edw. II. c. 8 (1324). 2 Inst. 273.

<sup>i</sup> 6 Rep. 62. Registr. 42.

<sup>k</sup> 2 Inst. 361.

<sup>l</sup> Gibs. Cod. 769.

<sup>m</sup> 2 Inst. 273.

benefice; and that for the same reason. Yet the ordinary cannot, alter lapse to the metropolitan, collate his own clerk to the prejudice of the archbishop.<sup>a</sup> For he had no permanent right and interest in the advowson, as the patron hath, but merely a temporary one; which having neglected to make use of during the time, he cannot afterwards retrieve it. But if the presentation lapses to the king, prerogative here intervenes and makes a difference; and the patron shall never recover his right, till the king has satisfied his turn by presentation: for *nullum tempus occurrit regi* (no time runs against the king).<sup>o</sup> And therefore it may seem as if the church might continue void forever, unless the king shall be pleased to present; and a patron thereby be absolutely defeated of his advowson. But to prevent this inconvenience, the law has lodged a power in the patron's hand, of as it were compelling the king to present. For if, during the delay of the crown, the patron himself presents, and his clerk is instituted, the king indeed by presenting another may turn out the patron's clerk; or, after induction, may remove him by *quare impedit* (why he has hindered); but if he does not, and the patron's clerk dies incumbent, or is canonically deprived, the king hath lost his right, which was only to the next or first presentation.<sup>p</sup>

[278] In case the benefice becomes void by death, or cession through plurality of benefices, there the patron is bound to take notice of the vacancy at his own peril; for these are matters of equal notoriety to the patron and ordinary: but in case of a vacancy by resignation, or canonical deprivation, or if a clerk presented be refused for insufficiency, these being matters of which the bishop alone is presumed to be cognizant, here the law requires him to give notice thereof to the patron, otherwise he can take no advantage by way of lapse.<sup>q</sup> Neither shall any lapse thereby accrue to the metropolitan or to the king; for it is universally true, that neither the archbishop or the king shall ever present by lapse, but where the immediate ordinary might have collated by lapse, within the six months, and hath exceeded his time: for the first step or beginning faileth, *et quod non habet principium, non habet*

<sup>a</sup> 2 Roll. Abr. 368.

<sup>p</sup> 7 Rep. 28. Cro. Eliz. 44.

<sup>o</sup> Dr. & St. d. 2. c. 36. Cro. Car. 355. <sup>q</sup> 4 Rep. 75. 2 Inst. 632.

*finem* (and that which has no beginning has no end).<sup>r</sup> If the bishop refuse or neglect to examine and admit the patron's clerk, without good reason assigned or notice given, he is styled a disturber by the law, and shall not have any title to present by lapse; for no man shall take advantage of his own wrong.<sup>s</sup> Also if the right of presentation be litigious or contested, and an action be brought against the bishop to try the title, no lapse shall incur till the question of right be decided.<sup>t</sup>

§ 378. d. **Simony.**—By *simony*, the right of presentation to a living is forfeited and vested *pro hac vice* (for this occasion) in the crown. Simony is the corrupt presentation of anyone to an ecclesiastical benefice for money, gift, or reward. It is so called from the resemblance it is said to bear to the sin of Simon Magus, though the purchasing of holy orders seems to approach nearer to his offense. It was by the canon law a very grievous crime: and is so much the more odious, because, as Sir Edward Coke observes,<sup>u</sup> it is ever accompanied with perjury; for the presentee is sworn to have committed no simony. However, it was not an offense punishable in a criminal way at the common law; <sup>w</sup> it being thought sufficient to leave the clerk to ecclesiastical censures. But as these did not affect [279] the simoniacal patron, nor were efficacious enough to repel the notorious practice of the thing, divers acts of parliament have been made to restrain it by means of civil forfeitures; which the modern prevailing usage, with regard to spiritual preferments, calls aloud to be put in execution. I shall briefly consider them in this place, because they divest the corrupt patron of the right of presentation, and vest a new right in the crown.

§ 379. (1) **Statutes, 1588, 1683, 1713.**—By the statute 31 Eliz., c. 6 (Benefices, 1588), it is for avoiding of simony enacted, that if any patron for any corrupt consideration, by gift or promise, directly or indirectly, shall present or collate any person to an ecclesiastical benefice or dignity; such presentation shall be

<sup>r</sup> Co. Litt. 344, 345.

<sup>u</sup> 3 Inst. 156.

<sup>s</sup> 2 Roll. Abr. 369.

<sup>w</sup> Moor. 564.

<sup>t</sup> Co. Litt. 344.

void, and the presentee be rendered incapable of ever enjoying the same benefice: and the crown shall present to it for that turn only.<sup>x</sup> But if the presentee dies, without being convicted of such simony in his lifetime, it is enacted by stat. 1 W. & M., c. 16 (Benefices, 1688), that the simoniacal contract shall not prejudice any other innocent patron, on pretense of lapse to the crown or otherwise. Also by the statute 12 Ann., st. 2, c. 12 (Simony, 1713), if any person for money or profit shall procure, in his own name or the name of any other, the next presentation to any living ecclesiastical, and shall be presented thereupon, this is declared to be a simoniacal contract; and the party is subjected to all the ecclesiastical penalties of simony, is disabled from holding the benefice, and the presentation devolves to the crown.

§ 380. (2) What constitutes simony.—Upon these statutes many questions have arisen, with regard to what is and what is not simony. And, among others, these points seem to be clearly settled: 1. That to purchase a presentation, the living being actually vacant, is open and notorious simony;<sup>y</sup> this being expressly in the face of the statute. 2. That for a clerk to bargain for the next presentation, the incumbent being sick and about to die, was simony, even before the statute of Queen Anne:<sup>z</sup> and now, by that statute, to purchase, either in his own name or another's, the next presentation, and be thereupon presented [280] at any future time to the living, is direct and palpable simony. But, 3. It is held that for a father to purchase such a presentation, in order to provide for his son, is not simony: for the son is not concerned in the bargain, and the father is by nature bound to make a provision for him.<sup>a</sup> 4. That if a simoniacal contract be made with the patron, the clerk not being privy thereto, the presentation for that turn shall indeed devolve to the crown, as a punishment of the guilty patron; but the clerk, who is innocent, does not incur any disability or forfeiture.<sup>b</sup> 5. That bonds given to pay money to charitable uses, on receiving a presentation to a living, are not

<sup>x</sup> For other penalties inflicted by this statute, see book IV. c. 4.

<sup>y</sup> Cro. Eliz. 788. Moor. 914.

<sup>z</sup> Hob. 165.

<sup>a</sup> Cro. Eliz. 686. Moor. 916.

<sup>b</sup> 3 Inst. 154. Cro. Jac. 385.



simoniacal,<sup>c</sup> provided the patron or his relations be not benefited thereby;<sup>d</sup> for this is no corrupt consideration, moving to the patron. 6. That bonds of resignation, in case of nonresidence or taking any other living, are not simoniacal;<sup>e</sup> there being no corrupt consideration herein, but such only as is for the good of the public. So also bonds to resign, when the patron's son comes to canonical age, are legal; upon the reason before given, that the father is bound to provide for his son.<sup>f</sup> 7. Lastly, general bonds to resign at the patron's request are held to be legal:<sup>g</sup> for they may possibly be given for one of the legal considerations before mentioned; and where there is a possibility that a transaction may be fair, the law will not suppose it iniquitous without proof. But, if the party can prove the contract to have been a corrupt one, such proof will be admitted, in order to show the bond simoniacal, and therefore void. Neither will the patron be suffered to make an ill use of such a general bond of resignation; as by extorting a composition for tithes, procuring an annuity for his relation, or by demanding a resignation wantonly or without good cause, such as is approved by the law; as, for the benefit of his own son, or on account of nonresidence, plurality of livings, or gross immorality in the incumbent.<sup>h</sup> <sup>10</sup>

§ 381. e. Breach of condition.—[281] The next kind of forfeitures are those by *breach* or nonperformance of a *condition* annexed to the estate, either expressly by deed at its original creation, or impliedly by law from a principle of natural reason. Both which we considered at large in a former chapter.<sup>1</sup>

§ 382. f. Waste.—I therefore now proceed to another species of forfeiture, viz., by *waste*.<sup>11</sup> Waste, *vastum*, is a spoil or de-

<sup>c</sup> Noy. 142.

<sup>d</sup> Stra. 534.

<sup>e</sup> Cro. Car. 180.

<sup>f</sup> Cro. Jac. 248. 274.

<sup>g</sup> Cro. Car. 180. Stra. 227.

<sup>h</sup> 1 Vern. 411. 1 Equ. Cas. Abr. 86, 87. Stra. 534.

<sup>1</sup> See chap. 10. pag. 152.

<sup>10</sup> On lapse and simony, one may consult 2 Stephen's Comm. (16th ed.), 812 ff.

<sup>11</sup> By the old statute of Gloucester, 1278 (see p. \*283, *post*), the committing of any act of waste was made a cause of forfeiture of the thing or place

struction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee simple or fee-tail.<sup>\* 12</sup>

§ 383. (1) **Acts constituting waste.**—Waste is either *voluntary*, which is a crime of commission, as by pulling down a house; or it is *permissive*, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. Whatever does a lasting damage to the freehold or inheritance is waste.<sup>1</sup> Therefore, removing wainscot, floors, or other things once fixed to the

\* Co. Litt. 53.

<sup>1</sup> Hetl. 35.

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wasted, in case a *writ of waste* were issued against the tenant. But this writ, having been superseded in modern times by an action for damages, was abolished by the Real Property Limitation Act of 1833; and a tenant for life is now liable only to pay damages for waste already done, or to be restrained by injunction from committing any other act of waste which he may be known to contemplate. Williams, Real Prop. (21st ed.), 116. On the creation of estates without impeachment of waste, see note 2, p. \*122, *ante*.

<sup>12</sup> **Law of waste in the United States.**—"The term 'waste,' as used in the statute, and in the bond given in conformity with the provisions of the statute, should be construed according to its accepted legal significance. Blackstone's (Chitty) definition of the term is: 'Waste is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments to the disherison of him that hath the remainder or reversion in fee simple or fee-tail.' Pomeroy, in paragraph 1348 (Equity, vol. 4), defines the term as follows: 'Waste is the destruction or improper deterioration or material alteration of things forming an essential part of the inheritance, done or suffered by the person rightfully in possession by virtue of a temporary or partial estate—as, for example, a tenant for life or for years. . . .' Washburn, in his work on Real Property (volume 1 [4th ed.], p. 140), says: 'But whatever the act or omission is, in order to its constituting waste, it must either diminish the value of the estate, or increase the burdens upon it, or impair the evidence of title of him who has the inheritance. Waste, in short, may be defined to be whatever does a lasting damage to the freehold or inheritance, and tends to the permanent loss of the owner of the fee, or to destroy or lessen the value of the inheritance.' An action to recover for waste, within the meaning of any of these generally accepted definitions, must be brought by the owner of the fee for some act of omission or commission done by one in possession under an inferior estate; or, by a mortgagee or other lienholder to protect his security, or recover for an injury thereto, where the security would be or is rendered inadequate by the commission of such waste. Now, while the mortgagor remained in possession of the mortgaged premises pending the final confirmation

freehold of a house, is waste.<sup>m</sup> If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste: but otherwise, if the house be burnt by the carelessness or negligence of the lessee; though now by the statute 6 Ann., c. 31 (Apprehension of Housebreakers, 1706), no action will lie against a tenant for an accident of this kind. Waste may also be committed in ponds, dove-houses, warrens, and the like; by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance.<sup>n</sup> Tim-

<sup>m</sup> 4 Rep. 64.

<sup>n</sup> Co. Litt. 53.

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of the sale, he was then holding as owner of the fee, with a right to redeem at any time before the sale was finally confirmed and the deed ordered, and his position toward the mortgagee and the purchaser at the foreclosure sale was that of a debtor to a creditor, and not that of one in possession by an inferior estate, to the remainderman, or the owner of the inheritance." *United States Fidelity & Guaranty Co. v. Rieck*, 76 Neb. 300, 107 N. W. 389. What constitutes waste by a tenant for a term of years is determined by a consideration as to whether or not an act done results in injury to the inheritance, and whether or not an act is waste is determined by the conditions which exist at the time the act is committed. *Moss Point Lumber Co. v. Supervisors*, 89 Miss. 448, 42 South. 290, 873. Destruction of fruit trees; carrying away sand and gravel from shore of land bordering on a stream; sinking an oil or gas well by one tenant in common, are acts of waste. *Welling v. Strickland*, 161 Mich. 235, 126 N. W. 471; *Potomac Dredging Co. v. Smoot*, 108 Md. 54, 69 Atl. 507; *Dangerfield v. Caldwell*, 151 Fed. 554, 81 C. C. A. 400. The plowing up of blue-grass sod on a farm, or the cutting of timber from wild lands in a careful and prudent manner, keeping in view the future value of the land, is not waste. *Mize v. Burnett*, 162 Mo. App. 441, 145 S. W. 150; *McNichol v. Eaton*, 77 Me. 246. The extent to which wood and timber may be cut on land to be cleared without waste is a question for the jury. *Jackson v. Brownson*, 7 Johns. (N. Y.) 227, 5 Am. Dec. 258. "Technically there is a difference between 'waste' and 'trespass.' 'Waste' is some unauthorized act which goes to the injury or destruction of an estate committed by one in the rightful possession thereof, while 'trespass' is the act of a mere intruder. But, as we have seen, there is no substantial distinction, so far as the remedy is concerned. The law gives for trespass, by which the substance of an estate is injured or destroyed, and which cannot be adequately compensated in damages, the remedies for waste (30 Am. & Eng. Ency. [2d ed.], 258), and therefore, while in a technical sense the appropriate remedy for the plaintiff, under the facts disclosed by the testimony, would have been a suit to restrain waste, rather than a suit to enjoin a trespass, the relief sought is substantially the same." *Roots v. Boring Junction Lumber Co.*, 50 Or. 298, 92 Pac. 811, 818, 94 Pac. 182.

ber also is part of the inheritance.<sup>o</sup> Such are oak, ash, and elm in all places: and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber; and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste.<sup>p</sup> But under-wood the tenant may cut down at any seasonable time [282] that he pleases;<sup>q</sup> and may take sufficient estovers of common right for house-bote and cart-bote; unless restrained (which is usual) by particular covenants or exceptions.<sup>r</sup> The conversion of land from one species to another is waste. To convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture; are all of them waste.<sup>s</sup> For, as Sir Edward Coke observes,<sup>t</sup> it not only changes the course of husbandry, but the evidence of the estate; when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value.<sup>u</sup> To open the land to search for mines of metal, coal, etc., is waste; for that is a detriment to the inheritance:<sup>v</sup> but, if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use;<sup>w</sup> for it is now become the mere annual profit of the land. These three are the general heads of waste, viz., in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

§ 384. (2) Who liable for waste.—Let us next see who are liable to be punished for committing waste. And by the feudal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories; “*Si vasallus feudum dissipaverit, aut insigni detrimento deterius fecerit, privabitur*” (If a vassal shall have wasted the fee, or lessened its value by any

<sup>o</sup> 4 Rep. 62.

<sup>p</sup> Co. Litt. 53.

<sup>q</sup> 2 Roll. Abr. 817.

<sup>r</sup> Co. Litt. 41.

<sup>s</sup> Hob. 296.

<sup>t</sup> 1 Inst. 53.

<sup>u</sup> 1 Lev. 309.

<sup>v</sup> 5 Rep. 12.

<sup>w</sup> Hob. 295.

notorious injury, he shall be deprived of it).''\* But in our ancient common law the rule was by no means so large: for not only he that was seised of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant, save only in three persons; guardian in chivalry, tenant in dower, and tenant by the curtesy;† [283] and not in tenant for life or years.‡ And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee; and if he did not, it was his own default. But, in favor of the owners of the inheritance, the statutes of Marlbridge<sup>a</sup> and Gloucester<sup>b</sup> provided, that the writ of waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other that holds in any manner for life or years. So that, for above five hundred years past, all tenants merely for life, or for any less estate (except tenants by statute merchant, statute staple, recognizance, or *elegit*, against whom the debtor may set off the damages in account<sup>c</sup>) have been punishable or liable to be impeached for waste, both voluntary and permissive; unless their leases be made, as sometimes they are, without impeachment of waste, *absque impetitione vasti*; that is, with a provision or protection that no man shall *impetere*, or sue him, for waste committed.\*

\* Ninth edition adds, "But tenant in tail after possibility of issue extinct is not impeachable for waste; because his estate was at its creation an estate of inheritance, and so not within the statutes.<sup>a</sup> Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*; because against them the debtor may set off the damages in account:<sup>b</sup> but it seems reasonable that it should lie *for the reversioner*, expectant on the determination of the debtor's own estate, or of these estates derived from the debtor."<sup>c</sup> [a Co. Litt. 27. 2 Roll. Abr. 826, 828. b Co. Litt. 54. c F. N. B. 58.]

x Wright, 44.

† It was, however, a doubt whether waste was punishable at the common law in tenant by the curtesy. Regist. 72. Bro. Abr. tit. Waste, 88. 2 Inst. 301.

‡ 2 Inst. 299.

a 52 Hen. III. c. 23 (Landlord and Tenant, 1267).

b 6 Edw. I. c. 5 (Action of Waste, 1278).

c Co. Litt. 54.



§ 385. (3) **Punishment for waste.**—The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages;<sup>d</sup> except in the case of a guardian, who also forfeited his wardship<sup>e</sup> by the provisions of the great charter:<sup>f</sup> but the statute of Gloucester directs that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages, to him that hath the inheritance. The expression of the statute is, “he shall forfeit the *thing* which he hath wasted”; and it hath been determined, that under these words the *place* is also included.<sup>g</sup> And if waste be done *sparsim*, or here and there, all over a wood, the whole wood shall be recovered; or if in several rooms of a [284] house, the whole house shall be forfeited;<sup>h</sup> because it is impracticable for the reversioner to enjoy only the identical places wasted, when lying interspersed with the other. But if waste be done only in one end of a wood (or perhaps in one room of a house, if that can be conveniently separated from the rest), that part only is the *locus vastatus*, or thing wasted, and that only shall be forfeited to the reversioner.<sup>i</sup>

§ 386. **g. Forfeiture of copyholds by breach of custom.**—A seventh species of forfeiture is that of *copyhold* estates, by *breach* of the *customs* of the manor. Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste; whereupon the lord may seize them without any presentment by the homage;<sup>k</sup> but also to peculiar forfeitures, annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors.<sup>l</sup>

<sup>d</sup> 2 Inst. 146.<sup>h</sup> Co. Litt. 54.<sup>e</sup> *Ibid.* 300.<sup>i</sup> 2 Inst. 304.<sup>f</sup> 9 Hen. III. c. 4 (1225).<sup>k</sup> 2 Vent. 38. Cro. Eliz. 499.<sup>g</sup> 2 Inst. 303.

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<sup>l</sup> **Modern forfeitures of copyholds.**—It is a survival of the ancient principles of tenure, which clings to copyholds after it has practically disappeared from other tenures, that any act of the tenant which, either expressly or by implication, denies his lord's title, is an occasion of forfeiture. Thus waste, voluntary or permissive, works a forfeiture; because it virtually asserts the right of the copyholder in a manner inconsistent with his lord's title. And, as we have seen, the law of waste is stricter in respect of a copyholder than

And we may observe that, as these tenements were originally holden by the lowest and most abject vassals, the marks of feudal dominion continue much the strongest upon this mode of property. Most of the offenses, which occasioned a resumption of the fief of the feudal law, and were denominated *feloniæ, per quas vassallus amitteret feudum* (felonies, by which the vassal would lose his fee),<sup>1</sup> still continue to be causes of forfeiture in many of our modern copyholds. As, by subtraction of suit and service:<sup>m</sup> *si dominum deservire noluerit*;<sup>n</sup> by disclaiming to hold of the lord, or swearing himself not his copyholder:<sup>o</sup> *si dominum ejuravit, i. e. negavit se a domino feudum habere*;<sup>p</sup> by neglect to be admitted tenant within a year and a day:<sup>q</sup> *si per annum et diem cessaverit in*

<sup>1</sup> Feud. l. 2. t. 26. in calc.<sup>m</sup> 3 Leon. 108. Dyer. 211.<sup>n</sup> Feud. l. 1. t. 21.

• Co. Copyh. § 57.

<sup>p</sup> Feud. l. 2. t. 34 & t. 26. § 3.<sup>q</sup> Plowd. 372.

in respect of a socage tenant for life, or a tenant for years. A lease without license by a common-law assurance for any term longer than a year is a cause of forfeiture; formerly a feoffment had a similar effect. (Owing to the facts that a feoffment has no longer any tortious operation (8 & 9 Vict. [1845], c. 106, § 4), that fines and recoveries are abolished (3 & 4 Will. IV [1833], c. 74, § 2), and that bargains and sales and grants have always been "innocent" conveyances, a demise for years appears to be the only process by which a copyholder can alienate to his lord's prejudice. The term is valid as against all persons but the lord (*Doe ex dem. Tresidder v. Tresidder*, [1841] 1 Q. B. 416, 113 Eng. Reprint, 1192); and is, therefore, a cause of forfeiture to him). So, also, is a willful refusal on the part of the copyholder to render his dues and services after sufficient notice; but a mere failure through inability is not. (*Willowe's Case*, [1608] 13 Rep. 1.) Willful confusion of boundaries is also an occasion of forfeiture; but the lord cannot obtain assistance from the high court to remedy the confusion, except upon the terms of waiving the forfeiture. (*Bishop of Durham v. Rippon*, [1826] 4 L. J. Ch. 32.)

In the case of copyholds, the high court will not give relief against a forfeiture legally incurred (*Peachy v. Duke of Somerset*, [1721] 1 Strange, 447, 93 Eng. Reprint, 626; *Hill v. Barclay*, [1811] 18 Ves. Jr., at p. 64, 34 Eng. Reprint, 238), unless the lord has another remedy (*Paston v. Uthert*, [1629] Litt., at p. 267, 124 Eng. Reprint, 238), or unless it is satisfied that the wrongdoing of the tenant arose through inadvertence (*Cox v. Higford*, [1710] 2 Vern. 664, 23 Eng. Reprint, 1032; *Nash v. Earl of Derby*, [1705] 2 Vern. 537, 23 Eng. Reprint, 948), or at least that pecuniary compensation can be made to the lord for any loss which he may have suffered. (*Thomas v. Porter*, [1668] 1 Ch. Ca. 95, 22 Eng. Reprint, 711.)—JENKS, *Modern Land Law*, 223.

*petenda investitura*; <sup>r</sup> by contumacy in not appearing in court after three proclamations: <sup>s</sup> *si a domino ter citatus non comparuerit*; <sup>t</sup> or by refusing, when sworn of the homage, to present the truth according to his oath: <sup>u</sup> [285] *si pares veritatem noverint, et dicant se nescire, cum sciant*.<sup>w</sup> In these, and a variety of other cases, which it is impossible here to enumerate, the forfeiture does not accrue to the lord till after the offenses are presented by the homage, or jury of the lord's court-baron; <sup>x</sup> *per laudamentum parium suorum*: <sup>y</sup> or, as it is more fully expressed in another place, <sup>z</sup> *nemo miles adimatur de possessione sui beneficii, nisi convicta culpa, quæ sit laudanda* <sup>a</sup> *per judicium parium suorum* (no soldier shall be removed from the possession of his benefice, unless convicted of some offense, which must be pronounced by the judgment of his peers).

§ 387. h. Bankruptcy.—The eighth and last method, whereby lands and tenements may become forfeited, is that of *bankruptcy*, or the act of becoming a bankrupt: which unfortunate person may from the several descriptions given of him in our statute law be thus defined: a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.<sup>14</sup>

<sup>r</sup> Feud. l. 2. t. 24.

<sup>s</sup> 8 Rep. 99. Co. Copyh. § 57.

<sup>t</sup> Feud. l. 2. t. 22.

<sup>u</sup> Co. Copyh. § 57.

<sup>w</sup> Feud. l. 2. t. 58.

<sup>x</sup> Co. Copyh. § 58.

<sup>y</sup> Feud. l. 1. t. 21.

<sup>z</sup> *Ibid.* t. 22.

<sup>a</sup> i. e., *arbitranda, definienda* (be judged, be declared). Du Fresne. IV. 79.

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<sup>14</sup> English Bankrupt Act of 1883.—Freeholds are subject to involuntary alienation for debt in the tenant's lifetime in the case of his bankruptcy. Bankruptcy is the name given to the judicial proceedings, first introduced by statutes of Henry VIII and Elizabeth, by which a man may be released from his debts, after surrendering all his property to his creditors. By the Bankruptcy Act, 1883, when a debtor is adjudged bankrupt, the whole of his freehold as well as his personal estate vests in the trustee under the act, who is empowered to sell the same and divide the proceeds amongst the creditors who have proved their debts. And any real estate which may be acquired by or devolve on a bankrupt before his discharge vests at once in like manner in

Who shall be such a trader, or what acts are sufficient to denominate him a bankrupt, with the several connected consequences resulting from that unhappy situation, will be better considered in a subsequent chapter; when we shall endeavor more fully to explain its nature, as it most immediately relates to personal goods and chattels. I shall only here observe the manner in which the property of lands and tenements are transferred, upon the supposition that the owner of them is clearly and indisputably a bankrupt, and that a commission of bankrupt is awarded and issued against him.

By the statute 13 Eliz., c. 7 (Bankruptcy, 1571), the commissioners for that purpose, when a man is declared a bankrupt, shall have full power to dispose of all his lands and tenements, which he had in his own right at the time when he became a bankrupt, or which shall descend or come to him at any time afterwards, before his debts are satisfied or agreed for; and all lands and tenements which were purchased by him jointly with his wife or children to his own use (or such interest therein as [286] he may lawfully part with), or purchased with any other person upon secret trust for his own use; and to cause them to be appraised to their full value, and to sell the same by deed indented and enrolled, or divide them proportionably among the creditors. This statute expressly included not only free, but customary and copyhold, lands: but did not extend to estates-tail further than for the bankrupt's life; nor to equities of redemption on a mortgaged estate, wherein the bankrupt has no legal interest, but only an equitable reversion. Whereupon the statute 21 Jac. I, c. 19 (Bankruptcy, 1623), enacts, that the commissioners shall be empowered to sell or convey, by deed indented and enrolled, any lands or tenements of the bankrupt, wherein he shall be seised of an estate-tail in possession, remainder, or reversion, unless the remainder or reversion thereof shall be in the crown; and that such sale shall be good against all such issues in tail, remaindermen, and reversionsers, whom the bankrupt himself might have barred by a com-

the trustee; and the bankrupt himself has no power to dispose thereof. Also where a debtor is released from his debts by a composition or scheme of arrangement approved by the court under the present bankruptcy law (1890), all or any part of his property may by the terms of the composition or scheme be vested in the trustee appointed to carry out the same.—WILLIAMS, *Real Prop.* (21st ed.), 278.

mon recovery, or other means: and that all equities of redemption upon mortgaged estates shall be at the disposal of the commissioners; for they shall have power to redeem the same, as the bankrupt himself might have done, and after redemption to sell them. And also, by this and a former act,<sup>b</sup> all fraudulent conveyances to defeat the intent of these statutes are declared void; but that no purchaser *bona fide*, for a good or valuable consideration, shall be affected by the bankrupt laws, unless the commission be sued forth within five years after the act of bankruptcy committed.

By virtue of these statutes a bankrupt may lose all his real estates; which may at once be transferred by his commissioners to their assignees, without his participation or consent.

<sup>b</sup> 1 Jac. I. c. 15 (Bankrupts, 1603).



## [287] CHAPTER THE NINETEENTH.

### OF TITLE BY ALIENATION.

§ 388. **Acquisition of title by conveyance or alienation.**—The most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense: under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another: whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties.<sup>1</sup>

§ 389. **1. Former restrictions on alienation.**—This means of taking estates, by alienation, is not of equal antiquity in the law of England with that of taking them by descent. For we may remember that, by the feudal law,<sup>a</sup> a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord; lest thereby a feeble or suspicious tenant might have been substituted and imposed upon him to perform the feudal services, instead of one on whose abilities and fidelity he could depend. Neither could the feudatory then subject the land to his debts; for, if he might, the feudal restraint of alienation would

<sup>a</sup> See pag. 57.

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**1 Modes of alienation.**—Title by alienation, according to Blackstone, comprises any method wherein estates are voluntarily resigned by one man and accepted by another. In this sense it comprises title by devise as well as by deed and by matter of record. (Ch. 20, 21.) Washburn prefers to classify titles by grant, excluding devises (or, in other words, alienation *inter vivos*), and embraces therein titles by public grant and office grant, which do not come within Blackstone's definition. His divisions are three: (1) Public grants, or titles derived to an individual from a state or the United States. (2) Office grants, or conveyances made by some officer of the law to effect certain purposes, where the owner is either unable or unwilling to execute the requisite deeds to pass the title. (3) Private grants, or conveyances from one individual to another. General references: 4 Kent, Com. Lect., 67; 3 Washburn, ch. 3, 4, 5, pl. 162-424 (top); 2 Hilliard's Real Property, ch. 79-89, inclusive; Cruise's Digest, tit. 32, occupying all of vol. 4; Walker's Am. Law, Lect. 31, pp. 369-413; Digby's Hist. of Real Property Law, ch. 10, § 1, pp. 321-337; Deane on Conveyancing; Wharton on Conveyancing; Sugden, Dart, Hilliard, on the Law of Vendors and Purchasers of Real Estate.—HAMMOND.

have been easily frustrated, and evaded.<sup>b</sup> And, as he could not alien it in his lifetime, so neither could he by will defeat the succession, by devising his feud to another family; nor even alter the course of it, by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he alien the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir.<sup>c</sup> And therefore it was very usual in ancient feoffments to express, [288] that the alienation was made by consent of the heirs of the feoffor; or sometimes for the heir apparent himself to join with the feoffor in the grant.<sup>d</sup> And, on the other hand, as the feudal obligation was looked upon to be reciprocal, the lord could not alien or transfer his seigniorship without the consent of his vassal: for it was esteemed unreasonable to subject a feudatory to a new superior, with whom he might have a deadly enmity, without his own approbation; or even to transfer his fealty, without his being thoroughly apprised of it, that he might know with certainty to whom his renders and services were due, and be able to distinguish a lawful distress for rent from a hostile seizing of his cattle by the lord of a neighboring clan.<sup>e</sup> This consent of the vassal was expressed by what was called *attorning*,<sup>f</sup> or professing to become the tenant of the new lord: which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser, and to become his tenant, the grant or contract was in most cases

<sup>b</sup> Feud. l. 1. t. 27.

<sup>c</sup> Co. Litt. 94. Wright, 168.

<sup>d</sup> Madox, Formul. Angl. No. 316. 319. 427.

<sup>e</sup> Gilb. Ten. 75.

<sup>f</sup> The same doctrine and the same denomination prevailed in Bretagne.—*Possessiones in jurisdictionalibus non aliter apprehendi posse, quam per attournances et avirances, ut loqui solent; cum vassallus, ejurato prioris domini obsequio et fide, novo se sacramento novo item domino acquirenti obstringebat; idque jussu auctoris.* (Possessions with a right of jurisdiction can only be taken by attorning or professing to become tenant, as it is usually called; when the vassal resigning his former obedience and faith, bound himself by a fresh oath to the new lord, and that by the command of his ancient lord.) D'Argentre Antiq. Consuet. Brit. apud. Dufresne. i. 819, 820.

void, or at least incomplete:“ which was also an additional clog upon alienations.<sup>2</sup>

§ 390. 2. Freedom of alienation: history.—But by degrees this feudal severity is worn off, and experience hath shown, that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared, in the first place, by a law of King Henry the First, which allowed a man to sell and dispose of lands which he himself had purchased; for over these he was thought to have a more extensive power than over what had been transmitted to him in a course of descent from his ancestors:<sup>h</sup> [289] a doctrine which is countenanced by the feudal constitutions themselves:<sup>1</sup> but he was not allowed to sell the whole of his own acquisitions, so as totally to disinherit his children, any more than he was at liberty to alien his paternal estate.<sup>k</sup> Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and

<sup>g</sup> Litt. § 551.

<sup>h</sup> *Emptiones vel acquisitiones suas det cui magis velit. Terram autem quam ei parentes dederunt, non mittat extra cognationem suam.* (He may give his purchases or acquisitions to whomsoever he pleases. But the land which descended to him he cannot alien from his kindred.) LL. Hen. I. c. 70.

<sup>i</sup> Feud. l. 2. t. 39.

<sup>k</sup> *Si questum tantum habuerit is, qui partem terræ suæ donare voluerit, tunc quidem hoc ei licet; sed non totum questum, quia non potest filium suum hæredem exheredare.* (If he, who wishes to give a part of his land, has only what he has acquired himself, he may lawfully do it; but he cannot alien the whole, because he cannot disinherit his son and heir.) Glanvill l. 7. c. 1.

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<sup>2</sup> By the 4 & 5 Anne (1705), c. 3 (sometimes cited as 4 Anne, c. 16), attornment ceased to be necessary to complete any voluntary grant or conveyance. Attornment was not necessary when the transfer was by operation of law, as in the case of lands being taken upon an *elegit*; but when the court appoints a receiver, it invariably directs that the tenants shall attorn to the receiver, without which he cannot sue or distrain for rent in his own name. Attornment is also necessary before a sequestrator appointed to enforce a judgment can recover rent. We may also here observe, that by the Distress for Rent Act, 1737, the fraudulent attornment of the tenant to a stranger, to the prejudice of his landlord, is rendered wholly inoperative.—STEPHEN, 1 Comm. (16th ed.), 355.

his *assigns* by name; but, if his *assigns* were not specified in the purchase deed, he was not empowered to alien:<sup>1</sup> and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir.<sup>m</sup> By the great charter of Henry III.<sup>n</sup> no subinfeudation was permitted of part of the land, unless sufficient was left to answer the services due to the superior lord, which sufficiency was probably interpreted to be one-half or moiety of the land.<sup>o</sup> But these restrictions were in general removed by the statute of *quia emptores*,<sup>p</sup> whereby all persons, except the king's tenants *in capite* (in chief, i. e., directly of the king), were left at liberty to alien all or any part of their lands at their own discretion.<sup>q</sup> And even these tenants *in capite* were by the statute 1 Edw. III, c. 12 (Sale of Land, 1326), permitted to alien, on paying a fine to the king.<sup>r</sup> By the temporary statutes 7 Hen. VII, c. 3 (Soldiers' Privileges, 1491), and 3 Hen. VIII, c. 4 (Soldiers' Privileges, 1511), all persons attending the king in his wars were allowed to alien their lands without license, and were relieved from other feudal burdens. And, lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II, c. 24 (Military Tenures, 1660). As to the power of *charging* lands with the debts of the owner, this was introduced so early as statute Westm. 2, which<sup>r</sup> subjected a *moiety* of the tenant's lands to executions, for debts recovered by law; as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*, made the same year, and in a statute staple by statute 27 Edw. III, c. 9 (1353), and in other similar recognizances by statute 23 Hen. [290] VIII, c. 6 (Recognizances for Debt, 1531). And now, the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. The restraint of *devising*

<sup>1</sup> Mirr. c. 1. § 3. This is also borrowed from the feudal law. Feud. l. 2. t. 48.

<sup>m</sup> Mirr. *Ibid.*

<sup>n</sup> 9 Hen. III, c. 32 (1225).

<sup>o</sup> Dalrymple of Feuds. 95.

<sup>p</sup> 18 Edw. I. c. 1 (1290).

<sup>q</sup> See pag. 72. 91.

<sup>r</sup> 2 Inst. 67.

<sup>rr</sup> 13 Edw. I. c. 18 (1285).

lands by will, except in some places by particular custom, lasted longer; that not being totally removed, till the abolition of the military tenures. The doctrine of *attornments* continued still later than any of the rest, and became extremely troublesome, though many methods were invented to evade them: till at last, they were made no longer necessary, by statutes 4 & 5 Ann., c. 16 (*Attornment*, 1705),\* and 11 Geo. II, c. 19 (*Distress for Rent*, 1737).<sup>3</sup>

\* Ninth edition reads after the words "4 & 5 Ann., c. 16," "nor shall, by statute 11 Geo. II, c. 19, the attornment of any tenant affect the possession of any lands, unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice."

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3 **Restraints on alienation.**—In the early law, alienability of property and rights of any sort was the exception, not the rule. Maine, *Ancient Law* (Pollock ed.), pp. 281–283. In the earliest stages of the English law of which we have record, chattels seem to have been practically the only kind of property as to which there was, in general, freedom of alienation. Land, under the feudal system, was not the subject of unrestrained conveyance. It was not until 1290, by virtue of the Statute of *Quia Emptores*, that even a fee simple could be transferred without a fine paid to the feudal lord. By that statute, a fee simple was made freely alienable. But only five years before the date of *Quia Emptores*, estates-tail were declared to be inalienable, by the Statute *De Donis*. The ingenuity of lawyers and judges avoided, to a great extent, the purpose of this statute, nearly two centuries later, when it was determined in *Taltarum's case* that an estate-tail might be conveyed by means of a common recovery. In modern law, practically every interest in real property, even the right of entry for breach of condition, is freely transferable, and the transfer may be made not only by conveyance *inter vivos* but by will. Rights under contracts were not assignable, and in some jurisdictions still remain unassignable at law, though equity would everywhere protect the assignee. Rights arising out of tortious injuries to property have by various statutes been made assignable. Practically the only part of the law of torts in which the old rule of nonalienability continues to exist is in the field of injuries to person and reputation. It may be stated as a general rule to-day that property and rights of every description are alienable, unless their alienation is prohibited by some rule of public policy, as in the case of a pension, under section 4745 of the United States Revised Statutes; or unless the rights are in their essence personal, as in the case of contracts for personal service, or rights of action for injuries to person or reputation; or unless the alienation is forbidden by the contract or grant creating the rights.

The power to forbid the alienation of an estate or interest by the deed, will, or other conveyance creating it, however, is by no means unlimited. On the



In examining the nature of alienation, let us first inquire, briefly, *who* may alien and to *whom*; and then, more largely, *how* a man may alien, or the several modes of conveyance.

§ 391. 3. Who may alien: who may purchase.—Who may alien, and to whom: or, in other words, who is capable of conveying and who of purchasing. And herein we must consider rather the incapacity, than capacity, of the several parties: for all persons in possession are *prima facie*, capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But, if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men, whereby justice might be

contrary, the general favor which courts have shown towards freedom of alienation has resulted in certain rules forbidding a seller or donor, a grantor or testator from restraining the power of alienation of the property transferred by him. One cannot, by any device, absolutely restrain the grantee or devisee of a fee-simple estate, or the owner of personal property from conveying it. Gray, *Restraints on Alienation* (2d ed.), § 279. A limited power of restraining the transfer of life interests in real estate or personal property by the employment of conditions or conditional limitations exists, but even in that case, unless the language plainly provides a forfeiture or termination of the estate or interest for breach of such condition, the courts will refuse to give the provision effect. In the case of married women, equity made an exception to these rules, but only for the protection of the women—it permitted a restraint to be imposed in respect to the alienation of married women's separate estates, and even allowed them to enjoy the same free from the risk of execution and sale by their creditors. But this rule was exceptional and is itself becoming obsolete by reason of the fact that statutes have in general supplanted that branch of equity jurisprudence which deals with married women's estates. If B is granted an estate upon condition that he shall not sell for ten years, or that he shall not sell without the grantor's consent during his lifetime, B in each case takes an absolute interest, freed from the condition, which is wholly void.

A seller of a chattel may not affix a condition to the sale, restraining the purchaser from reselling the article. It has been held under this principle that a manufacturer of articles, even under a secret process, cannot by contract fix the price at which the articles may be sold (*Dr. Miles Medical Co. v. John D. Park & Sons Co.* (1911), 220 U. S. 373, 55 L. Ed. 502, 31 Sup. Ct. Rep. 376), though the effect of this decision has been somewhat impaired by the subsequent decision in *Henry v. A. B. Dick Co.* (1911), 224 U. S. 1, Ann. Cas. 1913D, 880, 56 L. Ed. 645, 32 Sup. Ct. Rep. 364, holding that the principle does not extend to price restrictions upon patented articles. These cases,

trodden down, and the weak oppressed.\* Yet reversions and vested remainders may be granted; because the possession of the particular tenant is the possession of him in reversion or remainder: but *contingencies*, and mere *possibilities*, though they may be released, or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger, unless coupled with some present interest.<sup>ss</sup>

§ 392. a. **Persons attainted.**—Persons attainted of treason, felony, and *præmunire*, are incapable of conveying, from the time of the offense committed, provided attainder follows:† for such conveyance by them may tend to defeat the king of his forfeiture, or the [291] lord of his escheat. But they may *purchase* for the benefit of the crown, or the lord of the fee, though they are disabled to *hold*: the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime.<sup>u</sup> So, also, corporations, religious or others, may purchase lands: yet, unless they have a license to hold in mortmain, they cannot retain such purchase; but it shall be forfeited to the lord of the fee.<sup>4</sup>

§ 393. b. **Idiots; insane; infants; persons under duress.**—Idiots and persons of nonsane memory, infants, and persons under

\* Co. Litt. 214.

<sup>ss</sup> Sheppard's Touchstone, 238, 239, 322. 11 Mod. 152. 1 P. Wms. 574. Stra. 132.

† Co. Litt. 42.

<sup>u</sup> *Ibid.* 2.

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however, deal with the question whether or not a contract fixing prices at which sales may be made is valid. There is no dispute upon the fundamental proposition that one who buys articles in violation of such restriction takes a good title.

In New York and some other jurisdictions further limits are placed by statute upon the right of limiting the power of alienation, but the discussion of these statutory rules as well as of other matters connected with the general subject can best be studied in the late Professor John Chipman Gray's classical monograph on Restraints on the Alienation of Property.—McMURRAY.

<sup>4</sup> The general effect of modern English statutes is that attainder has been abolished from July 4, 1870, and that no conviction for treason or felony has any effect upon title.

duress, are not totally disabled either to convey or purchase, but *sub modo* (to a certain extent) only. For their conveyances and purchases are voidable, but not actually void. The king indeed, on behalf of an idiot, may avoid his grants or other acts.<sup>w</sup> But it hath been said, that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant: for that no man shall be allowed to stultify himself, or plead his own disability. The progress of this notion is somewhat curious. In the time of Edward I, *non compos* was a sufficient plea to avoid a man's own bond:<sup>x</sup> and there is a writ in the register<sup>y</sup> for the alienor himself to recover lands aliened by him during his insanity; *dum fuit non compos mentis suæ, ut dicit*, etc. (while he was of unsound mind, as he says). But under Edward III a scruple began to arise, whether a man should be permitted to *blemish* himself, by pleading his own insanity:<sup>z</sup> and, afterwards, a defendant in assize having pleaded a release by the plaintiff since the last continuance, to which the plaintiff replied (*ore tenus*—by word of mouth—as the manner then was) that he was out of his mind when he gave it, the court adjourned the assize; doubting, whether as the plaintiff was sane both then and at the commencement of the suit, he should be permitted to plead an intermediate deprivation of reason; and the question was asked, how he came to remember the release, if out of his senses when he gave it.<sup>a</sup> Under Henry VI this way of [292] reasoning (that a man shall not be allowed to disable himself, by pleading his own incapacity, because he cannot know what he did under such a situation) was seriously adopted by the judges in argument;<sup>b</sup> upon a question, whether the heir was barred of his right of entry by the feoffment of his insane ancestor. And from these loose authorities, which Fitzherbert does not scruple to reject as being contrary to reason,<sup>c</sup> the maxim that a man shall not

<sup>w</sup> *Ibid.* 247.

<sup>x</sup> Britton. c. 28. fol. 66.

<sup>y</sup> Fol. 228. See also Memorand. Scacch. 22 Edw. I. (prefixed to Maynard's Year-Book Edw. II.) fol. 23.

<sup>z</sup> 5 Edw. III. 70 (1331).

<sup>a</sup> 35 Assis. pl. 10.

<sup>b</sup> 39 Hen. VI. 42 (1460).

<sup>c</sup> F. N. B. 202.

stultify himself hath been handed down as settled law:<sup>d</sup> though later opinions, feeling the inconvenience of the rule, have in many points endeavored to restrain it.<sup>e</sup> And, clearly, the next heir, or other person interested, may, after the death of the idiot or *non compos*, take advantage of his incapacity and avoid the grant.<sup>f</sup> And so, too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option.<sup>g</sup> In like manner, an infant may waive such purchase or conveyance, when he comes to full age; or, if he does not then actually agree to it, his heirs may waive it after him.<sup>h</sup> Persons also, who purchase or convey under duress, may affirm or avoid such transaction, whenever the duress is ceased.<sup>i</sup> For all these are under the protection of the law; which will not suffer them to be imposed upon, through the imbecility of their present condition; so that their acts are only binding, in case they be afterwards agreed to, when such imbecility ceases. Yet the guardians or committees of a lunatic, by the statute of 11 Geo. III, c. 20 (Lunacy, 1770), are empowered to renew in his right under the directions of the court of chancery any lease for lives or years, and apply the profits of such renewal for the benefit of such lunatic, his heirs, or executors.

§ 394. *c. Feme covert.*—The case of a feme covert is somewhat different. She may *purchase* an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids [<sup>293</sup>] it by some act declaring his dissent.<sup>k</sup> And, though he does nothing to avoid it, or even if he actually consents,

<sup>d</sup> Litt. § 405. Cro. Eliz. 398. 4 Rep. 123.

<sup>e</sup> Comb. 469. 3 Mod. 310, 311. 1 Equ. Cas. Abr. 279.

<sup>f</sup> Perkins. § 21.

<sup>g</sup> Co. Litt. 2.

<sup>h</sup> *Ibid.*

<sup>i</sup> 2 Inst. 483. 5 Rep. 119.

<sup>k</sup> Co. Litt. 3.

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<sup>5</sup> *Stultifying one's self.*—The rule that a man shall not avoid his own deed or other act done in a condition of insanity seems never to have been adopted by the ecclesiastical courts (Turner v. Meyers, 1 Hagg. Ecc. 414), and is now entirely rejected alike in England and in this country. (See 2 Kent, Comm., 451.)—HAMMOND.

the feme covert herself may, after the death of her husband, waive or disagree to the same: nay, even her heirs may waive it after her, if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement.<sup>1</sup> But the *conveyance* or other contract of a feme covert (except by some matter of record) is absolutely void, and not merely voidable;<sup>m</sup> and therefore cannot be affirmed or made good by any subsequent agreement.

§ 395. **d. Aliens.**—The case of an alien born is also peculiar. For he may purchase anything; but after purchase he can *hold* nothing, except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the king.<sup>n 6</sup>

<sup>1</sup> *Ibid.*

<sup>n</sup> Co. Litt. 2.

<sup>m</sup> Perkins. § 154. 1 Sid. 120.

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<sup>6</sup> **Capacity to purchase or convey as affected by age, status, or mental condition.**—*Infants.*—The common-law rules as to the capacity of infants to be grantors or grantees of real property prevail generally in the United States. The voidable deed of an infant as grantor differs from most other voidable contracts, in that he cannot disaffirm it until he reaches his majority. *Sims v. Everhardt*, 102 U. S. 300, 26 L. Ed. 87. The ordinary statement of the courts is that after he is of age, if he fail to ratify the deed, he may disaffirm it within a reasonable time. *MacGreal v. Taylor*, 167 U. S. 688, 42 L. Ed. 326, 17 Sup. Ct. Rep. 961. It is now generally held that any unequivocal act clearly indicating his intention to set aside the deed will be a sufficient disaffirmance. *Tucker v. Moreland*, 10 Pet. (U. S.) 58, 9 L. Ed. 345. A deed to an infant as grantee is ordinarily valid, unless he repudiates it within a reasonable time after he becomes of age. *Cecil v. Salisbury*, 2 Vern. 224; *Henry v. Root*, 33 N. Y. 526; 2 Reeves, Real Prop., 1442.

*Persons under mental disability.*—Idiocy, insanity, and drunkenness are the more common causes of mental disability. "In the great majority of jurisdictions, the deed of a mentally incapacitated person as grantor is voidable; and not absolutely void, unless after judicial investigation he has been adjudged incompetent, and a committee or guardian has been accordingly appointed to take charge of his property (*Luhrs v. Hancock*, 181 U. S. 567, 574, 45 L. Ed. 1005, 21 Sup. Ct. Rep. 726; *Smith v. Ryan*, 191 N. Y. 452, 123 Am. St. Rep. 609, 14 Ann. Cas. 505, 19 L. R. A. (N. S.) 461, 84 N. E. 402; *Blinn v. Schwarz*, 177 N. Y. 252, 101 Am. St. Rep. 806, 69 N. E. 542; *Eaton v. Eaton*, 37 N. J. L. 108, 18 Am. Rep. 716; *Crawford v. Scovell*, 94 Pa. St. 48, 39 Am. Rep. 766; *Howe v. Howe*, 99 Mass. 98; *Hovey v. Hobson*, 53 Me.



§ 396. **e. Papists.**—Papists, lastly, and persons professing the popish religion, are by statute 11 & 12 W. III, c. 4 [11 Wm. 3, c. 4, Popery, 1699], (1700), disabled to purchase any lands, rents, or hereditaments; and all estates made to their use, or in trust for them, are void. But this statute is construed to extend only to papists above the age of eighteen; such only being absolutely disabled to purchase: yet the next Protestant heir of a papist under eighteen shall have the profits, during his life; unless he renounces his errors within the time limited by law.\*

• 1 P. Wms. 354.

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451, 89 Am. Dec. 705; Clay v. Hammond, 199 Ill. 370, 93 Am. St. Rep. 146, 65 N. E. 352; Nichol v. Thomas, 53 Ind. 42; Riggan v. Green, 80 N. C. 236, 30 Am. Rep. 77; 4 Kent, Comm., p. \*451). The deed of a person thus adjudged incompetent, and for whom a committee or guardian has been appointed, is absolutely void (*Ibid.*; Imhoff v. Witmer, 31 Pa. St. 243; Griswold v. Butler, 3 Conn. 227, 231; Thorpe v. Hanscom, 64 Minn. 201, 66 N. W. 1). Like the deed of an infant, that of a mentally incapacitated person, when voidable, may be disaffirmed by him after he regains his mental ability, or by his heirs, devisees, or other persons in privity with him, after his death, if it has never been validly affirmed (Smith v. Ryan, 191 N. Y. 452, 123 Am. St. Rep. 609, 14 Ann. Cas. 505, 19 L. R. A. (N. S.) 461, 84 N. E. 402; Allis v. Billings, 6 Met. (Mass.) 415, 39 Am. Dec. 744; Valpey v. Rea, 130 Mass. 384; Brown v. Freed, 43 Ind. 253; Fitzgerald v. Shelton, 95 N. C. 519). The right to affirm, and the method of doing so, are substantially the same as in the case of the deed of an infant. But by the weight of authority a difference is here insisted on, in that, if the grantee of a mentally incapacitated person act in good faith and without knowledge of the defect, the instrument cannot be set aside without the return of the consideration; nor, as a rule, can the disability follow the title into the hands of an innocent purchaser for value without notice (Elliott v. Ince, 7 De Gex, M. & G. 475; Eaton v. Eaton, 37 N. J. L. 108, 18 Am. Rep. 716; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Odom v. Riddick, 104 N. C. 515, 17 Am. St. Rep. 686, 7 L. R. A. 118, 10 S. E. 609; New England Loan & T. Co. v. Spitler, 54 Kan. 560, 38 Pac. 799. See Smith v. Ryan, 191 N. Y. 452, 123 Am. St. Rep. 609, 14 Ann. Cas. 505, 19 L. R. A. (N. S.) 461, 84 N. E. 402; Crawford v. Scovell, 94 Pa. St. 48, 39 Am. Rep. 766; Hovey v. Hobson, 53 Me. 451, 89 Am. Dec. 705; Henry v. Fine, 23 Ark. 417). In a few of the states of this country, of which Colorado and Oregon may be named as illustrations, the deed of a person lacking mental ability is absolutely void, and not merely voidable (Elder v. Schumacher, 18 Colo. 433, 33 Pac. 175; Farley v. Parker, 6 Or. 105, 25 Am. Rep. 504; Rogers v. Blackwell, 49 Mich. 192, 13 N. W. 512). This means that it needs no disaffirmance, and that its invalidity may be set up directly or collaterally by

§ 397. 4. Modes of conveying.—We are next, but principally, to inquire, *how* a man may alien or convey; which will lead us to consider the several modes of conveyance.

In consequence of the admission of property, or the giving a separate right by the law of society to those things which by the law of nature were in common, there was necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired; [294] which, we have more than once observed, was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man's dereliction of the thing he had seized, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession, the

anyone interested in the property. Like the conveyance to an infant, that to a person mentally deficient at the time may pass a good title; and it is presumed to do so, unless it is shown not to be for his benefit (2 Bl. Comm., p. \*291; Concord Bk. v. Bellis, 10 Cush. (Mass.) 276). He may disaffirm a deed to him, within a reasonable time after he regains his mental strength (*Ibid.*).” 2 Reeves, Real Prop., 1445.

*Married women.*—“In most states, a married woman now has as full capacity as her husband to deal with property; and in some states her ability in this respect is greater than his, in that she alone can bar his curtesy while he alone cannot bar her dower (N. Y. Laws 1848, c. 200; N. Y. Laws 1849, c. 375; N. Y. Laws 1909, c. 19, art. 4; Hatfield v. Sneden, 54 N. Y. 280, 287; Bertles v. Nunan, 92 N. Y. 152, 44 Am. Rep. 361; 1 Stim. Amer. Stat. Law, § 6500; § 460, *supra*.) Her position as to dealing with realty may be briefly summarized. At common law, the deed of a married woman alone was absolutely void. She could not convey her property *inter vivos*, except by uniting with her husband in the cumbersome procedure of a fine or common recovery (2 Bl. Comm., p. \*292; 2 Kent, Comm., p. \*150; Albany Fire Ins. Co. v. Bay, 4 N. Y. 9, 12; Bradley v. Walker, 138 N. Y. 291, 297, 33 N. E. 1079). She is now universally permitted by statute to unite with him in a direct conveyance of her land; and, while an acknowledgment of the instrument separate and apart from him is still retained as a requisite in some states (1 N. J. Gen. Stats., p. 854; Armstrong v. Ross, 20 N. J. Eq. 109; 1 Stim. Amer. Stat. Law, § 3245; Mexia v. Oliver, 148 U. S. 664, 37 L. Ed. 602, 13 Sup. Ct. Rep. 754), in most of them this feature of her transfer is abolished; and in many states she may deed away her property alone, the same as if she were single. The enabling statutes are quite commonly made, also, to extend to her transfer of her property as grantor through the medium of an attorney, who may even be her own husband, as was heretofore explained (Williams v. Paine, 169 U. S.

municipal law has established *descents* and *alienations*: the former to continue the possession in the heirs of the proprietor, after his *involuntary* dereliction of it by his death; the latter to continue it in those persons, to whom the proprietor, by his own *voluntary* act, shall choose to relinquish it in his lifetime. A transaction, or transfer, of property being thus admitted by law, it becomes necessary that this transfer should be properly evidenced: in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject matter, as what the thing transferred consisted of; or, lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the *common assurances* of the kingdom; whereby every man's estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed.

55, 42 L. Ed. 658, 18 Sup. Ct. Rep. 279; *Wronkow v. Oakley*, 133 N. Y. 505, 28 Am. St. Rep. 661, 16 L. R. A. 209, 31 N. E. 521; 1 Stim. Amer. Stat. Law, § 6506; § 503, *supra*. *Contra*, *Earle v. Earle*, 20 N. J. L. 347; *Sumner v. Conant*, 10 Vt. 9; *Dawson v. Shirley*, 6 Blackf. (Ind.) 531). A deed to a married woman was ordinarily effectual to pass the title, at common law; but the husband might dissent, and repudiate it, and thus nullify its effect (2 Bl. Comm., p. \*293; *Schouler*, Dom. Rel., § 92). Modern statutes have taken this power from him, and left the married woman, in every material respect, capable of being a grantee of realty." 2 Reeves, Real Prop., 1446.

*Aliens*.—Generally speaking, an alien grantor may transfer any interest he holds. 1 Stimson, Am. Stat. Law, § 6013. "The divergent forms of legislation in the United States may be grouped, generally, into three kinds, or classes: first, in most of the states, aliens may take, hold, and dispose of real property, the same as if they were citizens (1 N. J. Gen. Stats., p. 23; 1 Dembitz, Land Titles, p. 303; 1 Stim. Amer. Stat. Law, § 1013); second, in a number of others, this sweeping ability is conferred on resident aliens, but not generally on those who are nonresidents (*Ibid.*); and, third, in the other group of states, resident aliens are authorized thus to deal freely with property for a prescribed period, provided they properly make and file a declaration of their intent to become citizens of the United States (N. Y. Laws 1909, c. 52, §§ 12, 13; 1 Stim. Amer. Stat. Law, § 6013)." 2 Reeves, Real Prop., 1448.

Modifications in the English law by recent statutes in respect to the capacity of lunatics, infants, married women, and aliens to make purchases and alienations may be found in 1 Stephen's Comm. (16th ed.), 372 ff.

§ 398. a. **Common assurances.**— These common assurances are of four kinds: 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country; that is (according to the old common law) upon the very spot to be transferred. 2. By matter of *record*, or an assurance transacted only in the king's public courts of record. 3. By special *custom*, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect, till after his death; and that is by *devise*, contained in his last will and testament. We shall treat of each in its order.

## OF ALIENATION BY DEED.

§ 399. **Deeds.**—In treating of deeds I shall consider, first, their general nature; and, next, the several sorts or kinds of deeds, with their respective incidents. And in explaining the former, I shall examine, first, what a deed is; secondly, its requisites; and, thirdly, how it may be avoided.

§ 400. **1. General nature of deeds.**—First, then, a deed is a writing sealed and delivered by the parties.<sup>a</sup> It is sometimes called a charter, *carta*, from its materials; but most usually, when applied to the transactions of private subjects, it is called a deed, in Latin *factum*, κατ' ἐξοχην (pre-eminently), because it is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be *estopped* by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed.<sup>b</sup> If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be cut or indented (formerly in acute angles *instar dentium* (like teeth, or serrated), but at present in a waving line) on the top or side, to tally or correspond with the other; which deed, so made, is called an indenture. Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them; through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on [296] one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists;<sup>c</sup> and with us *chirographa*, or handwritings;<sup>d</sup> the word *cirographum* or *cyrographum* being usually that which is divided in making the indenture: and this custom is still preserved in making out the indentures of a fine, whereof hereafter. But at length indenting only has come into use, without cutting through

<sup>a</sup> Co. Litt. 171.

<sup>b</sup> Plowd. 434.

<sup>c</sup> Lyndew. l. 1. t. 10. c. 1.

<sup>d</sup> Mirror. c. 2. § 27.



any letters at all; and it seems at present to serve for little other purpose, than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *counterparts*: though of late it is most frequent for all the parties to execute every part; which renders them all originals. A deed made by one party only is not indented, but *polled* or shaved quite even; and therefore called a *deed poll*, or a single deed.<sup>1</sup>

§ 401. 2. Requisites of a deed.—We are in the next place to consider the *requisites* of a deed.

• *Ibid.* Litt. § 371, 372.

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<sup>1</sup> *Indentures and deeds poll*.—The English Real Property Act of 1845 provides that a deed, purporting to be an indenture, is to have the effect of an indenture, though not actually indented. In most jurisdictions in the United States the requirement of the grantee's signature is replaced by the theory that he becomes bound by his acceptance of the deed, so that recovery may be had against him in an action of covenant for a breach of any of its stipulations. *Bowen v. Beck*, 94 N. Y. 86, 46 Am. Rep. 124; *Hagerty v. Lee*, 54 N. J. L. 580, 20 L. R. A. 631, 25 Atl. 319; *Midland Ry. Co. v. Fisher*, 125 Ind. 19, 21 Am. St. Rep. 189, 8 L. R. A. 604, 24 N. E. 756. The name of the old form is, however, retained; and the deed still begins with the words: "This indenture made this — day of —, 19—, between A B," etc. The date of the indenture is uniformly at the beginning, and is not repeated in the *in testimonium* (*in witness*) clause.

A deed poll was originally treated as the act or instrument of one party, the grantor, alone; and therefore the grantee could not be bound by its covenants or stipulations. This is said still to be the theory in some of the New England states, such as Massachusetts, Vermont, and Connecticut, and also in Pennsylvania. *Kennedy v. Owen*, 136 Mass. 199; *Johnson v. Muzzy*, 45 Vt. 419, 12 Am. Rep. 214; *Hinsdale v. Humphrey*, 15 Conn. 431; *Maule v. Weaver*, 7 Pa. St. 329. In the great majority of the American states, however, as also in England, the modern principle that obligates a party to an instrument by his acceptance of it has been fully applied to the deed poll. The effect of a deed poll is thus substantially the same as that of an indenture. Nevertheless, in practice a deed poll is looked on as an instrument of lesser pretensions and effect, and is usually employed in a secondary capacity. Its form of beginning is: "Know all men by these presents that I, A B," etc. Its date is at the end, in the *in testimonium* clause. See 2 Reeves, *Real Prop.*, 1403.

§ 402. a. **Parties and subject matter.**—The first of which is, that there be persons able to contract and be contracted with, for the purposes intended by the deed; and also a thing, or subject matter to be contracted for; all which must be expressed by sufficient names.<sup>f</sup> So as in every grant there must be a grantor, a grantee, and a thing granted; in every lease a lessor, a lessee, and a thing demised.<sup>2</sup>

§ 403. b. **Consideration.**—Secondly, the deed must be founded upon good and sufficient *consideration*. Not upon an usurious contract;<sup>g</sup> nor upon fraud or collusion, either to deceive purchasers *bona fide*,<sup>h</sup> or just and lawful creditors;<sup>i</sup> any of which bad considerations will vacate the deed, and subject such persons, as put the same in use, to forfeitures, and often to imprisonment. A deed also, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to inure, or to be effectual, only to the use of the grantor himself.<sup>k</sup> The [297] consideration may be either a *good* or a *valuable* one. A good consideration is such as that of blood, or of natural love and affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence, and natural duty: a valuable consideration is such as money, marriage, or the like, which the law esteems an equivalent given for the grant;<sup>1</sup> and is therefore founded in motives of justice. Deeds made upon good consideration only, are considered as merely voluntary, and are frequently set aside in favor of creditors, and *bona fide* purchasers.<sup>3</sup>

<sup>f</sup> Co. Litt. 35.

<sup>g</sup> Stat. 13 Eliz. c. 8 (Usury, 1571).

<sup>h</sup> Stat. 27 Eliz. c. 4 (Fraudulent Conveyances, 1584).

<sup>i</sup> Stat. 13 Eliz. c. 5 (Fraudulent Conveyances, 1571).

<sup>k</sup> Perk. § 533.

<sup>1</sup> 3 Rep. 83.

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<sup>2</sup> The older forms of deeds have been for the most part retained in England. Some modifications have been introduced as the result of recent legislation, especially of the Conveyancing Act of 1881. The existing requisites of a deed may be conveniently ascertained by consulting 1 Stephen's Comm. (16th ed.), 382 ff.

<sup>3</sup> **Consideration.**—Consideration in a deed is regarded in England as an important, but not essential, part of the transaction. The omission to men-

§ 404. *c. Writing.*—Thirdly; the deed must be *written*, or I presume, *printed*, for it may be in any character or any language; but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed.<sup>m</sup> Wood or stone may be more durable, and linen less liable to rasures; but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities: for there is nothing else so durable, and at the same time so little liable to alteration; nothing so secure from alteration, that is at the same time so durable. It must also have the regular stamps, imposed on it by the several statutes for the increase of the public revenue; else it cannot be given in evidence. Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, the statute 29 Car. II, c. 3 (Statute of Frauds, 1677), enacts, that no lease or estate in lands, tenements, or hereditaments (except leases, not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value) shall be looked upon as of greater force than a lease or estate at will; unless put in writing, and

<sup>m</sup> Co. Litt. 229. F. N. B. 122.

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tion a valuable consideration, where it has in fact been paid, gives rise to grave suspicion of fraud, and is, moreover, a penal offense under the revenue laws, as tending to defraud the revenue. (Stamp Act, 1891.) Again, the absence of a valuable consideration brings the transaction within the class of *voluntary conveyances*, which are subject to various risks. 1 Stephen's Comm. (16th ed.), 384. A bargain and sale deed (p. \*338, *post*), operating by virtue of the Statute of Uses, must have a valuable consideration. Otherwise, the chief advantage of having a valuable consideration recited in the deed is to make it effectual against the grantor's creditors, and give the grantee the position of an innocent purchaser for value without notice. It is not necessary to recite the true consideration. The statement of the amount operates as an estoppel only in preventing the grantor from denying, against his own recital, that he received a valuable consideration. At common law a seal is in itself conclusive evidence of consideration. But equity may investigate the actual character of the transaction and set aside the presumption. And other courts are generally given like jurisdiction by statute in the American states. In some states a seal is made only presumptive evidence of consideration on an executory contract, and this applies to those parts of a deed, such as its covenants, that are executory. 1 Stimson, Am. Stat. Law, §§ 4120 ff; 2 Reeves, Real Prop., 1457.

signed by the party granting, or his agent lawfully authorized in writing.

§ 405. **d. Formal and orderly parts.**—Fourthly; the matter written must be *legally* and *orderly* set forth: that is, there must be words sufficient to specify the agreement and bind the parties: which sufficiency [298] must be left to the courts of law to determine.<sup>n</sup> For it is not absolutely necessary in law to have all the formal parts that are usually drawn out in deeds, so as there be sufficient words to declare clearly and legally the party's meaning. But, as these formal and orderly parts are calculated to convey that meaning in the clearest, distinctest, and most effectual manner, and have been well considered and settled by the wisdom of successive ages, it is prudent not to depart from them without good reason or urgent necessity; and therefore I will here mention them in their usual<sup>o</sup> order.

§ 406. (1) **Premises.**—The *premises* may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the present transaction is founded: and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.<sup>p</sup>

§ 407. (2) **Habendum.**—Next come the *habendum* and *tenendum*.<sup>q</sup> The office of the *habendum* is properly to determine what estate or interest is granted by the deed: though this may be performed, and sometimes is performed, in the premises. In which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to, the estate granted in the premises. As if a grant be “to A and the heirs of his body,” in the premises, *habendum* “to him and his heirs forever,” or *vice versa*: here A has an estate-tail, and a fee simple expectant thereon.<sup>r</sup> But, had it been in the premises “to him and his heirs,”

<sup>n</sup> Co. Litt. 225.

<sup>o</sup> *Ibid.* 6.

<sup>p</sup> See Appendix, No. II, § 2. pag. v.

<sup>q</sup> *Ibid.*

<sup>r</sup> Co. Litt. 21. 2 Roll. Rep. 19. 23. Cro. Jac. 476.

*habendum* "to him for life," the *habendum* would be utterly void;<sup>s</sup> for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away, or divested, by it.

§ 408. (3) *Tenendum*.—The *tenendum*, "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly [299] used to signify the tenure, by which the estate granted was to be holden; viz., "*tenendum per servitium militare, in burgagio, in libero socagio*, etc. (to hold by military service, in burgage, in free socage)." But, all these being now reduced to free and common socage, the tenure is never specified. Before the statute of *quia emptores*, 18 Edw. I (1290), it was also sometimes used to denote the lord of whom the land should be holden: but that statute directing all future purchasers to hold, not of the immediate grantor, but of the chief lord of the fee, this use of the *tenendum* hath been also antiquated; though for a long time after we find it mentioned in ancient charters, that the tenements shall be holden *de capitalibus dominis feodi* (of the chief lords of the fee);<sup>t</sup> but, as this expressed nothing more than the statute had already provided for, it gradually grew out of use.

§ 409. (4) *Reddendum*.—Next follow the terms of stipulation, if any upon which the grant is made: the first of which is the *reddendum* or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted. As "rendering, therefore, yearly the sum of ten shillings, or a pepper corn, or two days' plowing, or the like."<sup>u</sup> Under the pure feudal system, this render, *reditus*, return or rent, consisted in chivalry principally of military services; in villeinage, of the most slavish offices; and in socage, it usually consists of money, though it may consist of services still, or of any other certain profit.<sup>w</sup> To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or

<sup>s</sup> 2 Rep. 23. 8 Rep. 56.

<sup>t</sup> Append. No. I. Madox. Formul. passim.

<sup>u</sup> Append. No. II. § 1. pag. iii.

<sup>w</sup> See pag. 41.



some, or one of them, and not to any stranger to the deed.<sup>x</sup> But if it be of ancient services or the like, annexed to the land, then the reservation may be to the lord of the fee.<sup>y</sup>

§ 410. (5) Conditions.—Another of the terms upon which a grant may be made is a *condition*: which is a clause of contingency, on the happening of which the estate granted may be defeated; as “provided always, that if the mortgagor shall pay the mortgagee [300] 500*l.*, upon such a day, the whole estate granted shall determine”; and the like.<sup>z</sup>

§ 411. (6) Warranties: implied and express.—Next may follow the clause of *warranty*; whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted.<sup>a</sup> By the feudal constitution, if the vassal’s title to enjoy the feud was disputed, he might vouch, or call, the lord or donor to warrant or insure his gift;<sup>4</sup> which if he failed to do, and the

x Plowd. 13. 8. Rep. 71.

z Append. No. II. § 2. pag. viii.

y Append. No. I. pag. i.

a *Ibid.* No. I. pag. i.

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4 **Warranty of title.**—The feudal origin of our law of warranty might well be doubted on the simple ground of its early application to socage lands, which were not feudal as yet, and to chattels which never were so, equally with the military tenures of lord and vassal. That it was largely developed under a system of tenure is as clear as that the development was much assisted by the elaborate doctrine of Roman law *de evictionibus*. (See Dig. xxi. 2; Cod. viii. 45.) But it is equally certain that it made its first appearance in English law as a natural outgrowth of the mode in which the title of stolen cattle and other property was traced from one possessor to another, and each in turn made responsible for the title which he had transferred, in the Anglo-Saxon law.

To satisfy one’s self of the true origin of the law of warranty, it is only needful to compare with this Anglo-Saxon law of *team*, Bracton’s treatment of the same topic in lib. 3, tr. 2, c. 32, *de furtis*, fol. 150–152, and the latter again with the full treatment of the subject in its relation to titles to land in lib. 5, tr. 4, fol. 378–399. Glanvill (lib. 3, *de warrantia*), adds little to the evidence, for it is not needed to establish the connection between the tenth century and the thirteenth. But it contains some instructive passages as to the earlier stages of the more elaborate feudal doctrine, and especially shows the identity of the institution in its nonfeudal as well as feudal applications.

Glanvill says nothing of *escambium* or recompense by a warrantor: the warranty as yet is merely a mode of tracing and proving title. But a century

vassal was evicted, the lord was bound to give him another feud of equal value in recompense.<sup>b</sup> And so, by our ancient law, if before the statute of *quia emptores* a man enfeoffed another in fee, by the feudal verb *dedi* (I have given), to hold of himself and his heirs by certain services; the law annexed a warranty to this grant, which bound the feoffor and his heirs, to whom the services (which were the consideration and equivalent for the gift) were originally stipulated to be rendered.<sup>c</sup> Or if a man and his ances-

<sup>b</sup> Feud. l. 2. t. 8 & 25.

<sup>c</sup> Co. Litt. 384.

later the doctrine of *escambium* is fully developed, and Bracton's treatment of it, and the cases he quotes (lib. 5, tr. 4, *de warrantia*, c. 7, fol. 387 b) show that it has become a subject of practical importance. This is due, doubtless to the increased value of land as an article of commerce. The doctrine is one upon which English judges could have found little authority in any other system, though the methods of the Roman law were no doubt of the greatest help in preparing them for their task. Bracton points out the different cases that may arise, and the principles upon which they should be disposed of, in a way that reminds one of the best decisions of the great chancellors who molded English equity. In some points the resemblance becomes a real identity; as in the "marshaling," to use the later expression, of the warrantor's means to satisfy different claims, when he has not enough for all. (*Ib.*, § 7, fol. 388 b.)

The resemblance throws light on the mode in which our law even then was developed, and its relation to Roman law. It tends to prove that the supposed importation of foreign law in Bracton's time may have been only that same use of a discipline derived from it, and of some of its most general principles, which we find in modern equity judges—and no more.

Upon the origin of the law of *warranty* see remarks of Sir T. Twiss in his introduction to volume 6 of Bracton. He shows it to be English, or at least not to be derived from the *Leges Barbarorum*, or other known sources; and his suggestion as to Roman *jurisprudence* as distinguished from their written law will deserve attention when he shows us where that *jurisprudence* could have been found. He notices also the intimate connection between vouching to warranty and questions of title, in connection with the statute of Hayles. But at that period there is abundant evidence of the close connection of all the forms into which the doctrine afterwards divided. We have only to show that the proof of title to land and chattels alike after the Conquest was made in the same manner as that of chattels before that period, to establish the origin of warranty in both its forms, as defense of title and as recompense.

The intimate connection of these two institutions is clearly expressed by Britton: "For warranty in one sense signifies the defending of the tenant in his seisin, and in another sense it signifies that if he does not defend him

tors had immemorially holden land of another and his ancestors by the service of homage (which was called *homage auncestrel*) this also bound the lord to warranty;<sup>d</sup> the homage being an evidence of such a feudal grant. And, upon a similar principle, in case, after a partition or exchange of lands of inheritance, either party or his heirs be evicted of his share, the other and his heirs are bound to warranty,<sup>e</sup> because they enjoy the equivalent. And so, even at this day, upon a gift in tail or lease for life, rendering rent, the donor or lessor and his heirs (to whom the rent is payable) are bound to warrant the title<sup>f</sup> But in a feoffment in fee by the verb *dedi*, since the statute of *quia emptores* (1290), the feoffor only is bound to the implied warranty, and not his heirs;<sup>g</sup> because

<sup>d</sup> Litt. § 143.<sup>f</sup> *Ibid.* 384.<sup>e</sup> Co. Litt. 174.<sup>g</sup> *Ibid.*


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after being properly summoned, the warrantor is bound to exchange and to make him satisfaction to the value." (Lib. 3, c. 11, pl. 9; Nichols, ii. 102.) And this is only an expansion of Bracton's definition of *warrantizare*—"defendere et acquietare." (Fol. 380 b, and pp. 258, 259.) To trace the development of the two from the simple form in which they appear in the Kentish and Wessex laws to the elaborate doctrine of the common law, would throw great light on the law of property, and particularly of property in land. As to movables, with which alone the *team* dealt, instruction must be found in the results caused by the almost entire disappearance of the doctrine, except in the simple form of warranty of title between vendor and vendee.

From the nature of the case warranty was originally a duty incumbent on every person who gave or sold land or chattel to another, since it was merely the duty of vindicating the honesty of his own action and his own title to the thing. When the law of the subject became more complicated, this duty was supposed to grow out of the act of delivery, or in case of land out of the words of the *charta*—such as *do, dedi* (Hengham Magna, c. 13, p. 28), or the sale of a chattel. (Bract., fol. 151.) But its true origin is shown by the rule that in case of an exchange, *excambium*, where no written charter or words of any kind were needed, there was a duty to warrant on both sides. (Cowell, Inst., iv, 24, § 2; Brooke, Abt. "Exchange," 2. 12. And see Blackstone's remark on this page as to partition.) So, also, by the early rule that warranty was not the effect of an express contract between the parties, but a consequence of the mere transfer of land, or of chattels. It required no written or even express contract. All that the voucher had to show was a charter of simple gift, or of feoffment: and if the vouchee denied the obligation, he was bound to show an express exception contained in the charter. (Bract. lib. 5, tr. 4, c. 8, § 1, fol. 388 b.) That when homage proved the tenure no

it is a mere personal contract on the part of the feoffor, the tenure (and of course the ancient services) resulting back to the superior lord of the fee. And in other forms of alienation, gradually introduced since that statute, [301] no warranty whatsoever is implied; <sup>b</sup> they bearing no sort of analogy to the original feudal donation. And therefore in such cases it became necessary to add an express clause of warranty, to bind the grantor and his heirs; which is a kind of covenant real, and can only be created by the verb *warrantizo* or *warrant*.<sup>1</sup>

§ 412. (a) Origin of express warranties.—These express warranties were introduced, even prior to the statute of *quia emptores*, in order to evade the strictness of the feudal doctrine of nonalienation without the consent of the heir. For, though he, at the death of his ancestor, might have entered on any tenements that were aliened without his concurrence, yet, if a clause of warranty was added to the ancestor's grant, this covenant descending upon the heir insured the grantee; not so much by confirming his title, as by obliging such heir to yield him a recompense in lands of equal value: the law, in favor of alienations, supposing that no ancestor would wantonly disinherit his next of blood; <sup>k</sup> and therefore presuming that he had received a valuable consideration, either in land, or in money which had purchased land, and that this equivalent descended to the heir together with the ancestor's warranty. So that when either an ancestor, being the rightful tenant of the freehold, conveyed the land to a stranger and his heirs, or released the right in fee simple to one who was already in possession, and

<sup>b</sup> Co. Litt. 101.

<sup>k</sup> Co. Litt. 373.

<sup>1</sup> Litt. § 733.

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written charter was needed, is expressly said (c. 1, § 4, fol. 380 b), though it is clear enough otherwise. It did not even require a person capable of contracting; though that is true only of minors, *femes covert*, etc., on whom the obligation had descended from him *qui dedit aut vendidit*. (380 b.) There was no limit to the number of successive vouchings, as long as one could be found in the series—(*donec non sit aliquis ulterius qui vocari possit*, *ib.* § 2)—*usque ad decem vel amplius in infinitum*, *ib.* § 3. His examples show that three or four were a common number, though even these imply four or five ranks of feudatories or the passage of a tract of land through as many feoffments.—HAMMOND.

superadded a warranty to his deed, it was held that such warranty not only bound the warrantor himself to protect and assure the title of the warrantee, but it also bound his heir: and this, whether the warranty was *lineal*, or *collateral* to the title of the land.

§ 413. (i) **Lineal and collateral warranties.**—*Lineal* warranty was where the heir derived or might by possibility have derived, his title to the land warranted, either from or through the ancestor who made the warranty: as where a father, or an elder son in the life of the father, released to the disseisor of either themselves or the grandfather, with warranty, this was lineal to the younger son.<sup>1</sup> *Collateral* warranty was where the heir's title to the land neither was, nor could have been, derived from the [302] warranting ancestor; as where a younger brother released to his father's disseisor, with warranty, this was collateral to the elder brother.<sup>m</sup> But where the very conveyance, to which the warranty was annexed, immediately followed a disseisin, or operated itself as such (as, where a father tenant for years, with remainder to his son in fee, aliened in fee simple with warranty) this, being in its original manifestly founded on the *tort* or wrong of the warrantor himself, was called a warranty *commencing by disseisin*; and, being too palpably injurious to be supported, was not binding upon any heir of such tortious warrantor.<sup>n</sup>

§ 414. (ii) **Effect of warranties.**—In both lineal and collateral warranty, the obligation of the heir (in case the warrantee was evicted, to yield him other lands in their stead) was only on condition that he had other sufficient lands by descent from the warranting ancestor.<sup>o</sup> But though, without assets, he was not bound to insure the title of *another*, yet, in case of lineal warranty, whether assets descended or not, the heir was perpetually barred from claiming the land *himself*; for, if he could succeed in such claim, he would then gain assets by descent (if he had them not before) and must fulfill the warranty of his ancestor: and the same rule<sup>p</sup> was with less justice adopted also in respect of collateral warranties, which likewise (though no assets descended) barred the

<sup>1</sup> Litt. § 703. 706, 707.

<sup>o</sup> Co. Litt. 102.

<sup>m</sup> Litt. § 705. 707.

<sup>p</sup> Litt. § 711, 712.

<sup>n</sup> *Ibid.* 698. 702.



heir of the warrantor from claiming the land by any collateral title; upon the presumption of law that he might hereafter have assets by descent either from or through the same ancestor.

§ 415. (iii) *Restrained by statutes.*—The inconvenience of this latter branch of the rule was felt very early, when tenants by the curtesy took upon them to alien their lands with warranty; which collateral warranty of the father descending upon his son (who was the heir of both his parents) barred him from claiming his maternal inheritance: to remedy which the statute of Gloucester, 6 Edw. I, c. 3 (1278), declared, that such warranty should be no bar to the son, unless assets descend from the father. It was afterwards attempted in 50 Edw. III (1376) [303] to make the same provision universal, by enacting that no collateral warranty should be a bar, unless where assets descended from the same ancestor;<sup>a</sup> but it then proceeded not to effect. However, by the statute 11 Hen. VII, c. 20 (Recovery, 1495), notwithstanding any alienation with warranty by tenant in dower, the heir of the husband is not barred, though he be also heir to the wife. And by statute 4 & 5 Ann., c. 16 (1705), all warranties by any tenant for life shall be void against those in remainder or reversion; and all collateral warranties by any ancestor who has no estate of inheritance in possession shall be void against his heir. By the wording of which last statute it should seem, that the legislature meant to allow, that the collateral warranty of tenant in tail, descending (though without assets) upon a remainderman or reversioner, should still bar the remainder or reversion. For though the judges, in expounding the statute *de donis*, held that, by analogy to the statute of Gloucester, a lineal warranty by the tenant in tail without assets should not bar the issue in tail, yet they held such warranty with assets to be a sufficient bar;<sup>r</sup> which was therefore formerly mentioned<sup>s</sup> as one of the ways whereby an estate-tail might be destroyed; it being indeed nothing more in effect than exchanging the lands entailed for others of equal value. They also held that collateral warranty was not within the statute *de donis*; as that act was principally intended to prevent the tenant

<sup>a</sup> Co. Litt. 373.

<sup>s</sup> Pag. 116.

<sup>r</sup> Litt. § 712. 2 Inst. 293.

in tail from disinheriting his own issue: and therefore collateral warranty (though without assets) was allowed to be, as at common law, a sufficient bar of the estate-tail and all remainders and reversions expectant thereon.<sup>t</sup> And so it still continues to be, notwithstanding the statute of Queen Anne, if made by tenant in tail in possession: who therefore may now, without the forms of a fine or recovery, in some cases make a good conveyance in fee simple, by superadding a warranty to his grant; which, if accompanied with assets, bars his own issue, and without them bars such of his heirs as may be in remainder or reversion.

§ 416. (7) **Covenants.**—<sup>[304]</sup> After warranty usually follow *covenants*, or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform, or give, something to the other. Thus the grantor may covenant that he hath a right to convey; or for the grantee's quiet enjoyment; or the like: the grantee may covenant to pay his rent, or keep the premises in repair, etc.<sup>u</sup> If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs; who are bound to perform it, provided they have assets by descent, but not otherwise: if he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant; which makes such covenant a better security than any warranty, and it has therefore in modern practice totally superseded the other.<sup>5</sup>

§ 417. (8) **Conclusion of the deed.**—Lastly, comes the *conclusion*, which mentions the execution and date of the deed, or the time of its being given or executed, either expressly, or by reference to some day and year before mentioned.<sup>w</sup> Not but a deed is good, although it mention no date: or hath a false date; or even

<sup>t</sup> Co. Litt. 374. 2 Inst. 335.

<sup>w</sup> *Ibid.* pag. xii.

<sup>u</sup> Append. No. II. § 2. pag. viii.

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<sup>5</sup> **Covenants in United States.**—The usual covenants in conveyances in the American States are, of seisin, of right to convey, against encumbrances, for quiet enjoyment, and of warranty. The New York statute prescribing the short form of deed with full covenants, designates these covenants as

if it hath an impossible date, as the thirtieth of February; provided the real day of its being dated or given, that is, delivered, can be proved.\*

§ 418. e. *Reading of the deed.*—I proceed now to the *fifth* requisite for making a good deed; the *reading* of it. This is necessary, wherever any of the parties desire it; and, if it be not done on his request, the deed is void as to him. If he can, he should read it himself: if he be blind or illiterate, another must read it to him. If it be read falsely it will be void; at least for so much as is misrecited: unless it be agreed by collusion that the deed shall be read false, on purpose to make it void; for in such case it shall bind the fraudulent party.†

§ 419. f. *Signing and sealing.*—<sup>[305]</sup> Sixthly, it is requisite that the party, whose deed it is, should *seal*,<sup>6</sup> and in most cases I apprehend should *sign it also*. The use of seals, as a mark of authenticity to letters and other instruments in writing, is extremely ancient. We read of it among the Jews and Persians in the earliest and most sacred records of history.‡ And in the book

\* Co. Litt. 46. Dyer. 28.

† 2 Rep. 3. 9. 11 Rep. 27.

‡ 1 Kings. c. 21. Daniel. c. 6. Esther. c. 8.

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follows: "And the said party of the first part doth covenant with said party of the second part as follows:

"First. That the party of the first part is seised of said premises in fee simple, and has good right to convey the same.

"Second. That the party of the second part shall quietly enjoy the said premises.

"Third. That the said premises are free from encumbrances.

"Fourth. That the party of the first part will execute or procure any further necessary assurance of the title to said premises.

"Fifth. That the party of the first part will forever warrant the title to the said premises." See Rawle, Covenants for Title; 2 Reeves, Real Prop. 1521.

<sup>6</sup> In England, the seal is now usually a colored wafer, on which the party supposed to seal places his finger, by way of adopting the device. In a number of the American states the distinction between sealed and unsealed instruments is done away with by statute. In many states a scroll or similar device may constitute a valid seal. Where the requirement of a seal, in one form or another, is not abolished by statute, the uniform and safe practice is to affix a seal to all deeds. 1 Stimson, Am. Stat. Law, § 1564.

of Jeremiah there is a very remarkable instance, not only of an attestation by seal, but also of the other usual formalities attending a Jewish purchase.<sup>a</sup> In the civil law, also,<sup>b</sup> seals were the evidence of truth; and were required, on the part of the witnesses at least, at the attestation of every testament. But in the times of our Saxon ancestors, they were not much in use in *England*. For though Sir Edward Coke<sup>c</sup> relies on an instance of King Edwin's making use of a seal about an hundred years before the Conquest, yet it does not follow that this was the usage among the whole nation: and perhaps the charter he mentions may be of doubtful authority, from this very circumstance, of being sealed: since we are assured by all our ancient historians that sealing was not then in common use. The method of the Saxons was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross: which custom our illiterate vulgar do, for the most part to this day keep up; by signing a cross for their mark, when unable to write their names. And indeed this inability to write, and therefore making a cross in its stead, is honestly avowed by Cædwalla, a Saxon king, at the end of one of his charters.<sup>d</sup> In like manner, and for the same unsurmountable reason, the Normans, a brave but [306] illiterate nation, at their first settlement in France, used the practice of sealing only, without writing their names: which custom continued, when learning made its way among them, though the reason for doing it had ceased; and hence the charter of Edward the Confessor to Westminster Abbey, himself being brought up in Normandy, was witnessed only by his seal, and is generally thought to be the oldest

<sup>a</sup> "And I bought the field of Hanameel, and weighed him the money, even seventeen shekels of silver. And I subscribed the evidence, and sealed it and took witnesses, and weighed him the money in the balances. And I took the evidence of the purchase, both that which was sealed according to the law and custom, and also that which was open." c. 32.

<sup>b</sup> Inst. 2. 10. 2 & 3.

<sup>c</sup> 1 Inst. 7.

<sup>d</sup> "*Propria manu pro ignorantia litterarum signum sanctæ crucis expressi et subscripsi.* (On account of my ignorance of letters, I have impressed and subscribed with my own hand the sign of the holy cross.)" Seld. Jan. Angl. l. 1. § 42. And this (according to Procopius) the Emperor Justin in the East, and Theodoric king of the Goths in Italy, had before authorized by their example, on account of their inability to write.

sealed charter of any authenticity in England.\* At the Conquest, the Norman lords brought over into this kingdom their own fashions; and introduced waxen seals only, instead of the English method of writing their names, and signing with the sign of the cross.<sup>f</sup> The impressions of these seals were sometimes a knight on horseback, sometimes other devices: but coats of arms were not introduced into seals, nor indeed into any other use, till about the reign of Richard the First, who brought them from the crusade in the holy land; where they were first invented and painted on the shields of the knights, to distinguish the variety of persons of every Christian nation who resorted thither, and who could not, when clad in complete steel, be otherwise known or ascertained.

This neglect of signing, and resting only upon the authenticity of seals, remained very long among us; for it was held in all our books that sealing alone was sufficient to authenticate a deed: and so the common form of attesting deeds, “*sealed and delivered*,” continues to this day; notwithstanding the statute 29 Car. II, c. 3 (Statute of Frauds, 1677), before mentioned, revives the Saxon custom,<sup>g</sup> and expressly directs the signing, in all grants of lands, and many other species of deeds: in which, therefore, signing seems to be now as necessary as sealing, though it hath been sometimes held that the one includes the other.<sup>h</sup>

§ 420. g. Delivery of the deed.—A seventh requisite to a good deed is that it be *delivered*, by the party himself or his certain attorney: which, therefore, is [307] also expressed in the attesta-

\* Lamb. Archeion. 51.

<sup>f</sup> “*Normanni chirographorum confectionem, cum crucibus aureis, aliisque, signaculis sacris, in Anglia firmari solitam, in ceteram impressam, mutant, modumque scribendi Anglicum rejiciunt.*” Ingulph.

<sup>g</sup> 3 Lev. 1. Stra. 764.

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<sup>h</sup> Blackstone was of the opinion that the statute [of frauds] restored the old Saxon form of signing and superadded it to sealing and delivery in the case of a deed. This view seems not to be the true one, however; for the reason on which the statute was based could hardly apply in the case of sealed instruments. Accordingly, by modern authority the statute applies only to simple contracts. (*Cooch v. Goodman*, 2 Q. B. 580, 114 Eng. Reprint, 228; *Aveline v. Whisson*, 4 M. & G. 801, 134 Eng. Reprint, 330.)—STREET, 2 Foundations of Legal Liability, 172.



tion, "sealed and *delivered*." A deed takes effect only from this tradition or delivery; for if the date be false or impossible, the delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing,<sup>b</sup> and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is, to the party or grantee himself; or to a third person, to hold till some conditions be performed on the part of the grantee: in which last case it is not delivered as a *deed*, but as an *escrow*; that is, as a scroll or writing, which is not to take effect as a deed till the conditions be performed; and then it is a deed to all intents and purposes.<sup>18</sup>

§ 421. *h. Attestation or execution.*—The *last* requisite to the validity of a deed is the *attestation*, or execution of it *in the presence of witnesses*: though this is necessary, rather for preserving the evidence than for constituting the essence of the deed. Our

<sup>b</sup> Perk. § 130.

<sup>1</sup> Co. Litt. 36.

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<sup>8</sup> *Delivery.*—No deed can operate without delivery. *Kenney v. Parks*, 137 Cal. 527, 70 Pac. 556; *Benner v. Bailey*, 234 Ill. 79, 84 N. E. 638; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 50 N. E. 963. Delivery of a deed may be made in two ways: delivery complete in the first instance, or delivery in escrow. The ordinary form of delivery involves an intent on the part of the grantor to transfer the property to the grantee, and some overt act to indicate that intent. And it may be said, in a summary way, that when the grantor gives physical possession of the document to the grantee, either actually or constructively or directly states that he delivers the instrument, wherever it may be, and so puts it within the power of grantee to take it, and there is no proof of an intent not to transfer the title, a delivery complete in the first instance is made. *Otis v. Spencer*, 102 Ill. 622, 40 Am. Rep. 617; *Towery v. Henderson*, 60 Tex. 291; *Thatcher v. St. Andrew's Church*, 37 Mich. 264; *Guess v. South Bound Ry. Co.*, 40 S. C. 450, 19 S. E. 68; *McLennan v. McDonnell*, 78 Cal. 273, 20 Pac. 566; 2 *Reeves, Real Prop.*, 1469. Delivery of a deed in escrow is the putting of it into the hands of a third person, as a depository, to be handed to the grantee on the happening of a designated event. *Gilbert v. North American Fire Ins. Co.*, 23 Wend. (N. Y.) 43, 35 Am. Dec. 543; *Cincinnati etc. R. Co. v. Iliff*, 13 Ohio St. 235; *Bouvier, Law Dict., Rawle's 3d Revision*. An escrow has no effect until the performance of the condition. *Hinman v. Booth*, 21 Wend. (N. Y.) 267. A deed delivered in escrow cannot be revoked. *McDonald v. Huff*, 77 Cal. 279, 19 Pac. 499.

modern deeds are in reality nothing more than an improvement or amplification of the *brevia testata* (witnessed memoranda) mentioned by the feudal writers;<sup>k</sup> which were written memorandums, introduced to perpetuate the tenor of the conveyance and investiture when grants by parol only became the foundation of frequent dispute and uncertainty. To this end they registered in the deed the persons who attended as witnesses, which was formerly done without their signing their names (that not being always in their power), but they only heard the deed read; and then the clerk or scribe added their names, in a sort of memorandum; thus: "*hijis testibus, Johanne Moore, Jacobo Smith, et aliis ad hanc rem convocatis.*" (Witness John Moore, Jacob Smith and others, for this purpose assembled.)"<sup>l</sup> This like all other solemn transactions, was originally done only *coram paribus* (before the peers),<sup>m</sup> and frequently when assembled in the court-baron, hundred, or county court: which was then expressed in the attestation, *teste comitatu, hundredo, etc.* (witness the county, hundred, etc.).<sup>n</sup> Afterwards the attestation of other witnesses was allowed, the trial in [308] case of a dispute being still reserved to the *pares* (peers); with whom the witnesses (if more than one) were associated and joined in the verdict:<sup>o</sup> till that also was abrogated by the statute of York, 12 Edw. II, st. 1, c. 2 (1318). And in this manner, with some such clause of *hijis testibus*, are all old deeds and charters, particularly *magna carta*, witnessed. And in the time of Sir Edward Coke, creations of nobility were still witnessed in the same manner.<sup>p</sup> But in the king's common charters, writs, or letters patent, the style is now altered: for at present the king is his own witness, and attests his letters patent thus; "*teste meipso*, witness, ourself at Westminster, etc.,"<sup>q</sup> a form which was introduced by Richard the First,<sup>a</sup> but not commonly used till about the beginning of the fifteenth century; nor the clause of *hijis testibus* entirely discon-

<sup>k</sup> Feud. l. 1. t. 4.

<sup>l</sup> Co. Litt. 7.

<sup>m</sup> Feud. l. 2. t. 32.

<sup>n</sup> Spelm. Gloss. 228. Madox. Formul. No. 221. 322. 660.

<sup>o</sup> Co. Litt. 6.

<sup>p</sup> 2 Inst. 77.

<sup>q</sup> Madox. Formul. No. 515.

tinued till the reign of Henry the Eighth:† which was also the era of discontinuing it in the deeds of subjects, learning being then revived, and the faculty of writing more general; and therefore ever since that time the witnesses have subscribed their attestation, either at the bottom, or on the back of the deed.\*

§ 422. 3. **Deeds how avoided.**—We are next to consider how a deed may be *avoided*, or rendered of no effect. And from what has been before laid down it will follow, that if a deed wants any of the essential requisites before mentioned; either, 1. Proper parties, and a proper subject matter: 2. A good and sufficient consideration: 3. Writing, on paper or parchment, duly stamped: 4. Sufficient and legal words, properly disposed: 5. Reading, if desired, before the execution: 6. Sealing; and, by the statute, in many cases signing also: or, 7. Delivery, it is a void deed *ab initio* (from the beginning). It may also be avoided by matter *ex post facto* (after the fact): as, 1. By rasure, interlining, or other alteration in any material part; unless a memorandum be made thereof at the time of the execution and attestation.†<sup>9</sup> 2. By breaking off,

† *Ibid.* Dissert., fol. 32.

† 11 Rep. 27.

▪ 2 Inst. 78.

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<sup>9</sup> **Effect of alteration of deed.**—The generally accepted rule is that a material alteration of a deed after its delivery, if made by the act or consent of all the interested parties, is effectual, if there be a redelivery of the instrument after the change is made, and not otherwise; in other words, a new conveyance must be made (*Moelle v. Sherwood*, 148 U. S. 21, 27, 37 L. Ed. 350, 13 Sup. Ct. Rep. 426; *Malarin v. United States*, 68 U. S. (1 Wall.) 282, 288, 17 L. Ed. 594; *Bassett v. Bassett*, 55 Me. 127; *Burns v. Lynde*, 6 Allen (Mass.), 305; *Fitzpatrick v. Fitzpatrick*, 6 R. I. 64, 74, 75 Am. Dec. 681; *Tucker v. Allen*, 16 Kan. 312); but such a variation of its effect will not usually be sustained to the extent of divesting title already vested, or injuriously affecting the intervening rights of innocent purchasers or encumbrancers for value (*Ibid.*; *Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 350, 13 Sup. Ct. Rep. 426; *Herriek v. Malin*, 22 Wend. (N. Y.) 388; *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Webb v. Mullins*, 78 Ala. 111; 1 Greenl. Ev., § 568). An alteration of the nature last mentioned, that is material and after the delivery of the deed, if made by the grantee alone or his successor in interest and not innocently or unintentionally but with wrongful motive, is now held practically everywhere in the United States to vitiate and nullify an executory instrument, or the

or defacing the seal.<sup>u</sup> 3. By delivering it up to be canceled; [309] that is, to have lines drawn over it in the form of lattice work or *cancelli*; though the phrase is now used figuratively for any manner of obliteration or defacing it. 4. By the disagreement of such, whose concurrence is necessary, in order for the deed to stand: as, the husband, where a feme covert is concerned; an infant, or person under duress, when those disabilities are removed; and the like. 6. By the judgment or decree of a court of judicature. This was anciently the province of the court of star-chamber, and now of the chancery: when it appears that the deed was obtained by fraud, force, or other foul practice; or is proved to be an absolute forgery.<sup>w</sup> In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.

§ 423. 4. The several species of deeds.—And, having thus explained the general nature of deeds, we are next to consider their several species, together with their respective incidents. And herein I shall only examine the particulars of those, which, from long practice and experience of their efficacy, are generally used in the alienation of *real* estates: for it would be tedious, nay infinite, to descant upon all the several instruments made use of in *personal* concerns, but which fall under our general definition of a deed; that is, a writing sealed and delivered. The former, being principally such as serve to *convey* the property of lands and tene-ments from man to man, are commonly denominated *conveyances*:

<sup>u</sup> 5 Rep. 23.

<sup>w</sup> Toth. nume. 24. 1 Vern. 348.

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executory parts of a deed already delivered (Mathewson's Case, 5 Co. Rep. 23a; Herriek v. Malin, 22 Wend. (N. Y.) 388; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; Chessman v. Whittemore, 23 Pick. (Mass.) 231; Wallace v. Harmstad, 15 Pa. St. 462, 53 Am. Dec. 603; Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513. See Potter v. Adams, 125 Mo. 118, 46 Am. St. Rep. 478, 28 S. W. 490); but it does not undo what the instrument has already done—does not nullify nor overthrow the deed, in so far as it is executed and its operation complete. (*Ibid.*; Doe v. Bingham, 4 Barn. & Ald. 672, 106 Eng. Reprint, 1082; Jackson v. Jacoby, 9 Cow. (N. Y.) 125, 126; Rifener v. Bowman, 53 Pa. St. 313; North v. Henneberry, 44 Wis. 306; Johnson v. Moore, 33 Kan. 90, 5 Pac. 406.)—REEVES, 2 Real Prop. 1440.

which are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

§ 424. a. Conveyances at common law.—Of conveyances by the common law, some may be called *original*, or *primary* conveyances; which are those by means whereof the benefit or estate is created or first arises: others are *derivative* or *secondary*; whereby the benefit or estate, originally created, is enlarged, restrained, transferred, or extinguished.

§ 425. (1) *Original conveyances*.—<sup>[310]</sup> Original conveyances are the following: 1. Feoffment; 2. Gift; 3. Grant; 4. Lease; 5. Exchange; 6. Partition. *Derivative* are, 7. Release; 8. Confirmation; 9. Surrender; 10. Assignment; 11. Defeasance.

§ 426. (a) *Feoffment or grant*.—A feoffment,<sup>10</sup> *feoffamentum*, is a substantive derived from the verb, to enfeoff, *feoffare* or

<sup>10</sup> *History of feoffment*.—When the history of English conveyancing comes to be written, the feoffment will occupy an honorable place in its pages. From the time at which our land law assumed its definite shape in the thirteenth century, until the practice of conveyancers was revolutionized by the Statute of Uses, it was the normal assurance of freehold interests in land, whether held by military or by socage tenure. Fines and recoveries were, in truth, but evasions of a recognized rule; the clumsy conveyance by lease with entry, followed by release, was only possible or advantageous in special cases. Even after the Statute of Uses (27 Henry VIII, c. 10, 1535) and the Statute of Wills (32 Henry VIII, c. 1, 1540) had opened up new worlds to the conveyancer, the feoffment still remained the orthodox assurance of the common law. The language of Coke, usually so crabbed and turgid, rises into something like dignified simplicity as he speaks of its powers. The feoffment is “the ancient and the most necessary conveyance, both for that it is solemn and public, and therefore best remembered and proved, and also for that it cleareth all disseisins, abatements, intrusions and other wrongful or defeasible estates.” Coke speaks of Ephron as enfeoffing Abraham of the field of Machpelah; being, apparently, of opinion that the mediæval feoffment was a direct descendant of the ceremonies employed on that occasion. Without entering into this interesting antiquarian speculation, it may be sufficient to say, that the feoffment is essential to the feudal view of a freehold estate, which is, that it is an interest in land of which the holder is *seised*, i. e., corporeally possessed, by virtue of a gift from a superior. A feoffment is, as the language of mediæval writers warrants us in saying, a *livery* (or delivery) of seisin,



*infecundare*, to give one a feud, and therefore feoffment is properly *donatio feudi* (the gift of a fee).<sup>x</sup> It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined, the gift of any corporeal hereditament to another. He that so gives, or enfeoffs, is called the *feoffor*; and the person enfeoffed is denominated the *feoffee*.

This is plainly derived from, or is indeed itself the very mode of the ancient feudal donation; for though it may be performed by the word, "enfeoff" or "grant," yet the aptest word of feoffment is "*do or dedi*."<sup>y</sup> And it is still directed and governed by the same feudal rules; insomuch that the principal rule relating to the extent and effect of the feudal grant, "*tenor est qui legem dat feudo* (it is the condition or tenor of the deed which gives validity to a fee)," is, in other words, become the maxim of our law with relation to feoffments, "*modus legem dat donationi* (measure gives validity to the grant)."<sup>z</sup> And therefore as in pure feudal donations the lord, from whom the feud moved, must expressly limit and declare the continuance or quantity of estate which he meant to confer, "*ne quis plus donasse præsumatur, quam in donatione expresserit* (lest anyone be presumed to have given more than is expressed in the donation)";<sup>a</sup> so, if one grants by feoffment lands or tenements to another, and limits or expresses no estate, the grantee (due ceremonies of law being performed), hath barely an estate for life.<sup>b</sup> For, as the personal abilities of

<sup>x</sup> Co. Litt. 9.

<sup>y</sup> *Ibid.*

<sup>z</sup> Wright, 21.

<sup>a</sup> Pag. 108.

<sup>b</sup> Co. Litt. 42.

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i. e., an actual corporeal transfer of possession. By the common law, no documentary evidence was necessary to render a feoffment valid; although from very early times prudence suggested that the transaction should be recorded in a subsequently executed charter or deed. But, though no written conveyance was necessary, it was necessary that the livery should be intended to pass a freehold tenement, and if it was intended to pass more than a life estate, the appropriate words of inheritance had to be added. Neither the copyholder nor the tenant for years can convey or take, as such, by feoffment; nor can any interest less than an estate in possession—e. g., an equitable interest, a servitude or a remainder—pass by feoffment. On the other hand,

the feoffee were originally presumed to be the immediate or principal inducements to the feoffment, the feoffee's estate ought to be confined to his person and subsist only for his life: unless the feoffor, by express provision [311] in the creation and constitution of the estate, hath given it a longer continuance. These express provisions are indeed generally made; for this was for ages the only conveyance, whereby our ancestors were wont to create an estate in fee simple,<sup>c</sup> by giving the land to the feoffee, to hold to him and his heirs forever; though it serves equally well to convey any other estate of freehold.<sup>d 11</sup>

<sup>c</sup> See Appendix. No. I.

<sup>d</sup> Co. Litt. 9.

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until the "tortious" operation of a feoffment was abolished in 1845, every feoffment operated to confer an estate, albeit the feoffor had no lawful title. For, if the feoffor were actually seised, his seisin at least passed; if he were not, he could not, in fact, deliver seisin.

At the present time, it must be confessed, the feoffment plays but a small part in conveyancing. The blows inflicted on its popularity by the statutes of Henry VIII, which rendered the secret conveyance at last possible, were followed by other attacks. The Statute of Frauds (29 Car. II, c. 3, 1677) provided that interests in land created by "livery and seisin" only, without writing, should be taken to have the force and effect of estates at will only; and this provision was supplemented by the act to amend the law of real property, which rendered all feoffments void at law unless evidenced by deed. Thus the charter, which had previously been a mere optional means of proving the existence of a feoffment, became, in fact, the important part of the conveyance, while the livery of seisin sank into a mere solemnity. From the operation of the act of 1845 was, however, excepted the case of a feoffment by an infant under a special custom; and of this exception use is now occasionally made, when an infant desires to convey gavelkind lands. In other cases, a formal livery of seisin would merely add an element of publicity to a conveyance which it may be desired to keep secret. But it is worthy of note that the disuse of the feoffment is largely responsible for the agitation in favor of registration of title; although a Land Registry is not by any means the same thing as a Register of Seisins.—JENKS, *Modern Land Law*, 299. See, also, Digby, *Hist. Real Prop.* (5th ed.), 144 ff; Jenks, *Short Hist. of Eng. Law*, 106 ff., 259.

In some of the American states feoffment with livery of seisin is expressly abolished, and in many of them it is declared by statute to be unnecessary. 1 Stimson, *Am. Stat. Law*, § 1470.

<sup>11</sup> **Freehold by wrong.**—In several American editions this sentence is made to convey a wrong meaning by printing "estate or freehold." The feoffment could not convey an estate *not* of freehold. Even if made by a tarmor

§ 427. (i) **Feudal investiture.**—But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*; without which the feoffee has but a mere estate at will.<sup>e</sup> This livery of seisin is no other than the pure feudal investiture, or delivery of corporal possession of the land or tenement; which was held

<sup>e</sup> Litt. § 66.

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or other person who had no freehold in himself but simply a possession, its operation was to give the feoffee a “freehold by wrong” or “tortious freehold,” while it never gave a term of years or estate at will or sufferance.

This is not an abstruse and technical doctrine, unintelligible by the laity and devised by feudal tyrants to oppress the laity. It is simply the consequence of the very nature of the feoffment as the delivery of the land itself, and not of an estate in the land. By such a transfer the feoffee took presumptively the freehold (*liberum tenementum*) of the land, for the reason which Blackstone has stated in another work: “Since no one at common law was said to have or to be in possession of land, unless it were conveyed to him by the livery of seisin, which gave him the corporal investiture and bodily occupation thereof; and this ceremony of delivering seisin could not convey a less interest than for term of life. For as it is observed by St. Germain (Dr. & Stud. Dial. 2, c. 22) ‘the possession of the land is after the law of England called the frank-tenement or freehold.’” (Blackstone, Law Tracts, i. 140.) Therefore, as Blackstone says in the same place, he that enjoys an estate for years is not said to be possessed of the land, but only of his *term of years*. (Blackstone, Law Tracts, i, 140.) The termor’s possession of the land in fact enables him to transfer it in fact to another person, but that transfer will not make the new possessor a termor. It is not an assignment of the term, for that must be effected in a different mode.

There is indeed an anomaly here, in allowing a freehold even “by wrong” to be given by the feoffment of one who has not a freehold himself: seisin to be given by one who has never received it. We find a similar anomaly in other rules respecting the termor’s estate. He cannot take seisin himself, yet may take it for the benefit of the next estate of freehold: and this estate of freehold will be immediately created and vested in the freehold tenant during the continuance of the term, and yet will be treated for many purposes as a remainder after the term. (2 Comm. \*164, \*166.) The only explanation of these anomalies is to be found in the fact that *seisin* originally meant possession as an actual fact, and of chattels as well as land: and that the feoffment was at first the actual transfer of possession of the land itself, without reference to any “estate.” When seisin afterwards became a technical term for possession of certain kinds of estate only, it was too late to change the legal phraseology which had become fixed by usage.—HAMMOND.

absolutely necessary to complete the donation. "*Nam feudum sine investitura nullo modo constitui potuit* (for a fee can in nowise be perfected without investiture)":<sup>f</sup> and an estate was then only perfect, when, as Fleta expresses it in our law, "*fit juris et seisinæ conjunctio* (there is a conjunction of law and seisin)."<sup>g</sup>

Investitures, in their original rise, were probably intended to demonstrate in conquered countries the actual possession of the lord; and that he did not grant a bare litigious right, which the soldier was ill-qualified to prosecute, but a peaceable and firm possession. And, at a time when writing was seldom practiced, a mere oral gift, at a distance from the spot that was given, was not likely to be either long or accurately retained in the memory of bystanders, who were very little interested in the grant. Afterwards they were retained as a public and notorious act, that the country might take notice of and testify the transfer of the estate: and that such, as claimed title by other means, might know against whom to bring their actions.

In all well-governed nations, some notoriety of this kind has been ever held requisite, in order to acquire and ascertain [312] the property of lands. In the Roman law *plenum dominium* (absolute ownership) was not said to subsist, unless where a man had both the *right*, and the *corporate possession*; which possession could not be acquired without both an actual intention to possess, and an actual seisin, or entry into the premises, or part of them in the name of the whole.<sup>h</sup> And even in ecclesiastical promotions, where the freehold passes to the person promoted, corporate possession is required at this day, to vest the property completely in the new proprietor; who, according to the distinction of canonists,<sup>i</sup> acquires

<sup>f</sup> Wright, 37.

<sup>g</sup> l. 3. c. 15. § 5.

<sup>h</sup> *Nam apiscimur possessionem corpore et animo; neque per se corpore; neque per se animo. Non autem ita accipiendum est, ut qui fundum possidere velit, omnes glebas circumambulet; sed sufficit quamlibet partem ejus fundi introire.* (To obtain possession, we must enter on the land with an intention to possess, neither entry nor intention alone being sufficient. But it is not to be understood that he who wishes to take possession must walk over every clod, for it is enough if he enter on any part of the land.) (Ff. 41. 2, 3.) And again: *traditionibus dominia rerum, non nudis pactis, transferuntur* (the ownership of a thing is transferred by delivery, not by mere agreement). (Cod. 2, 3. 20.)

<sup>i</sup> Decretal. l. 3. t. 4. c. 40.

the *jus ad rem* (a right to the thing), or inchoate and imperfect right, by nomination and institution; but not the *jus in re* (a right in the thing), or complete and full right, unless by corporal possession. Therefore, in dignities possession is given by installment; in rectories and vicarages by induction, without which no temporal rights accrue to the minister, though every ecclesiastical power is vested in him by institution. So, also, even in descents of lands, by our law, which are cast on the heir by act of the law itself, the heir has not *plenum dominium*, or full and complete ownership, till he has made an actual corporal entry into the lands: for if he dies before entry made, *his* heir shall not be entitled to take the possession, but the heir of the person who was last actually seised.<sup>k</sup> It is not, therefore, only a mere right to enter, but the actual entry, that makes a man complete owner; so as to transmit the inheritance to his own heirs: *non jus, sed seisinā, facit stipitem* (not right, but seisin, makes the stock).<sup>l</sup>

§ 428. (ii) **Symbolical delivery of possession.**—Yet, the corporal tradition of lands being sometimes inconvenient, a symbolical delivery of possession was in many cases anciently allowed; by transferring something near at hand, in the presence of credible witnesses, which by agreement should serve to represent the very thing designed to be conveyed; and an occupancy of this sign or symbol was permitted [313] as equivalent to occupancy of the land itself. Among the Jews we find the evidence of a purchase thus defined in the book of Ruth:<sup>m</sup> “now this was the manner in former time in Israel, concerning redeeming and concerning changing, for to confirm all things: a man plucked off his shoe, and gave it to his neighbor; and this was a testimony in Israel.” Among the ancient Goths and Swedes, contracts for the sale of lands were made in the presence of witnesses who extended the cloak of the buyer, while the seller cast a clod of the land into it, in order to give possession; and a staff or wand was also delivered from the vendor to the vendee, which passed through the hands of the witnesses.<sup>n</sup> With our Saxon ancestors the delivery of a turf was a necessary solemnity, to establish the conveyance of lands.<sup>o</sup>

<sup>k</sup> See pag. 209, 227, 228.

<sup>l</sup> Flet. 1. 6. c. 2. § 2.

<sup>m</sup> Ch. 4. v. 7.

<sup>n</sup> Stiernhook, de Jure Sueon, l. 2. c. 4.

<sup>o</sup> Hickes, Dissert. Epistolar. 85.



And, to this day, the conveyance of our copyhold estates is usually made from the seller to the lord or his steward by delivery of a rod or verge, and then from the lord to the purchaser, by redelivery of the same in the presence of a jury of tenants.

§ 429. (iii) **Conveyances in writing.**—Conveyances in writing were the last and most refined improvement. The mere delivery of possession, either actual or symbolical, depending on the ocular testimony and remembrance of the witnesses, was liable to be forgotten or misrepresented, and became frequently incapable of proof. Besides the new occasions and necessities, introduced by the advancement of commerce, required means to be devised of charging and encumbering estates, and of making them liable to a multitude of conditions and minute designations for the purposes of raising money, without an absolute sale of the land; and sometimes the like proceedings were found useful in order to make a decent and competent provision for the numerous branches of a family, and for other domestic views. None of which could be effected by a mere, simple, corporal transfer of the soil from one man to another, which was principally calculated for conveying an absolute unlimited dominion. Written [314] deeds were therefore introduced, in order to specify and perpetuate the peculiar purposes of the party who conveyed: yet still, for a very long series of years, they were never made use of, but in company with the more ancient and notorious method of transfer, by delivery of corporal possession.

§ 430. (iv) **Livery of seisin.**—Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only. In hereditaments incorporeal it is impossible to be made; for they are not the object of the senses: and in leases for years, or other chattel interests, it is not necessary. In leases for years, indeed, an actual *entry* is necessary, to vest the estate in the lessee: for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini*: and, when he enters in pursuance of that right, he is then and not before in

possession of his term, and complete tenant for years.<sup>p</sup> This entry by the tenant himself serves the purpose of notoriety, as well as livery of seisin from the grantor could have done; which it would have been improper to have given in this case, because that solemnity is appropriated to the conveyance of a freehold. And this is one reason why freeholds cannot be made to commence *in futuro* (at a future day), because they cannot (at the common law) be made but by livery of seisin; which livery, being an actual manual tradition of the land, must take effect *in presenti* (immediately), or not at all.<sup>q</sup>

On the creation of a *freehold* remainder, at one and the same time with a particular estate for years, we have before seen that at the common law livery must be made to the particular tenant.<sup>r</sup> But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing; "*nam quod semel meum est, amplius meum esse non potest* (for what is once mine cannot be mine more fully)," <sup>s</sup> but it must be made to the remainderman [315] himself, by consent of the lessee for years: for without his consent no livery of the possession can be given; <sup>t</sup> partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given <sup>u</sup> for introducing the doctrine of attornments.

§ 431. (aa) *Livery in deed*. — Livery of seisin is either in *deed*, or in *law*. Livery in *deed* is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney, as by the principals themselves in person) come to the land, or to the house; and there, in the presence of witnesses, declare the contents of the feoffment or lease, on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough there growing, with words to this effect. "I deliver these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must

<sup>p</sup> Co. Litt. 46.

<sup>q</sup> See pag. 165.

<sup>r</sup> Pag. 167.

<sup>s</sup> Co. Litt. 49.

<sup>t</sup> Co. Litt. 48.

<sup>u</sup> Pag. 288.

take the ring, or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone, and shut to the door, and then open it, and let in the others.<sup>w</sup> If the conveyance or feoffment be of divers lands, lying scattered in one and the same county, then in the feoffor's possession, livery of seisin of any parcel, in the name of the rest, sufficeth for all;<sup>x</sup> but if they be in several counties, there must be as many liveries as there are counties. For, if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto*, before the peers or freeholders of the neighborhood, who attested such delivery in the body or on the back of the deed; according to the rule of the feudal law,<sup>y</sup> *pares debent interesse investituræ feudi, et non alii* (the peers, and no others, should be present at the investiture of the fee): for which this reason is expressly given; because [316] the peers or vassals of the lord, being bound by their oath of fealty, will take care that no fraud be committed to his prejudice, which strangers might be apt to connive at. And though, afterwards, the ocular attestation of the *pares* was held unnecessary, and livery might be made before any credible witnesses, yet the trial, in case it was disputed (like that of all other attestations),<sup>z</sup> was still reserved to the *pares* or jury of the county.<sup>a</sup> Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants: because no livery can be made in this case, but by the consent of the particular tenant; and the consent of one will not bind the rest.<sup>b</sup> And in all these cases it is prudent, and usual, to indorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it; together with the names of the witnesses.<sup>c</sup> And thus much for livery in deed.

§ 432. (bb) *Livery in law*.—Livery in *law* is where the same is not made *on* the land, but *in sight of it* only; the feoffor saying

<sup>w</sup> Co. Litt. 48. West. Symb. 251.

<sup>x</sup> Litt. § 414.

<sup>y</sup> Feud. l. 2. t. 58.

<sup>z</sup> See pag. 307.

<sup>a</sup> Gilb. 10. 35.

<sup>b</sup> Dyer. 18.

<sup>c</sup> See Appendix. No. I.

to the feoffee, "I give you yonder land; enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise; unless he dares not enter, through fear of his life or bodily harm: and then his continual claim, made yearly, in due form of law, as near as possible to the lands,<sup>d</sup> will suffice without an entry.<sup>e</sup> This livery in law cannot, however, be given or received by attorney, but only by the parties themselves.<sup>f</sup>

§ 433. (b) *Gifts*.—The conveyance by *gift*, *donatio*, is properly applied to the creation of an estate-tail, as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment, but in the nature of the estate passing by it: for the operative words of conveyance in this case are *do* or *dedi*;<sup>g</sup> and gifts in tail are equally imperfect without livery of seisin, as feoffments in fee simple.<sup>h</sup> [317] And this is the only distinction that Littleton seems to take, when he says,<sup>i</sup> "it is to be understood that there is feoffor and feoffee, donor and donee, lessor and lessee"; viz., feoffor is applied to a feoffment in fee simple, donor to a gift in tail, and lessor to a lease for life, or for years, or at will. In common acceptation gifts are frequently confounded with the next species of deeds: which are,

§ 434. (c) *Grants*.—Grants, *concessionēs*; the regular method by the common law of transferring the property of *incorporeal* hereditaments, or such things whereof no livery can be had.<sup>k</sup> For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery*; and the others, as advowsons, commons, rents, reversions, etc., to lie *in grant*.<sup>l</sup> And the reason is given by Bracton:<sup>m</sup> "*traditio*, or livery, *nil aliud est quam rei corporalis de persona in personam, de manu in manum, translatio aut in possessionem inductio; sed res incorporales, quæ sunt ipsum jus rei vel corpori inhærens, traditionem non patiuntur* (livery is merely the transferring from one person to another, from one hand to another, or the induction into possession of a corporeal here-

<sup>d</sup> Litt. § 421, etc.<sup>e</sup> Co. Litt. 48.<sup>f</sup> *Ibid.* 52.<sup>g</sup> West's Symbol. 256.<sup>h</sup> Litt. § 59.<sup>i</sup> § 57.<sup>k</sup> Co. Litt. 9.<sup>l</sup> *Ibid.* 172.<sup>m</sup> L. 2. c. 18.

ditament; but an incorporeal hereditament, which is the right itself to a thing, or inherent in the person, does not admit of delivery).” These, therefore, pass merely by the delivery of the deed. And in seigniories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite) were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject matter: for the operative words therein commonly used are *dedi et concessi*, “have given and granted.”

§ 435. (d) Leases.—A lease is properly a conveyance of any lands or tenements (usually in consideration of rent or other annual recompense) made for life, for years or at will, but always for a *less* time than the lessor hath in the premises: for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are, “demise, grant, and to farm let; *dimisi, concessi, et ad firmam* [318] *tradidi*.” *Farm*, or *feorme*, is an old Saxon word signifying provisions:<sup>a</sup> and it came to be used instead of rent or render, because anciently the greater part of rents were reserved in provisions; in corn, in poultry, and the like; till the use of money became more frequent. So that a farmer, *firmarius*, was one who held his lands upon payment of a rent or *feorme*: though at present, by a gradual departure from the original sense, the word “*farm*” is brought to signify the very estate or lands so held upon farm or rent. By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments; though livery of seisin is indeed incident and necessary to one species of leases, viz., leases for life of corporeal hereditaments; but to no other.

§ 436. (i) Right to make leases.—Whatever restriction, by the severity of the feudal law, might in times of very high antiquity be observed with regard to leases; yet by the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore, tenant in fee simple might let leases of any

<sup>a</sup> Spelm. Gl. 229.



duration; for he hath the whole interest: but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner; nor could a husband, seised *jure uxoris* (in right of his wife), make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired. Yet some tenants for life, where the fee simple was in abeyance, might (with the concurrence of such as have the guardianship of the fee) make leases of equal duration with those granted by tenants in fee simple, such as parsons and vicars with consent of the patron and ordinary.<sup>o</sup> So, also, bishops, and deans, and such other sole ecclesiastical corporations as are seised of the fee simple of lands in their corporate right, might, with the concurrence and confirmation of such persons as the law requires, have made leases for years, or for life, estates in tail, or in fee, without any limitation or control. And corporations aggregate [319] might have made what estates they pleased, without the confirmation of any other person whatsoever. Whereas now, by several statutes, this power where it was unreasonable, and might be made an ill use of, is restrained; and, where in the other cases the restraint by the common law seemed too hard, it is in some measure removed. The former statutes are called the *restraining*, the latter the *enabling* statute. We will take a view of them all, in order of time.

§ 437. (aa) Enabling statute of 32 Henry VIII.—And first the *enabling* statute, 32 Hen. VIII, c. 28 (Leaseholds, 1540), empowers three manner of persons to make leases, to endure for three lives or one and twenty years, which could not do so before. As, first, tenant in tail may by such leases bind his issue in tail, but not those in remainder or reversion. Secondly, a husband seised in right of his wife, in fee simple or fee-tail, provided the wife joins in such lease, may bind her and her heirs thereby. Lastly, all persons seised of an estate of fee simple in right of their churches, which extends not to parsons and vicars, may (without the concurrence of any other person) bind their successors. But then there must many requisites be observed, which the statute specifies, otherwise such leases are not binding.<sup>p</sup> 1. The lease must

<sup>o</sup> Co. Litt. 44.

<sup>p</sup> Co. Litt. 44.

be by indenture; and not by deed poll, or by parol. 2. It must begin from the making, or day of the making, and not at any greater distance of time. 3. If there be any old lease in being, it must be first absolutely surrendered, or be within a year of expiring. 4. It must be *either* for twenty-one years, *or* three lives; and not for both.<sup>12</sup> 5. It must not exceed the term of three lives, or twenty-one years, but may be for a shorter term. 6. It must be of corporeal hereditaments, and not of such things as lie merely in grant; for no rent can be reserved thereout by the common law, as the lessor cannot resort to them to distrain.<sup>a</sup> 7. It must be of [320] lands and tenements most commonly letten for twenty years past; so that if they have been let for above half the time (or eleven years out of the twenty) either for life, for years, at will, or by copy of court roll, it is sufficient. 8. The most usual and customary feorm or rent, for twenty years past, must be reserved yearly on such lease. 9. Such leases must not be made without impeachment of waste. These are the guards, imposed by the statute (which was avowedly made for the security of farmers and the consequent improvement of tillage) to prevent unreasonable abuses, in prejudice of the issue, the wife, or the successor, of the reasonable indulgence here given.

§ 438. (bb) **Disabling statutes.**—Next follows, in order of time, the *disabling* or *restraining* statute, 1 Eliz., c. 19 (Bishoprics, 1559) (made entirely for the benefit of the successor), which enacts, that all grants by archbishops and bishops (which include even those confirmed by the dean and chapter; the which, however

<sup>a</sup> But now by the statute 5 Geo. III, c. 17 (Leases, 1765), a lease of tithes or other incorporeal hereditaments, alone, may be granted by any bishop or any such ecclesiastical or eleemosynary corporation, and the successor shall be entitled to recover the rent by an action of debt, which (in case of a freehold lease) he could not have brought at the common law.

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<sup>12</sup> **Church leases.**—The limitation of leases of church lands to three lives (illustrated so fully by the examples of Archbishop Oswald's leases in Kemble and Thorpe), no doubt had its origin in the law of Justinian. (Nov. vii, c. 3, § 3.) But this cannot be taken as evidence of the general use or knowledge of that law among the Anglo-Saxons. As a matter of general interest to the church, the rule would be made known by its canons to every bishop who recognized a submission to the Roman church.—HAMMOND.

long or unreasonable, were good at common law) other than for the term of one and twenty years or three lives from the making, or without reserving the usual rent, shall be void. Concurrent leases, if confirmed by the dean and chapter, are held to be within the exception of this statute, and therefore valid; provided they do not exceed (together with the lease in being) the term permitted by the act.<sup>r</sup> But, by a saving expressly made, this statute of 1 Eliz. did not extend to grants made by any bishop to the crown; by which means Queen Elizabeth procured many fair possessions to be made over to her by the prelates, either for her own use, or with intent to be granted out again to her favorites, whom she thus gratified without any expense to herself. To prevent which<sup>s</sup> for the future, the statute 1 Jac. I, c. 3 (Leases, 1603), extends the prohibition to grants and leases made to the king, as well as to any of his subjects.

Next comes the statute 13 Eliz., c. 10 (Dilapidations, 1571), explained and enforced by the statutes 14 Eliz., c. 11 & 14 (Leases, 1572), 18 Eliz., c. 11 (Dilapidations, 1576), and 43 Eliz., c. 29 (Leases, 1601), which extend the restrictions laid by [321] the last mentioned statute on bishops, to certain other inferior corporations, both sole and aggregate. From laying all which together we may collect, that all colleges, cathedrals, and other ecclesiastical, or eleemosynary corporations, and all parsons and vicars, are restrained from making any leases of their lands, unless under the following regulations: 1. They must not exceed twenty-one years, or three lives, from the making. 2. The accustomed rent, or more, must be yearly reserved thereon. 3. Houses in corporations, or market towns, may be let for forty years; provided they be not the mansion-houses of the lessors, nor have above ten acres of ground belonging to them: and provided the lessee be bound to keep them in repair: and they may also be aliened in fee simple for lands of equal value in recompense. 4. Where there is an old lease in being, no concurrent lease shall be made, unless where the old one will expire within three years. 5. No lease (by the equity of the statute) shall be made without impeachment of waste.<sup>t</sup>

<sup>r</sup> Co. Litt. 49.

<sup>t</sup> Co. Litt. 45.

<sup>s</sup> 11 Rep. 71.

6. All bonds and covenants tending to frustrate the provisions of the statutes of 13 & 18 Eliz. shall be void.

§ 439. (aaa) **Effect of disabling statutes.**—Concerning these restrictive statutes there are two observations to be made. First, that they do not, by any construction, enable any persons to make such leases as they were by common law disabled to make. Therefore, a parson, or vicar, though he is restrained from making longer leases than for twenty-one years or three lives, even *with* the consent of patron and ordinary, yet is not enabled to make any lease at all, so as to bind his successor, *without* obtaining such consent.<sup>u</sup> Secondly, that though leases contrary to these acts are declared void, yet they are good against the *lessor* during his life, if he be a sole corporation; and are also good against an aggregate corporation so long as the head of it lives, who is presumed to be the most concerned in interest. For the act was intended for the benefit of the successor only; and no man shall make an advantage of his own wrong.<sup>w</sup>

§ 440. (bbb) **College leases.**—<sup>[322]</sup> There is yet another restriction with regard to college leases, by statute 18 Eliz., c. 6 (Leases, 1575), which directs, that one-third of the old rent, then paid, should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d., or a quarter of malt for every 5s.; or that the lessees should pay for the same according to the price that wheat and malt should be sold for, in the market next adjoining to the respective colleges, on the market-day before the rent becomes due. This is said \* to have been an invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal secretary of state, who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the new-found Indies (which effects were likely to increase to a greater degree), devised this method for upholding the revenues of colleges. Their foresight and penetration has in this respect been very apparent: for, though the rent so reserved in corn was at first but one-third of the old rent, or half of what was still reserved in money, yet now the proportion

<sup>u</sup> *Ibid.* 44.

\* Strype's *Annals* of Eliz.

<sup>w</sup> *Ibid.* 45.

is nearly inverted; and the money arising from corn rents is *communibus annis* (upon an average), almost double to the rents reserved in money.

§ 441. (ccc) Leases of nonresident clergy.—The leases of beneficed clergymen are further restrained, in case of their non-residence, by statutes 13 Eliz., c. 20 (Benefices, 1571), 14 Eliz., c. 11 (Leases, 1572), 18 Eliz., c. 11 (Dilapidations, 1576), and 43 Eliz., c. 9 (Leases, 1601), which direct, that if any beneficed clergyman be absent from his cure above fourscore days in any one year, he shall not only forfeit one year's profit of his benefice, to be distributed among the poor of the parish; but that all leases made by him, of the profits of such benefice, and all covenants and agreements of like nature, shall cease and be void: except in the case of licensed pluralists, who are allowed to demise the living, on which they are nonresident, to their curates only; provided such curates do not absent themselves above <sup>[323]</sup> forty days in any one year. And thus much for leases, with their several enlargements and restrictions.<sup>† 13</sup>

§ 442. (e) Exchange.—An *exchange* is a mutual grant of equal interests, the one in consideration of the other. The word “exchange” is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word or expressed by any circumlocution.<sup>a</sup> The estates exchanged must be equal in quantity;<sup>a</sup> not of *value*, for that is immaterial, but of *interest*; as fee simple for fee simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery.<sup>b</sup> But no livery of

<sup>†</sup> For the other learning relating to leases, which is very curious and diffusive, I must refer the student to 3 Bac. Abridg. 295. (title, *Leases and Terms for Years*) where the subject is treated in a perspicuous and masterly manner; being supposed to be extracted from a manuscript of Sir Geoffrey Gilbert.

<sup>a</sup> Co. Litt. 50, 51.

<sup>a</sup> Litt. § 64, 65.

<sup>b</sup> Co. Litt. 51.

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<sup>13</sup> For the history and present status of leasehold interests, see Digby, *Hist. Real Prop.* (5th ed.), 176–181, 241–249; Jenks, *Mod. Land Law*, 74 ff; and Pollock, *Land Laws*, 135 ff.



seisin, even in exchanges of freehold, is necessary to perfect the conveyance:<sup>c</sup> for each party stands in the place of the other and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for, if either party die before entry, the exchange is void, for want of sufficient notoriety.<sup>d</sup> And so, also, if two parsons, by consent of patron and ordinary, exchange their preferments; and the one is presented, instituted, and inducted, and the other is presented, and instituted, but dies before induction; the former shall not keep his new benefice, because the exchange was not completed, and therefore he shall return back to his own.<sup>e</sup> For if, after an exchange of lands or other hereditaments, either party be evicted of those which were taken by him in exchange, through defect of the other's title; he shall return back to the possession of his own, by virtue of the implied warranty contained in all exchanges.<sup>f 14</sup>

§ 443. (f) Partition.—A partition is when two or more joint tenants, coparceners, or tenants in common, agree to divide the [324] lands so held among them in severalty, each taking a distinct part. Here, as in some instances there is a unity of interest, and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates, which they are to take and enjoy separately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin.<sup>g</sup> And the statutes of 31 Hen. VIII, c. 1 (Partition, 1539), and 32 Hen. VIII, c. 32 (Partition, 1540),

<sup>c</sup> Litt. § 62.

<sup>f</sup> Pag. 300.

<sup>d</sup> Co. Litt. 50.

<sup>g</sup> Litt. § 250. Co. Litt. 169.

<sup>e</sup> Perk. § 288.

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<sup>14</sup> By the Statute of Frauds (1677) an exchange had to be evidenced in writing; and by the Real Property Act of 1845, it must now be by deed in every case except that of an exchange of copyhold. And by the Real Property Act of 1845 an exchange of any tenements or hereditaments made by deed executed after October 1, 1845, does not imply any condition in law. The conveyance by exchange at common law is almost obsolete. In lieu thereof the parties execute mutual conveyances of their respective lands, the one to the other. 1 Stephen's Comm. (16th ed.), 410; 2 Reeves, Real. Prop. 1385.

made no alteration in this point. But the statute of frauds, 29 Car. II, c. 3 (1677), hath now abolished this distinction, and make a deed in all cases necessary.<sup>15</sup>

§ 444. (2) **Secondary or derivative conveyances.**—These are the several species of *primary*, or *original* conveyances. Those which remain are of the *secondary*, or *derivative* sort; which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

§ 445. (a) **Releases.**—Releases; which are a discharge or conveyance of a man's right in lands or tenements, to another that hath some former estate in possession. The words generally used therein are "remised, released, and forever quitclaimed."<sup>h</sup> And these releases may inure either, 1. By way of *enlarging an estate*, or *enlarger l'estate*: as, if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs, this gives him the estate in fee.<sup>i</sup> But in this case the releesee must be in *possession* of some estate, for the release to work upon; for if there be lessee for years, and before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void

<sup>h</sup> Litt. § 445.

<sup>i</sup> *Ibid.* § 465.

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<sup>15</sup> **Partition in United States.**—By the English Real Property Act of 1845, partitions of all hereditaments, not being copyhold, made after October 1, 1845, will be void at law, unless made by deed. In most of the American states, co-owners of any kind may partition the property by oral agreement, followed by actual exclusive possession and occupation of their respective portions. Accordingly, when A and B own a tract of land as joint tenants, tenants in common, or owners by the entirety, where husband and wife may convey directly to each other, and agree orally that A shall thereafter own the northern half in severalty and B the southern half, and then each takes possession of his individual pieces and occupies it exclusively, the partition becomes complete. *Wood v. Fleet*, 36 N. Y. 499, 93 Am. Dec. 528; *Wescoat v. Wilson*, 62 N. J. Eq. 177, 49 Atl. 1112; *Byers v. Byers*, 183 Pa. St. 509, 38 Atl. 1027; *Horgan v. Bickerton*, 17 R. I. 483, 23 Atl. 23, 24 Atl. 772; *Markoe v. Wakeman*, 107 Ill. 251; *Shaffer v. Hahn*, 111 N. C. 1, 15 S. E. 1033; *Buzzell v. Gallagher*, 28 Wis. 678; *Tuffree v. Polhemus*, 108 Cal. 670, 41 Pac. 806; 2 *Reeves*, Real Prop., 992.

for want of possession in the releesee.<sup>k 16</sup> 2. By way of *passing an estate*, or *mitter l'estate*: as when one of two coparceners releaseth all her [325] right to the other, this passeth the fee simple of the whole.<sup>1</sup> And in both these cases there must be a privity of estate between the relessor and releesee;<sup>m</sup> that is, one of their estates must be so related to the other, as to make but one and the same estate in law. 3. By way of *passing a right*, or *mitter le droit*: as if a man be disseised, and releaseth to his disseisor all his right; hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious.<sup>n</sup> 4. By way of *extinguishment*: as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall inure to the advantage of B's remainder as well as of A's particular estate.<sup>o</sup> 5. By way of *entry and feoffment*: as if there be

<sup>k</sup> *Ibid.* § 459.

<sup>n</sup> Litt. § 466.

<sup>1</sup> Co. Litt. 273.

<sup>o</sup> *Ibid.* § 470.

<sup>m</sup> *Ibid.* 272, 273.

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**16 Release and quitclaim.**—This has been criticised, by Mr. Sweet and others, as not accurately expressed. The examples given are those of other releases, such as those which pass an estate, pass the right, etc., where Blackstone says nothing of possession; or by saying that tenant at will may take a release, as if Blackstone had required seisin and not possession.

It is conceived that this rule is still in force, although many of our American books speak of land as passing by quitclaims (which is only another name for release) to one who had no interest or possession before. The explanation is that the term "quitclaim deed" is very commonly used, even by lawyers and judges, for a simple deed of conveyance without covenants, as opposed to a warranty deed, or to a deed with covenants against grantor. Such deeds pass the land and its legal possession by virtue of the granting words in them: they do not merely "remit, release, and quitclaim," which presupposes possession in the grantee. If a deed in the latter form be held to pass the title, it can only be by virtue of that loose construction which disregards all words and rules, in order to carry out the understood intention of the parties. Such "equitable constructions" are denials of right, not to the parties themselves, but to the countless unborn litigants whose rights will be taken away or squandered in useless litigation by reason of the precedents thus created. In some cases we find judges already applying to simple deeds of conveyance rules of law that belong only to releases proper, because of this misuse of the term "quitclaim." (See cases collected in Boone on Real Property, § 324, notes 7, 8.)

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two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered, and thereby put an end to the disseisin, and afterwards had enfeofed one of the disseisors in fee.<sup>p</sup> And hereupon we may observe that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery; which makes a notoriety in the country: but if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land: for the occupancy of the releesee is a matter of sufficient notoriety already.<sup>17</sup>

<sup>p</sup> Co. Litt. 273.

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17 **Quitclaim deeds.**—A release, once in very frequent use, judging from the length at which it is treated by Littleton and Coke, is now a comparatively unimportant instrument. Jenks, Mod. Land Law, 344. The quitclaim deed is an outgrowth of the common-law release. *United States v. California & O. Land Co.*, 148 U. S. 31, 37 L. Ed. 354, 13 Sup. Ct. Rep. 458; *Blacksmith v. Fellows*, 7 N. Y. 401, 422; *Lewis v. Shearer*, 189 Ill. 184, 59 N. E. 580; *Wholey v. Cavanaugh*, 88 Cal. 132, 25 Pac. 1112; *State v. Kemmerer*, 14 S. D. 169, 84 N. W. 771; *Bryan v. Eason*, 147 N. C. 284, 61 S. E. 71; *Mosier v. Momson*, 13 Okl. 41, 74 Pac. 905. Its operative words, like those of the release, are "remise, release and forever quitclaim." It derives its names from the last of these, which is thus explained. "The curious term *quietum clamare*, the origin of our 'to cry quits,' is extremely common, especially when the right that is to be transferred is an adverse right; for example, a disseisee will quitclaim his disseisor. Very possibly in the past such transactions have been effected without written instruments. We often read of the transfer of a rod in connection with a quitclaim, and the term itself may point to some formal renunciatory cry." 2 Pollock & Maitland, Hist. Eng. Law (2d ed.), 91. The quitclaim has been enlarged, in most jurisdictions, into a primary or original conveyance. *United States v. California & O. Land Co.*, 148 U. S. 31, 37 L. Ed. 354, 13 Sup. Ct. Rep. 458; *Hall's Lessee v. Ashby*, 9 Ohio, 96, 34 Am. Dec. 424; *Bryan v. Eason*, 147 N. C. 284, 61 S. E. 71; *Doe v. Reed*, 4 Scam. (5 Ill.) 117, 38 Am. Dec. 124; *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560. The quitclaim deed conveys whatever interest the grantor had to convey at the time. It likewise transfers as complete a title as any other form of conveyance. *Pleasants v. Blodgett*, 39 Neb. 741, 42 Am. St. Rep. 624, 58 N. W. 423; *Moelle v. Sherwood*, 148 U. S. 21, 37 L. Ed. 350, 13 Sup. Ct. Rep. 426; *Bryan v. Eason*, 147 N. C. 284, 61 S. E. 71. It does not, however, imply any covenant of title. *French v. Spencer*, 21 How. (U. S.) 228, 16 L. Ed. 97; *Wilhelm v. Wilken*, 149 N. Y. 447, 52 Am. St. Rep. 743, 32 L. R. A. 370, 44 N. E. 82; *Gage v.*

§ 446. (b) **Confirmation.**—A confirmation is of a nature nearly allied to a release. Sir Edward Coke defines it<sup>a</sup> to be a conveyance of an estate or right *in esse*, whereby a voidable estate is made sure and unavoidable, or whereby a particular estate is increased: and the words of making it are these, “have given, granted, ratified, approved, and confirmed.”<sup>r</sup> An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term; here the lease for years is voidable by him in reversion: yet, if he [326] hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable but sure.<sup>s</sup> The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release, which operates by way of enlargement.<sup>18</sup>

<sup>a</sup> 1 Inst. 295.

<sup>s</sup> Litt. § 516.

<sup>r</sup> Litt. § 515, 531.

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Sanborn, 106 Mich. 269, 64 N. W. 32; San Francisco v. Lawton, 18 Cal. 465, 79 Am. Dec. 187; McNellis v. Hilkowski, 98 Minn. 127, 107 N. W. 965. Formerly, and still in a few states, the grantee of a quitclaim deed was put upon inquiry by the very nature of deed as to any outstanding defects in the title. But the receipt of a quitclaim deed does not of itself prevent the grantee from showing that he is a *bona fide* purchaser. Moelle v. Sherwood, 148 U. S. 21, 37 L. Ed. 350, 13 Sup. Ct. Rep. 426. And in some states an innocent purchaser for value by quitclaim has the benefit of his position as such purchaser. Stanley v. Schwalby, 162 U. S. 255, 277, 40 L. Ed. 960, 16 Sup. Ct. Rep. 754; Wilhelm v. Wilken, 149 N. Y. 447, 52 Am. St. Rep. 743, 32 L. R. A. 370, 44 N. E. 82; Woodward v. Sartwell, 129 Mass. 210; Lewis v. Shearer, 189 Ill. 184, 59 N. E. 580; Fox v. Hall, 74 Mo. 315, 41 Am. Rep. 316; Nidever v. Ayers, 83 Cal. 39, 23 Pac. 192; 2 Reeves, Real Prop., 1397.

<sup>18</sup> **Confirmation.**—A confirmation cannot give validity to a deed absolutely void. Bradley v. Walker, 138 N. Y. 291, 297, 33 N. E. 1079; Barr v. Schroeder, 32 Cal. 609. It is often supplied by a quitclaim deed, yet sometimes distinguished therefrom. For instance, it has been held that a patent from the United States government, confirming the Mexican title to certain lands in territory acquired from Mexico, and releasing that of the United States, is a confirmation rather than a quitclaim. Boquillas Land & C. Co. v. Curtis, 213 U. S. 339, 344, 53 L. Ed. 822, 29 Sup. Ct. Rep. 493, quoting and adopting the definition in Gilbert, Tenures, p. 75. While a confirmation is a conveyance, secondary in form, yet modern courts, in seeking to carry out the intention of the parties, if reasonably possible, will construe an instrument in form a deed of confirmation as a grant, or a bargain and sale, or some other instru-



§ 447. (c) **Surrender.**—A surrender, *sursumreditio*, or rendering up, is of a nature directly opposite to a release; for, as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. It is defined,<sup>t</sup> a yielding up of an estate for life or years to him that hath the immediate reversion or remainder, wherein the particular estate may merge or drown, by mutual agreement between them. It is done by these words, "hath surrendered, granted, and yielded up." The surrenderor must be in possession;<sup>u</sup> and the surrenderee must have a higher estate, in which the estate surrendered may merge: therefore, tenant for life cannot surrender to him in remainder for years.<sup>w</sup> In a surrender there is no occasion for livery of seisin;<sup>x</sup> for there is a privity of estate between the surrenderor, and the surrenderee; the one's particular estate and the other's remainder are one and the same estate; and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes: since the reversion of the lessor, or confirmor, and the particular estate of the lessee, or confirmee, are one and the same estate: and where there is already a possession, derived from such a privity of estate, any further delivery of possession would be vain and nugatory.<sup>y</sup> <sup>19</sup>

<sup>t</sup> Co. Litt. 337.<sup>x</sup> Co. Litt. 50.<sup>u</sup> *Ibid.* 338.<sup>y</sup> Litt. § 460.<sup>w</sup> Perk. § 589.

ment sufficient to pass the title originally. *Heath v. Hewitt*, 127 N. Y. 166, 24 Am. St. Rep. 438, 13 L. R. A. 46, 27 N. E. 959; *Fauntleroy v. Dunn*, 3 B. Mon. (Ky.) 594; 2 Reeves, Real Prop., 1388.

<sup>19</sup> **Surrender: express and implied.**—A surrender, or more particularly, an express surrender, described above by Blackstone, is a yielding up of possession of an estate of life or years to him who has the immediate reversion or remainder, by which the lesser estate is merged in the greater by mutual agreement. *Welcome v. Hess*, 90 Cal. 507, 25 Am. St. Rep. 145, 27 Pac. 369; *Parsons & Sweeney Oil Co. v. McCormick*, 68 W. Va. 604, 70 S. E. 371; *Bailey v. Wells*, 8 Wis. 141, 158, 76 Am. Dec. 233; *Young v. Berman*, 96 Ark. 78, 34 L. R. A. (N. S.) 977, 131 S. W. 62. A quitclaim deed now frequently takes the place of the deed of surrender.

By the Statute of Frauds (1677), no lease, except of copyhold, could be surrendered otherwise than by deed or note in writing; and by the Real Property

§ 448. (d) **Assignment.**—An *assignment* is properly a transfer, or making over to another, of the right one has in *any* estate; but it is usually applied to an estate for life or years. And it differs from a lease only in this; that by a lease one grants an interest less <sup>[327]</sup> than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.<sup>20</sup>

§ 449. (e) **Defeasance.**—A defeasance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be *defeated*<sup>z</sup> or totally undone. And in

<sup>z</sup> From the French verb *defaire*, *infectum reddere* (to nullify).

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Act of 1845, a surrender of **any** interest which had to be in writing, is void unless made by deed.

An implied surrender, or surrender by operation of law, occurs when an estate incompatible with the existing estate is accepted, or the lessee takes a new lease of the same lands, or the owner of a particular estate has been a party to some act the validity of which he is by law afterwards estopped from disputing and which would not be valid if his particular estate had continued to exist. Bouvier, Law Dict., Rawle's 3d revision; *Livingston v. Potts*, 16 Johns. (N. Y.) 28; *Haycock v. Johnston*, 97 Minn. 289, 114 Am. St. Rep. 715, 106 N. W. 304.

<sup>20</sup> **Assignment.**—The lessee may alienate his term like any other right of property. He may do this either by way of underlease or assignment. An underlease is where a lessee makes a lease for a shorter term than he himself holds, leaving thereby a reversion, of however short a duration, in himself. In its legal attributes an underlease in no way differs from a lease. The grant of the whole term by the lessee is called an assignment. Digby, Hist. Law Real Prop. (5th ed.), 414; *Davis v. Vidal*, 105 Tex. 444, 151 S. W. 290. Under the Statute of Frauds (1677), assignments had to be in writing, and the Real Property Act, 1845, requires them to be by deed. An assignment is used in our modern law to include a transfer of a mortgage, a judgment lien, a rent, an easement, or any other outstanding claim or encumbrance on realty. 2 Reeves, Real Prop., 1389; *Brown v. Smith*, 13 N. D. 580, 102 N. W. 171; *Scott v. Blades Lumber Co.*, 144 N. C. 44, 56 S. E. 548. The operative words of an assignment are "assign, transfer, and set over," but like other deeds it is construed according to the intent of the parties. The New York statute, for instance, declares: "Every instrument creating, transferring, assigning or surrendering an estate or interest in real property must be construed according to the intent of the parties, so far as such intent can be gathered from the whole instrument, and is consistent with the rules of law." Real Prop. L., § 240, originally 1 R. S. 748, § 2.—REEVES, 2 Real Prop., 1389.

this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day. And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law;<sup>a</sup> and, therefore only, indulged: no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth;<sup>21</sup> though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment; and so, also, annuities, conditions, war-

<sup>a</sup> Co. Litt. 236.

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<sup>21</sup> **Revocation and resulting uses.**—It was not the “solemnity” of the act, or the simplicity and truth of the actors, that made the distinction, but the very nature of the feoffment as a transfer of the land itself, and not of a mere estate in it. The land having actually passed by the feoffment, no defeasance or other agreement between the parties could change the effect of this transfer. But when a use was created, it might be subsequently revoked or modified, and so of all instruments that merely transferred an estate in the land and not the land itself. Coke has well explained this by calling the feoffment an executed conveyance. (Co. Litt. 204 a.) For the same reason, apparently, if a feoffment be made, or a fine be levied, or recovery be suffered, without consideration, and no uses be expressed, the use results to the feoffor and his heirs. But if any uses be expressed, it shall be to those uses, though no consideration be had; and herein is the difference between raising uses by fine, feoffment, or other conveyance operating by transmutation of possession and uses raised by covenant; for, upon the first, if no uses were expressed, it is equity that assigns the feoffor to have the resulting use; by the law, the feoffor has parted with all his interest (see *Cave v. Holford*, 3 Ves. 667), but where he expresses uses there can be no equity in giving him the use against his own will. (See *Gilbert on Uses*, c. 222.) On the other hand, in case of a covenant there can be no use without a consideration; for the covenantee in such case can have no right by law, and there is no reason why equity should give him the use. (And see *Calthrop's Case*, Moor, 101; *Stephen's Case*, 1 Leon, 138; *Jenkins' Case*, Cent. 6. 36.) Perhaps no better illustration of this difference between the operation of a feoffment and that of the conveyance of a use can be given, than the well-known rule that a feoffment to a man and his intended wife before marriage will give the entire land to the husband alone, while the conveyance to the use of him and his intended wife will operate in favor of both of them.—HAMMOND.

ranties, and the like), were always liable to be recalled by defeasances made subsequent to the time of their creation.<sup>b 22</sup>

§ 450. (3) **Conveyances under the statute of uses.**—There yet remain to be spoken of some few conveyances, which have their force and operation by virtue of the *statute of uses*.

§ 451. (a) **Uses and trusts.**—Uses and *trusts* are in their original of a nature very similar, or rather exactly the same: answering more to the *fideicommissum* (trust) than the *usufructus* (usufruct) of the civil law; which latter was the temporary right of using a thing, without having the ultimate property or full dominion of the substance.<sup>c</sup> But the *fideicommissum*, which usually was created by will, was the disposal of an inheritance to one, in confidence that he [328] should convey it or dispose of the profits at the will of another. And it was the business of a particular magistrate, the *prætor fideicommissarius* (trust prætor), instituted

<sup>b</sup> *Ibid.* 237.

<sup>c</sup> Ff. 7. 1. 1.

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<sup>22</sup> **Defeasance.**—Defeasances of land are now of rare occurrence; the practice in modern times being (as in the case of mortgages) to include in the deed only the conveyance of the land to the alienee, and the conditions (if any) to which it is to be subject. When those conditions are fulfilled, the alienee is bound to reconvey. 1 Stephen's Comm. (16th ed.), 420. The modern mortgage originated in an absolute conveyance, accompanied by a separate deed, in which it was provided that, if the money loaned were repaid or the specified conditions otherwise complied with, the conveyance should become null and void. This accompanying deed was a defeasance. Naturally, in the unfolding of landed security for debt, the defeasance and conveyance were combined into one document, and took the form of the modern mortgage. Tersely, then, a deed of defeasance started as a separate instrument, and has found its usual office of to-day in the defeasance clause of a mortgage. 2 Reeves, Real Prop., 1390. Courts regard with disfavor conditions and defeasances which are calculated to prevent or defeat the absolute resting of titles. Nevertheless, where the condition or defeasance is clear and explicit, they do not hesitate to give effect to the intention of the parties. Where, then, a deed of land conveyed in consideration of a contract for support, and a stipulation for the avoidance of the agreement in case of failure to perform the contract embraced in a separate instrument form parts of one transaction, the stipulation for avoidance constitutes a defeasance. *Epperson v. Epperson*, 108 Va. 471, 62 S. E. 344.

by Augustus, to enforce the observance of this confidence.<sup>d 23</sup> So that the right thereby given was looked upon as a vested right, and entitled to a remedy from a court of justice; which occasioned that known division of rights by the Roman law, into *jus legitimum*, a legal right, which was remedied by the ordinary course of law; *jus fiduciarium*, a right in trust, for which there was a remedy in conscience; and *jus precarium*, a right in courtesy, for which the remedy was only by entreaty or request.<sup>e</sup> In our law, a use might be ranked under the rights of the second kind; being a confidence reposed in another who was tenant of the land, or *terre-tenant*, that he should dispose of the land according to the intentions of *cestui que use*, or him to whose use it was granted, and suffer him to take the profits.<sup>f 24</sup> As, if a feoffment was made

<sup>d</sup> Inst. 2. tit. 23.

<sup>e</sup> Ff. 43. 26. 1. Bacon on Uses, 8<sup>o</sup>. 306.

<sup>f</sup> Plowd. 352.

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<sup>23</sup> Nay, what is more, the emperors were able, by means of their jurisdiction, to call into being a number of institutions entirely unknown to the previous law. The most important of these was the "*fideicommissum*." Down to Augustus the only kind of bequest recognized by Roman law was one made in accordance with the strict, formal requirements of a *legatum*. The Emperor Augustus was the first to introduce into the administration of justice the principle that, where a testator requested a person who was benefited under his will to make over the benefit he received to a third party—this is the meaning of *fideicommissum*—the request should be legally enforceable, even though it had been made without any form whatever. Augustus entrusted the consuls with the exercise of the new jurisdiction; after Titus, a special prætor *fideicommissarius* was appointed to adjudicate on such matters *extra ordinem* as the emperor's delegate, and in the provinces the like function was imposed on the governors. In this way the *fideicommissum*, or informal bequest, came into use as a legal institution, and such was its subsequent development that it gradually revolutionized the whole Roman law of bequests, and even—when "universal" *fideicommissa* were introduced—the whole Roman law of succession of the older type.—SOHM, Institutes of Roman Law (trans. by Ledlie, 3d ed.), 108.

<sup>24</sup> Meaning of *cestui que use* and *cestui que trust*.—"What is the plural of *cestui que trust*? Some write *cestuis que trust*, others *cestui que trusts*, and some *cestuis que trustent*. The first is probably the best, but there is not much to choose between it and the second; the third is hopelessly wrong. The present writer is not aware when *cestui que trust* was introduced into our language. It is, of course, bastard Norman-French, and was probably introduced in the seventeenth century. It is obviously coined after the pattern of *cestui*



to A and his heirs, to the use of (or in trust for) B and his heirs; here at the common law A the *terre-tenant*, had the legal property and possession of the land, but B, the *cestuy que use*, was in conscience and equity to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III,<sup>g</sup> by means of the foreign ecclesiastics; who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to their religious houses directly, but to *the use of* the religious houses:<sup>h</sup> which the clerical chancellors of those times held to be *fideicommissa* (trusts), and binding in conscience; and therefore assumed the jurisdiction,

<sup>g</sup> Stat. 50 Edw. III. c. 6 (Fraudulent Conveyances, 1376). 1 Rich. II. c. 9 (Fraudulent Conveyances, 1377). 1 Rep. 139.

<sup>h</sup> See pag. 271.

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*que use*, and when we come to *cestui que use* we are on sure ground so far as plurals are concerned, for it is familiar knowledge that *use* is derived from the Norman-French *oes*, which in its turn comes from the Latin *opus*, meaning 'benefit'; thus, in Britton (34 a) the king orders an inquiry to be made as to the moneys which his officers have received *a noster oes*, 'for our benefit,' and the statute 15 Rich. II, c. 5 contains provisions designed to prevent land being held *al oeps de gentz de religion*, or *al oeps des gildes & fraternitees*. That *oes* or *use* in these passages means 'benefit' and not 'use' in the sense of employment or user, is clear from a case cited by Littleton (§ 383), where an executor took the profits of his testator's lands to his own use, instead of applying them, as he ought to have done, to the use of the dead (*al use le mort*) by distributing the money for his soul.

"*Cestui que use*, therefore, means 'he for whose benefit,' and *cestui que trust* means 'he upon trust for whom' certain property is held. *Que* is frequently used in law French in the sense of 'whose'; thus Blackstone says (Comm. ii, 264), 'All prescription must be either in a man and his ancestors, or in a man and those whose estate he hath; which last is called prescribing in a *que estate*.' So the phrase *cestui que vie* means 'he for whose life,' not 'he who lives.' It seems, however, that the word was originally spelled *qui*, for in his admirable introduction to the Year-Books published by the Selden Society, the late Professor Maitland remarked (vol. i, p. xlviii): 'The *qui* that is the case of the indirect object, the *qui* (formerly *cui*) that is doing the work of the Latin *cuius* and the Latin *cui* (as in the common phrase *qi heir il est*, "whose heir he is"), does not so readily degenerate into *que*. Our phrase "to prescribe in a *que estate*" is less [This is obviously a *lapsus calami*; "less" should be "more"] justifiable than our *cestui que trust*, since it represents *qi estate il ad*, "whose [not which] estate he has."'"—26 Law Quart. Rev. 196.

which Augustus had vested in his *prator*, of compelling the execution of such trust in the chancery. And, as it was most easy to obtain such grants from dying persons, a maxim was established, that though by law the lands themselves were not devisable, yet if a testator had enfeoffed another to his own use and so was [329] possessed of the use only, such use was devisable by will. But we have seen<sup>1</sup> how this evasion was crushed in its infancy, by statute 15 Rich. II, c. 5 (Mortmain, 1391), with respect to religious houses.

Yet, the idea being once introduced, however fraudulently, it afterwards continued to be often innocently, and sometimes very laudably, applied to a number of civil purposes: particularly as it removed the restraint of alienations by will, and permitted the owner of lands in his lifetime to make various designations of their profits, as prudence, or justice, or family convenience, might from time to time require. Till at length, during our long wars in France and the subsequent civil commotions between the houses of York and Lancaster, uses grew almost universal; through the desire that men had (when their lives were continually in hazard) of providing for their children by will, and of securing their estates from forfeitures; when each of the contending parties, as they became uppermost, alternately attainted the other. Wherefore about the reign of Edward IV (before whose time, Lord Bacon remarks,<sup>k</sup> there are not six cases to be found relating to the doctrine of uses), the courts of equity began to reduce them to something of a regular system.

§ 452. (i) Doctrine of uses.—Originally it was held that the chancery could give no relief, but against the very person himself intrusted for *cestuy que use*, and not against his heir or alienee. This was altered in the reign of Henry VI with respect to the heir;<sup>1</sup> and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use.<sup>m</sup> But a purchaser for a valuable consideration, without notice, might hold

<sup>1</sup> Pag. 272.

<sup>k</sup> On Uses, 313.

<sup>1</sup> Keilw. 42. Year-Book 22 Edw. IV. 6 (1482).

<sup>m</sup> Keilw. 46. Bacon of Uses, 312.

the land discharged of any trust or confidence. And also it was held that neither the king or queen, on account of their dignity royal,<sup>n</sup> nor any corporation aggregate, [330] on account of its limited capacity,<sup>o</sup> could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust. And, if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use;<sup>p</sup> because they were not parties to the trust, but came in by act of law; though doubtless their title in reason was no better than that of the heir.

On the other hand, the use itself, or interest of *cestuy que use*, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use, whereof the use is inseparable from the possession; as annuities, ways, commons, and authorities, *quæ ipso usu consumuntur* (which are consumed by the use itself):<sup>q</sup> or whereof the seisin could not be instantly given.<sup>r</sup> 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another without any consideration, equity presumes that he meant it to the use of himself:<sup>s</sup> unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions.<sup>t</sup> But, if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration.<sup>u</sup> 3. Uses were descendible according to the rules of the common law, in the case of inheritances in possession;<sup>w</sup> for in this and many other respects *æquitas sequitur legem* (equity follows the law), and cannot establish a different rule of property from that which the law has established. 4. Uses might

<sup>n</sup> Bro. Abr. tit. Feoffm. al. Uses. 31. Bacon of Uses. 346, 347.

<sup>o</sup> Bro. Abr. tit. Feoffm. al. Uses. 40. Bacon. 347.

<sup>p</sup> 1 Rep. 122.

<sup>q</sup> 1 Jon. 127.

<sup>r</sup> Cro. Eliz. 401.

<sup>s</sup> See pag. 296.

<sup>t</sup> 1 And. 37.

<sup>u</sup> Moor. 684.

<sup>w</sup> 2 Roll. Abr. 780.

be assigned by secret deeds between the parties,<sup>x</sup> or be devised by last will and testament:<sup>y</sup> for, as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary: [331] and as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. But, *cestuy que use* could not at common law alien the legal interest of the lands, without the concurrence of his feoffee;<sup>z</sup> to whom he was accounted by law to be only tenant at sufferance.<sup>a</sup> 5. Uses were not liable to any of the feudal burdens; and particularly did not escheat for felony or other defect of blood; for escheats, etc., are the consequences of *tenure*, and uses are *held* of nobody; but the land itself was liable to escheat, whenever the blood of the feoffee to uses was extinguished by crime or by defect; and the lord (as was before observed) might hold it discharged of the use.<sup>b</sup> 6. No wife could be endowed, or husband have his curtesy, of a use:<sup>c</sup> for no trust was declared for their benefit, at the original grant of the estate. And therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives; which was the original of modern jointures.<sup>d</sup> 7. A use could not be extended by writ of *elegit*, or other legal process, for the debts of *cestuy que use*.<sup>e</sup> For, being merely a creature of equity, the common law, which looked no further than to the person actually seised of the land, could award no process against it.<sup>25</sup>

It is impracticable, upon our present plan, to pursue the doctrine of uses through all the refinements and niceties, which the ingenuity of the times (abounding in subtle disquisitions) de-

<sup>x</sup> Bacon of Uses. 312.

<sup>y</sup> *Ibid.* 308.

<sup>z</sup> Stat. 1 Rich. III. c. 1 (Secret Conveyances, 1483).

<sup>a</sup> Bro. Abr. *Ibid.* 23.

<sup>b</sup> Jenk. 190.

<sup>c</sup> 4 Rep. 1. 2 And. 75.

<sup>d</sup> See pag. 137.

<sup>e</sup> Bro. Abr. tit. Executions. 90.

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25 "An excellent summary of the law of Uses before the statute may be seen in Blackstone, ii, 330, 331."—POLLOCK, Land Laws, 96 n.

duced from this child of imagination; when once a departure was permitted from the plain, simple rules of property established by the ancient law. These principal outlines will be fully sufficient to show the ground of Lord Bacon's complaint,<sup>f</sup> that this course of proceeding "was turned to deceive many of their just and reasonable rights. A man, that had cause to sue for land, knew not against whom to [332] bring his action, or who was the owner of it. The wife was defrauded of her thirds; the husband of his curtesy; the lord of his wardship, relief, heriot, and escheat; the creditor of his extent for debt; and the poor tenant of his lease." To remedy these inconveniences abundance of statutes were provided, which made the lands liable to be extended by the creditors of *cestuy que use*; <sup>g</sup> allowed actions for the freehold to be brought against him, if in the actual pernancy or enjoyment of the profits; <sup>h</sup> made him liable to actions of waste; <sup>i</sup> established his conveyances and leases made without the concurrence of his feoffees; <sup>k</sup> and gave the lord the wardship of his heir, with certain other feudal perquisites.<sup>l</sup>

§ 453. (ii) Statute of Uses, 1535. — These provisions all tended to consider *cestuy que use* as the real owner of the estate; and at length that idea was carried into full effect by the statute 27 Hen. VIII, c. 10 (Statute of Uses, 1535), which is usually called the *statute of uses*, or, in conveyances and pleadings, the *statute for transferring uses into possession*.<sup>26</sup> The hint seems to have

<sup>f</sup> Use of the Law. 153.

<sup>g</sup> Stat. 50 Edw. III. c. 6 (Fraudulent Conveyances, 1376). 2 Rich. II. Sess. 2. 3 (1378). 19 Hen. VII. c. 15 (Fraudulent Uses, 1503).

<sup>h</sup> Stat. 1 Rich. II. c. 9 (Fraudulent Conveyances, 1377). 4 Hen. IV. c. 7 (Fraudulent Conveyances, 1402). 11 Hen. VI. c. 3 (Fraudulent Conveyances, 1433). 1 Hen. VII. c. 1 (1485).

<sup>i</sup> Stat. 11 Hen. VI. c. 5 (Land Transfer, 1433).

<sup>k</sup> Stat. 1 Rich. III. c. 1 (Secret Conveyances, 1483).

<sup>l</sup> Stat. 4 Hen. VII. c. 17 (Fraudulent Conveyances, 1488). 19 Hen. VII. c. 15 (Feoffments to Uses, 1503).

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<sup>26</sup> At last, in 1535, the Parliament of Henry VIII passed "an act concerning uses and wills," which has ever since been known as the Statute of Uses, and is one of the fundamental and peculiar points of our modern law of real property. The intention was to abolish the system of uses altogether, and re-



been derived from what was done at the accession of King Richard III; who having, when Duke of Gloucester, been frequently made a feoffee to uses, would upon the assumption of the crown (as the law was then understood) have been entitled to hold the lands discharged of the use. But, to obviate so notorious an injustice, an act of parliament was immediately passed,<sup>m</sup> which ordained that, where he had been so enfeoffed jointly with other persons, the land should vest in the other feoffees, as if he had never been named; and that, where he stood solely enfeoffed, the estate itself should vest in *cestuy que use* in like manner as he had the use. And so the statute of Henry VIII, after reciting the various inconveniences before mentioned, and many others, enacts, that "when any person shall be *seised* of lands, etc., to the use, confidence, or trust, of any other person or body [333] politic, the person or corporation entitled to the use in fee simple, fee-tail, for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, etc., of and in the like estates as they have in the use, trust, or confidence; and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use." The statute thus *executes* the use as our lawyers term it; that is, it conveys the possession to the use, and transfers the use into possession: thereby making *cestuy que use* complete owner of the lands and tenements, as well at law as in equity.

§ 454. (aa) Decisions of common-law courts. — The statute having thus, not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership; the courts of common law began to take cognizance of uses, instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many

<sup>m</sup> 1 Rich. III. c. 5 (1483).

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unite the beneficial enjoyment of land to the legal estate; it was likewise intended to abolish the power of disposing of lands by will, which had been introduced by the machinery of uses, and was now in common exercise.—POLLOCK, Land Laws, 97.

of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use, the same considerations were necessary for raising it, and it could only be raised of the same hereditaments, as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents, that formerly attended it in its fiduciary state, were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee; because the legal estate never rests in him for a moment, but is instantaneously transferred to *cestuy que use*, as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy and escheat, in consequence of the seisin of *cestuy que use*, who was now become the *terre-tenant* also; and they likewise were no longer devisable by will.<sup>27</sup>

[334] The various necessities of mankind induced also the judges very soon to depart from the rigor and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. Hence it was adjudged that the use need not always be executed the instant the conveyance is made: but, if it cannot take effect at that time,

<sup>27</sup> The resulting effect of the Statute of Uses is thus set out by Sir Frederick Pollock (Land Laws, 99): "If Stanford made a feoffment to More, Fisher, and Brooke, to hold to the use of himself, the statute made this ineffectual. Before the statute, More, Fisher, and Brooke would have become the only tenants whom the common-law courts could notice, and the only persons liable for the feudal dues (which, however, would mostly never become demandable), while the court of chancery would compel them to allow Stanford all the benefit of the estate. By the operation of the statute, More, Fisher, and Brooke would not become owners at all; Stanford, by being named to take the use, would at once come into their place. He would be as much the legal tenant as before, and liable to all the legal burdens and incidents. A feoffment to John, or to John and William, or to John and William and Peter, to the use of Peter, or in trust or confidence for Peter, was made by the statute equivalent to a feoffment to Peter. The use carried with it the legal estate; in the curious technical phrase which has ever since been current in the books, the use was said to be executed in Peter by the statute. And the law thus made by the Statute of Uses is law to this day."

the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time; and in the meanwhile the ancient use shall remain in the original grantor: as, when lands are conveyed to the use of A and B, after a marriage shall be had between them,<sup>n</sup> or to the use of A and his heirs till B shall pay him a sum of money, and then to the use of B and his heirs.<sup>o</sup> Which doctrine, when devised by will were again introduced, and considered as equivalent in point of construction to declarations of uses, was also adopted in favor of *executory devises*.<sup>p</sup> But herein these, which are called *contingent* or *springing*, uses differ from an executory devise; in that there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore, if the estate of the feoffee to such use be destroyed by alienation or otherwise, before the contingency arises, the use is destroyed forever:<sup>q</sup> whereas by an executory devise the freehold itself is transferred to the future devisee. And, in both these cases, a fee may be limited to take effect after a fee:<sup>r</sup> because, though that was forbidden by the common law in favor of the lord's escheat, yet, when the legal estate was not extended beyond one fee simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity; and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto* (after the fact);<sup>s</sup> as, if A makes a feoffment [335] to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty; and, upon the birth of a son, the use is executed jointly in them both.<sup>t</sup> This is sometimes called a *secondary*, sometimes a *shifting*, use. And, whenever the use limited by the deed expires, or cannot vest, it returns back to him who raised it, after such expiration or during such impossibility, and is styled a *resulting* use. As, if a man makes a feoffment to the use of his intended wife for life, with remainder

<sup>n</sup> 2 Roll. Abr. 791. Cro. Eliz. 439.

<sup>o</sup> Bro. Abr. tit. Feoffm. al. Uses. 30.

<sup>p</sup> See pag. 173.

<sup>q</sup> 1 Rep. 134. 138. Cro. Eliz. 439.

<sup>r</sup> Pollexf. 78. 10 Mod. 423.

<sup>s</sup> Bro. Abr. tit. Feoffm. al. Uses. 30.

<sup>t</sup> Bacon of Uses. 351.

to the use of her first-born son in tail: here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee.<sup>u</sup> It was likewise held, that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow, was a deed of defeasance coeval with the grant itself (and therefore esteemed a part of it) upon events specifically mentioned.<sup>w</sup> And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead.<sup>x</sup> And this was permitted, partly to indulge the convenience and partly the caprice of mankind; who (as Lord Bacon observes<sup>y</sup>) have always affected to have the disposition of their property revocable in their own time, and irrevocable ever afterwards.

§ 455. (bb) **Decisions of the court of chancery.**—By this equitable train of decisions in the courts of law, the power of the court of chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that “no use could be limited on a use,”<sup>z</sup> 28 and

<sup>u</sup> *Ibid.* 350. 1 Rep. 120.

<sup>y</sup> On Uses. 316.

<sup>w</sup> See pag. 327.

<sup>z</sup> Dyer, 155 [Tyrrel's Case].

<sup>x</sup> Co. Litt. 237.

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<sup>28</sup> **Tyrrel's Case and the origin of trusts.**—“The strange doctrine of Tyrrel's Case [Dyer, 155].’ ‘The object of the legislature appears to have been the annihilation of the common-law use. The courts, by a strained construction of the statute, preserved its virtual existence.’ ‘Perhaps, however, there is not another instance in the books in which the intention of an act of Parliament has been so little attended to.’ ‘This doctrine must have surprised everyone who was not sufficiently learned to have lost his common sense.’ Such are a few of the many criticisms passed upon the common-law judges who decided, in 1557, that a use upon a use was void, and therefore not executed by the Statute of Uses. It has, indeed, come to be common learning that this decision in Tyrrel's Case was due to ‘the absurd narrowness of the courts of law’; that the liberality of the chancellor at once corrected the error of the judges by supporting the second use as a trust; and ‘by this means a statute made upon

that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of further use to another person is repugnant, and therefore [336] void.<sup>a</sup> And therefore, on a feoffment to A and his heirs, to the use of B and his heirs, in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity: not adverting, that the instant the first use was executed in B, he became seised to the use of C, which second use the statute might as well be permitted to execute as it did the first; and so the legal estate might be instantaneously transmitted down, through a hundred uses upon uses, till finally executed in the last *cestuy que use*. Again; as the statute mentions only such persons as were *seised* to the use of others, this was held not to extend to terms of years, or other chattel interests, whereof the termor is not *seised*, but only *possessed*;<sup>b</sup> and therefore, if a term of one thousand years be limited to A, to the use of (or in trust for) B, the statute does

<sup>a</sup> 1 And. 37. 136.

<sup>b</sup> Bacon Law of Uses. 335. Jenk. 244.

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great consideration, introduced in a solemn and pompous manner, has had no other effect than to add at most three words to a conveyance.'

"This common opinion finds, nevertheless, no support in the old books. On the contrary, they show that the doctrine of Tyrrel's Case was older than the Statute of Uses—presumably, therefore, a chancery doctrine—and that the statute so far accomplished its purpose that for a century there was no such thing as the separate existence in any form of the equitable use in land."—AMES. Lect. on Leg. Hist., 243.

The concluding paragraph of this brief essay is as follows: "In the light of the preceding authorities, Lord Hardwicke's oft-quoted remark that the Statute of Uses had no other effect than to add three words to a conveyance must be admitted to be misleading. Lord Hardwicke himself, some thirty years afterwards, in *Buckinghamshire v. Drury*, put the matter much more justly: 'As property stood at the time of the statute, personal estate was of little or trifling value; copyholds had hardly then acquired their full strength, trusts of estates in land did not arise till many years after (I wonder how they ever happened to do so).' The modern passive trust seems to have arisen for substantially the same reasons which gave rise to the ancient use. The spectacle of one retaining for himself a legal title, which he had received on the faith that he would hold it for the benefit of another, was so shocking to the sense of natural justice that the chancellor at length compelled the faithless legal owner to perform his agreement." *Ibid.* 247.



not execute this use, but leaves it as at common law.\* And lastly (by more modern resolutions), where lands are given to one and his heirs in trust to receive and pay over the profits to another, this use is not executed by the statute: for the land must remain in the trustee to enable him to perform the trust.<sup>d</sup>

§ 456. (cc) Modern law of trusts.—Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case it was evident that B was never intended by the parties to have any beneficial interest; and, in the second, the *cestuy que use* of the term was expressly driven into the court of chancery to seek his remedy: and therefore that court determined, that though these were not *uses*, which the statute could execute, yet still they were *trusts* in equity, which in conscience ought to be performed.\* To this the reason of mankind assented, and the doctrine of uses was revived, under the denomination of *trusts*: and thus, by this strict construction of the courts of law, a statute made upon great deliberation, and introduced in the most solemn manner, has had little other effect than to make a slight alteration in the formal words of a conveyance.<sup>f</sup>

[337] However, the courts of equity, in the exercise of this new jurisdiction, have wisely avoided in a great degree those mischiefs which made uses intolerable. They now consider\* a trust estate (either when expressly declared or resulting by necessary implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law:<sup>29</sup> and, by a long series of uniform de-

\* Ninth edition reads, "The statute of frauds, 29 Car. II. c. 3 (1677), having required that every declaration, assignment, or grant of any trust in lands or hereditaments (except such as arise from implication or construction of law) shall be made in writing, signed by the party, or by his written will; the courts now consider, etc."

c Poph. 76. Dyer. 369.

d 1 Equ. Cas. Abr. 383, 384.

e 1 Hal. P. C. 248.

f Vaugh. 50. Atk. 591.

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<sup>29</sup> Resulting uses and trusts.—"Result from *implication or construction of law*" is the exact language of the statute (29 Car. II, c. 3, § 8), and this is

terminations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence, by which trusts are made to answer in general all the beneficial ends of uses, without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate, unless by alienation for a valuable consideration to a purchaser without notice;<sup>g</sup> which, as *cestuy que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to forfeiture, to leases and other encumbrances, nay even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents,<sup>h</sup> than from any well-grounded principle. It hath also been held not liable to escheat to the lord, in consequence of attainder or want of heirs:<sup>i</sup> because the trust could never be intended for his benefit. But let us now return to the statute of uses.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances; introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporeal freeholds: the security and notoriety of which public investiture abundantly overpaid the labor of going to the land, or of sending an attorney in one's stead. But this now has given way to

§ 457. (b) **Covenant to stand seised to uses.**—[338] A twelfth species of conveyance, called a *covenant to stand seised to uses*;<sup>30</sup>

<sup>g</sup> 2 Freem. 43.

<sup>h</sup> 1 Chanc. Rep. 254. 2 P. Wms. 640.

<sup>i</sup> Hardr. 494. Burgess and Wheat. Hil. 32 Geo. II. in Cane.

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worth observation, because from these three words of a single exception have been formed the three great classes of trusts not necessary to be declared in writing, viz., *implied* trusts, *resulting* trusts, *constructive* trusts. As might be expected, the bounds between them are not easily fixed.—HAMMOND.

30 **Covenant to stand seised in United States.**—The covenant to stand seised to uses was once much used in England for marriage settlements. But, as estates to preserve contingent remainders could not thereby be created, it

by which a man, seised of lands, covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman; for life, in tail, or in fee. Here the statute executes at once the estate; for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land,<sup>k</sup> without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate, when made upon such weighty and interesting considerations as those of blood or marriage.

§ 458. (c) **Bargain and sale.**—A thirteenth species of conveyance, introduced by this statute, is that of a *bargain and sale* of lands;<sup>31</sup> which is a kind of a real contract, whereby the bargainor for some pecuniary consideration bargains and sells, that is, contracts to convey, the land to the bargainee; and becomes by such bargain a trustee for, or seised to the use of, the bargainee; and then the statute of uses completes the purchase:<sup>1</sup> or, as it hath been well expressed,<sup>m</sup> the bargain first vests the use, and then the statute vests the possession. But as it was foreseen that conveyances thus made, would want all those benefits of notoriety, which the old common-law assurances were calculated to give; to prevent, therefore, clandestine conveyances of freeholds, it was enacted in the same session of parliament by statute 27 Hen. VIII, c. 16

<sup>k</sup> Bacon Use of the Law. 151.

<sup>m</sup> Cro. Jac. 696.

<sup>1</sup> *Ibid.* 150.

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gradually became obsolete. As a method of transferring property it is still theoretically recognized in this country, but, because of shorter and better methods, is practically obsolete here also. The doctrine of the covenant to stand seised is often resorted to by courts in order to give effect to the intention of the parties who have undertaken to convey lands by deeds which are insufficient for the purpose under the rules required in other forms of conveyance. *Corwin v. Corwin*, 6 N. Y. 342, 57 Am. Dec. 453; *Wallis v. Wallis*, 4 Mass. 136, 3 Am. Dec. 210; 4 Kent, Comm., 493; 2 Reeves, Real Prop., 1392.

<sup>31</sup> These two forms of conveyance are in fact one, the difference of operation depending on the parties to it, not on the name or language employed. Whether it be called covenant, etc., or bargain and sale, it will operate alike: on a valuable consideration between strangers, on that of love and affection among near kindred. In either case the instrument merely raises the use and the statute transfers the land.—HAMMOND.

(Enrollments, 1536),<sup>32</sup> that such bargains and sales should not inure to pass a freehold, unless the same be made by indenture, and *enrolled* within six months in one of the courts of Westminster Hall, or with the *custos rotulorum* (Keeper of the Rolls) of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious till about six years before;<sup>n</sup> which also occasioned them to be overlooked in framing the statute of uses: and therefore such bargains and sales are not directed to be enrolled.<sup>33</sup> But how impossible it is to [339] foresee, and provide against, *all* the consequences of innovations! This omission has given rise to

<sup>n</sup> See pag. 142.

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<sup>32</sup> On the Statute of Enrollments see Digby, *Hist. Real Prop.* (5th ed.), 366 ff. (the text of the statute will be found on p. 368); Jenks, *Short Hist. Eng. Law*, 121.

<sup>33</sup> **Modern bargain and sale deed.**—Since the statute of enrollment was generally held to have no application in this country, the deed of bargain and sale, terse, convenient, and effective as it was, came to be, and may be said to remain the prevailing type of conveyance in the states. (Kent, *Comm.*, p. \*495; 1 *Stim. Amer. Stat. L.*, § 1470; § 1053, *supra*.) It has been simplified; and in many instances by statute made to operate, like a grant, only from the time of its delivery. (N. Y. L. 1909, c. 52, §§ 244, 246; 1 *Stim. Amer. Stat. L.*, §§ 1470–1472; *Schafer v. Reilly*, 50 N. Y. 61, 66; *Diefendorf v. Diefendorf*, 132 N. Y. 100, 30 N. E. 375; *Ten Eyck v. Whitbeck*, 156 N. Y. 341, 50 N. E. 963. Since the original bargain and sale transfer operated under the Statute of Uses, the title passed when the bargain was complete and the statute operated, and did not await the delivery of the deed.) It employs the operative words ‘bargain and sell,’ and recites usually the actual, valuable consideration. (*Jackson v. Cadwell*, 1 *Cow.* (N. Y.) 622; *Wood v. Chapin*, 13 N. Y. 509, 517, 67 *Am. Dec.* 62; *Baird v. Baird*, 145 N. Y. 659, 28 *L. R. A.* 375, 40 *N. E.* 222; *Fetrow v. Merriwether*, 53 *Ill.* 275, 278; *Jackson v. Dillon*, 2 *Overt.* (Tenn.) 261.) It describes the parties and the land, effects a simple transfer of the property from one party to the other, and in its simplest and most common form it contains no covenants for title. In several states it is in effect a grant. (N. Y. L. 1909, c. 52, § 246; 1 *Stim. Amer. Stat. L.*, §§ 1470–1472.) In many of them, while it is a higher deed than a quitclaim in its origin and history, yet, like the quitclaim deed, it now accomplishes no more than the mere transfer of any interest owned at the time by the grantor; and so in such jurisdictions it does not affect any interest acquired by him after its delivery. (N. Y. L. 1909, c. 52, § 251; 1 *Stim. Amer. Stat. L.*, § 1500; *Leggett v. Mutual Life Ins. Co.*, 53 N. Y. 394, 398.)—*REEVES*, 2 *Real Prop.* 1399.

§ 459. (d) **Lease and release.**—A fourteenth species of conveyance, viz., by *lease and release*; first invented by Serjeant Moore, soon after the statute of uses, and now the most common of any, and therefore not to be shaken; though very great lawyers (as, particularly, Mr. Noy) have formerly doubted its validity.<sup>o</sup> It is thus contrived. A lease, or rather bargain and sale, upon some pecuniary consideration, for one year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrollment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year; and then the statute immediately annexes the *possession*. He therefore being thus in possession, is capable of receiving a release of the freehold and reversion; which, we have seen before,<sup>p</sup> must be made to a tenant in possession: and accordingly, the next day, a release is granted to him.<sup>q</sup> This is held to supply the place of livery of seisin; and so a conveyance by lease and release is said to amount to a feoffment.<sup>r 34</sup>

o 2 Mod. 252.

p Pag. 324.

q See Appendix. No. II. § 1, 2.

r Co. Litt. 270. Cro. Jac. 604.

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<sup>34</sup> **History of the lease and release.**—"After a time an ingenious conveyancer bethought him of availing himself of a bargain and sale as a secret mode of conveying freehold interests in lands, thus avoiding the necessity of any livery of seisin or of enrollment. It was after some doubt at length held by the court of wards that a bargain and sale for a term of years gave to the lessee by force of the words of the Statute of Uses 'possession' of his term as if he had actually entered on the land, at all events for the purpose of being capable of taking by a simple deed a release of the reversion. Thus if A, tenant in fee simple, bargained and sold the manor of Dale to B for a year, and the day after executed a release of the reversion in fee to B and his heirs, he would by the bargain and sale have immediately vested in him an estate for a year in possession. He would thereupon become capable of taking a release, and so soon as the release was executed, the smaller estate and the larger would coalesce and the term be 'merged' or sunk in the larger estate, whereupon B would become tenant in fee simple in possession. So popular did this conveyance become, that in ordinary cases it entirely superseded the feoffment, and bargain and sale enrolled, and became the general mode of conveying freeholds *inter vivos* till the year 1841. In that year an act was passed 'for rendering a release as effectual for the conveyance of freehold estates as a lease and release by the same parties.' This act was repealed in 1844 by the act to simplify the transfer of property; and in 1845 the last-mentioned



§ 460. (e) *Deeds to lead or declare uses.*—To these may be added deeds to *lead* or *declare the uses* of other more direct conveyances, as feoffments, fines, and recoveries; of which we shall speak in the next chapter: and,

§ 461. (f) *Deeds of revocation of uses.*—Deeds of *revocation of uses*, hinted at in a former page,<sup>s</sup> and founded in a previous power, reserved at the raising of the uses,<sup>t</sup> to revoke such as were then declared; and to appoint others in their stead, which is incident to the power of revocation.<sup>u</sup> And this may suffice for a specimen of conveyances founded upon the statute of uses; and will finish our observations upon such deeds as serve to *transfer* real property.

§ 462. 5. *Deeds to charge and discharge lands.*—[340] Before we conclude, it will not be improper to subjoin a few remarks upon such deeds as are used not to *convey*, but to *charge* or *encumber*, lands, and *discharge* them again: of which nature are, *obligations* or bonds, *recognizances*, and *defeasances* upon them both.

§ 463. a. *Obligation or bond.*—An *obligation* or bond, is a deed<sup>v</sup> whereby the obligor obliges himself, his heirs, executors, and

<sup>s</sup> Pag. 335.

<sup>u</sup> Co. Litt. 237.

<sup>t</sup> See Appendix. No. II. pag. xi.

<sup>v</sup> See Appendix. No. III. pag. xiii.

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act was in its turn repealed and superseded by the provisions of the act to amend the law of real property. The second section of this act gives the power of creating and transferring a leasehold estate in possession by a simple deed of grant. The effect of the Statute of Uses is, however, still preserved, and a grant to uses under the act to amend the law of real property operates in precisely the same way, and is subject to precisely the same rules as any of the other conveyances to uses above noticed. The form of the conveyance of land has been still further shortened and simplified by the Conveyancing Acts, 1881, 1882, 44 and 45 Vict., c. 41, and 45 and 46 Vict., c. 39; but the principles of the law as affected by the previous statutes remain unaltered.”—DIGBY, *Hist. Real Prop.* (5th ed.) 366.

After the passage of the Real Property Act of 1845, the conveyance by lease and release rapidly fell out of use. In most of the states of the Union it has been held that the statute of enrollments was never in force. This explains why the bargain and sale deed, developed and condensed from its original form, is so commonly found on this side of the Atlantic, and why the lease and release has been used but little here. 2 Reeves, *Real Prop.*, 1396.

administrators, to pay a certain sum of money to another at a day appointed. If this be all, the bond is called a single one, *simplex obligatio* (single bond, i. e., bond without a condition); but there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force: as, payment of rent; performance of covenants in a deed; or repayment of a principal sum of money borrowed of the obligee, with interest, which principal sum is usually one-half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the obligor while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral*, charge upon the lands. How it affects the personal property of the obligor, will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain, or insensible, the condition alone is void, and the bond shall stand single and unconditional: for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se* (wrong in itself), the obligation itself is void: for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards [341] becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved: for no prudence or foresight of the obligor could guard against such a contingency.<sup>w</sup> On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law; but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought; viz., his principal, interest, and expenses, in case the forfeiture accrued by nonpayment of money borrowed; the damages sustained, upon nonperformance of covenants; and the like. And the like practice having gained some footing in the courts of law,<sup>x</sup>

<sup>w</sup> Co. Litt. 206.

<sup>x</sup> 2 Keb. 553. 555. Salk. 596, 597. 6 Mod. 11. 60. 101.

the statute 4 & 5 Ann., c. 16 (1705), at length enacted, in the same spirit of equity, that in case of a bond, conditioned for the payment of money, the payment or tender of the principal sum due, with interest, and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.

§ 464. **b. Recognizance.**—A *recognizance* is an obligation of record, which a man enters into before some court of record or magistrate duly authorized,<sup>y</sup> with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond: the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo*, the recognizance is an acknowledgment of a former debt upon record; the form whereof is “that A B doth acknowledge to owe to our lord the king, to the plaintiff, to C D or the like, the sum of ten pounds,” with condition to be void on performance of the thing stipulated: in which case the king, the plaintiff, C D, etc., is called the cognizee, “*is cui cognoscitur* (he to whom it is acknowledged)” ; as he that enters into the recognizance is called the cognizor, “*is qui cognoscit* (he who acknowledges).” This, being either certified to, or taken by the officer of some court, is witnessed only by the record of that court, and not by the party’s seal: so that it is not in strict propriety a deed, though the effects of it are greater than a [342] common obligation; being allowed a priority in point of payment, and binding the lands of the cognizor, from the time of enrollment on record.<sup>z</sup> There are also other recognizances, of a private kind, *in nature of a statute staple*, by virtue of the statute 23 Hen. VIII, c. 6 (Recognizances for Debt, 1531), which have been already explained,<sup>a</sup> and shown to be a charge upon real property.

§ 465. **c. Defeasance.**—A defeasance, on a bond, or recognizance, or judgment recovered, is a condition which, when performed, defeats or undoes it, in the same manner as a defeasance of an estate before mentioned. It differs only from the common

<sup>y</sup> Bro. Abr. tit. Recognizance, 24.

<sup>z</sup> Stat. 29 Car. II. c. 3. § 18 (Statute of Frauds, 1677).

<sup>a</sup> See pag. 160.

condition of a bond, in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed.<sup>b</sup> This, like the condition of a bond, when performed, discharges and disencumbers the estate of the obligor.

§ 466. 6. Question of registering deeds.—These are the principal species of deeds or matter *in pais*, by which estates may be either conveyed or at least affected.<sup>35</sup> Among which the

<sup>b</sup> Co. Litt. 237. 2 Saund. 47.

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<sup>35</sup> Recording acts and registration of title.—The common law made no provision for recording conveyances. Title to land passed by livery of seisin, and the unbending rule of the common law was that when the owner of land once transferred his legal interest, he had nothing left to convey. Accordingly, if he made a second conveyance, even to a *bona fide* purchaser for value, the latter took nothing. The validity of conveyances was determined strictly by the order in which they were executed. 2 Pomeroy, Eq. Juris. (3d ed.), § 679.

Equity never adopted the same strictness with regard to priorities as did the common law. It enforced prior equitable rights and estates only against those who took with notice or without consideration, and the *bona fide* purchaser for value and without notice took the land freed from all equitable interests. Where the rights of *bona fide* purchasers were not concerned, however, the rule in equity was generally the same as that at law, namely, the first equity in order of time was the first in right. Even in equity the *bona fide* purchaser of land, the legal title to which had been previously conveyed to another, took nothing. 2 Pomeroy, Eq. Juris. (3d ed.), §§ 679–682.

The recording acts enable a wider effect to be given to equitable principles than equity, unaided by such statutes, could give. Thus, in the instance mentioned, of successive deeds to equally innocent grantees, the rule is general, under the recording acts, that the grantee who first records his deed will take the title. Thus, in such a case, the dates of the records control, not the dates of the deeds. One, therefore, who omits to record his deed, is subject to the risk that his grantor may make a second deed to another purchaser, who will, in the absence of notice that a former deed has been made, secure the title if he take the precaution to record his deed. Though the recording of a deed is not essential to the passing of title as between the parties; it is essential to secure the new owner from the risk of being disturbed or dispossessed by subsequent purchasers or encumbrancers.

The recording acts are peculiarly a product of the development of legislation in the United States. It is said that such laws exist in every state of the Union. 2 Tiffany, Real Property, § 476. In England, there never has been a uniform system of recording conveyances. A purchaser of lands in that

conveyances to uses are by much the most frequent of any; though in these there is certainly one palpable defect, the want of sufficient notoriety: so that purchasers or creditors cannot know with any absolute certainty what the estate, and the title to it, in reality are, upon which they are to lay out or to lend their money. In the ancient feudal method of conveyance (by giving corporal seisin of the lands) this notoriety was in some measure answered; but all the advantages resulting from thence are now totally defeated by the introduction of death-bed devises and secret conveyances: and there has never been yet any sufficient guard provided against fraudulent charges and encumbrances; since the disuse of the old Saxon custom of transacting all conveyances at

country relies upon the title deeds themselves; here, he relies in the main upon the title as it is deduced of record. The American courts have frequently held that a purchaser is not obligated to buy the land for which he contracted unless the title is fairly deducible of record. (29 Am. & Eng. Ency. p. 614.) Accordingly, after the destruction of the public records in the fire of 1906, in San Francisco, purchasers who agreed to buy land were entitled to refuse to carry out their contracts unless the title were restored of record under the Burnt Records Act,—a judicial proceeding to re-establish the record title. *Crim v. Umben* (1909), 155 Cal. 697, 132 Am. St. Rep. 127, 103 Pac. 178. On the other hand, the destruction of the records does not affect the rights of persons who have recorded their conveyances; subsequent purchasers are affected with notice of what the records contained before their destruction. (24 Am. & Eng. Ency. L., 2d ed., p. 153.) A good brief discussion of the recording acts will be found in 2 Pomeroy, *Equity Jurisprudence* (3d ed.), §§ 644–665.

It is worthy of note that the scope of the recording statutes has been so extended that now many instruments not affecting land are required to be recorded. Trademarks, bills of sale, certificates of partnership, contracts of conditional sale of chattels, are a few instances out of many that might be cited, where statutes in various states require recording.

Notwithstanding the greater security and fairness obtained by the American recording system over the older methods of the common law and equity, the system falls far short of ideal perfection. One who purchases land the record title to which is perfect may find that he has received nothing. A deed regular on its face may, for example, have been a forgery, or may have been made by an insane person, or someone may have a title by adverse possession, which, of course, does not appear on the records. In addition to these grave faults, the transfer of title is at present attended with considerable expense and delay, and the examination of the records becomes increasingly difficult and expensive with the lapse of time. Professor H. W. Chaplin in an article in 6 *Harvard*



the county court, and entering a memorial of them in the chartulary or ledger-book of some adjacent monastery;<sup>c</sup> and the failure of the general register established by King Richard the First, for the starrs or mortgages made to [343] Jews, in the *capitula de Judæis*, of which Hoveden has preserved a copy. How far the establishment of a like general register, for deeds, and wills, and other acts affecting real property, would remedy this inconvenience, deserves to be well considered. In Scotland every act and event, regarding the transmission of property, is regularly entered on record.<sup>d</sup> And some of our own provincial divisions, particularly the extended county of York, and the populous county

<sup>c</sup> Hickes, Dissertat. Epistolar. 9.

<sup>d</sup> Dalrymple on Feudal Property. 262, etc.

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Law Review, at page 302, and Professor John R. Rood in 12 Mich. Law Review, at page 379, point out many of the defects in the recording system. These shortcomings have led many persons to desire a system whereby the title itself should pass rather than an apparent title, which may prove worthless. The Torrens system, named after Sir R. R. Torrens, who in 1858 secured the introduction of the system into South Australia, is intended to bring about this result. The plan has been thus explained: "The essential feature of the Torrens is this: that title to land passes only by the entry of the transfer upon an official register. A deed between the parties is entirely inoperative in so far as the legal title is concerned. Land, in fact, becomes as to its title entirely like stock in a corporation; it is transferable only on the official books. The owner of land shows his right, not by a deed from an individual grantor, but by a certificate of title issued to him by the official registrar of titles, in form a copy of the official entry, and in every respect like a certificate of stock. In order to transfer his title, the owner must bring or send to the registrar his certificate which is then surrendered and canceled; and after the proper entry on the register, a new certificate is issued to the transferee, certifying that the land now stands in his name on the register. The person in whose name the land stands on the register is the legal owner of the land, or, in less scientific, but no less accurate, language, the land always goes with the certificate." (Professor J. H. Beale, in 6 Harvard Law Review, p. 369.)

A system of registered titles similar to that under the Torrens Act has been in force in many European countries for centuries. It has been adopted in most of the English-speaking colonies of Great Britain. It has been introduced in part in England. It has been authorized by law, though on an optional basis, in New York, Massachusetts, Illinois, Minnesota, Oregon, Colorado, Ohio, Washington, North Carolina, Mississippi and California. A recent writer says: "A system of adjudicated title by the so-called Torrens system

of Middlesex, have prevailed with the legislature\* to erect such registers in their several districts. But, however plausible these provisions may appear in theory, it hath been doubted by very competent judges, whether more disputes have not arisen in those counties by the inattention and omissions of parties, than prevented by the use of registers.

\* Stat. 2 & 3 Ann. c. 4 (Yorkshire Land Registry, 1703). 6 Ann. c. 35 (1707). 7 Ann. c. 20 (Middlesex Registry, 1708). 8 Geo. II. c. 6 (Yorkshire Land Registry, 1734).

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is practical, workable, satisfactory, and increasing in favor, where given a fair opportunity. And it is submitted that this is the only system yet devised whereby titles to land can be made open to the public, easily and cheaply ascertainable, and safe and secure to the purchaser. Its chief merit is not its cheapness, but its security, though it does have the additional merit lacking under the old system, of not dragging a lengthening chain of expense, obscurity, doubt and danger with every transfer." (Professor John R. Rood, 12 Michigan Law Review, p. 393, March, 1914.)

Recent discussions of the Torrens system may be found in articles in 19 Case and Comment, pp. 721-769; 23 Green Bag, p. 58; Reports of American Bar Association for 1912, pp. 1147-1153; American Bar Association Journal, vol. 1, p. 3.—MCMURRAY.

## CHAPTER THE TWENTY-FIRST. [344]

### OF ALIENATION BY MATTER OF RECORD.

§ 467. **Assurances by matter of record.**—Assurances by *matter of record* are such as do not entirely depend on the act or consent of the parties themselves: but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of, the transfer of property from one man to another; or of its establishment, when already transferred. Of this nature are, 1. Private acts of parliament. 2. The king's grants. 3. Fines. 4. Common recoveries.

§ 468. **1. Private acts of parliament.**—Private *acts of parliament* are, especially of late years, become a very common mode of assurance.<sup>1</sup> For it may sometimes happen, that by the ingenuity of some, and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances (a confusion unknown to the simple conveyances of the common law); so that it is out of the power of

<sup>1</sup> **Private acts as conveyances.**—All our legislatures pass what are known as private in contradistinction from public or general acts; but for private acts in the English sense, as modes of conveyance to accomplish objects for which common forms and private powers would fail, there is little occasion in this country; nor would our constitutions allow them to be valid, if passed. Even in England, their number and importance has been very much diminished by recent statutes conferring enlarged power on the courts; e. g., to authorize leases and sales of settled estates, contrary to the terms of settlement. (19 & 20 Vict. c. 120, 1856.)

In this country the legislature cannot interfere with private property for private purposes: cannot take the property of A and give it to B. (Miller, J., in *Citizens' Sav. etc. Assn. v. Topeka*, 20 Wall. 655, 22 L. Ed. 455; *Hoke v. Henderson*, 15 N. C. 1, 25 Am. Dec. 677.) It may dispense with formal rules, or disregard the distinction between real and personal property, or change forms and investments. (*Wilkinson v. Leland*, 2 Pet. 627, 657, 7 L. Ed. 542, 553; *Norris v. Clymer*, 2 Pa. St. 277.) The subject is admirably discussed by Judge Cooley, *Constitutional Limitations*, chapter 5, pages 97–106, and also pages 388, 390. (See, also, Judge Dillon's discussion of the power to waive legal requirements; *Allen v. Armstrong*, 16 Iowa, 508.)—HAMMOND.

either the courts of law or equity to relieve the owner. Or it may sometimes happen, that by the strictness or omission of family settlements, the tenant of the estate is abridged of some reasonable power (as letting leases, making a jointure for a wife, or the like), which power cannot be given him by the ordinary judges either in common law or equity. Or it may be necessary, in settling an estate, to secure it against the claims of infants or other persons under legal disabilities; who are not bound by any judgments or decrees of the ordinary courts of justice. In these, or other cases of [345] the like kind, the transcendent power of parliament is called in, to cut the Gordian knot; and by a particular law, enacted for this very purpose, to unfetter an estate; to give its tenant reasonable powers; or to assure it to a purchaser, against the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. This practice was carried to a great length in the year succeeding the restoration; by setting aside many conveyances alleged to have been made by constraint, or in order to screen the estates from being forfeited during the usurpation. And at last it proceeded so far, that, as the noble historian expresses it,<sup>a</sup> every man had raised an equity in his own imagination, that he thought was entitled to prevail against any descent, testament, or act of law, and to find relief in parliament: which occasioned the king at the close of the session to remark<sup>b</sup> that the good old rules of law are the best security; and to wish that men might not have too much cause to fear, that the settlements which they make of their estates shall be too easily unsettled when they are dead, by the power of parliament.

Acts of this kind are, however, at present carried on, in both houses, with great deliberation and caution; particularly in the house of lords they are usually referred to two judges to examine and report the facts alleged, and to settle all technical forms. Nothing, also, is done without the consent, expressly given, of all parties in being and capable of consent, that have the remotest interest in the matter; unless such consent shall appear to be perversely and without any reason withheld. And, as was before hinted, an equivalent in money or other estate is usually settled

<sup>a</sup> Lord Clar. Contin. 162.

<sup>b</sup> *Ibid.* 163.

upon infants, or persons not *in esse*, or not of capacity to act for themselves, who are to be concluded by this act. And a general saving is constantly added, at the close of the bill, of the right and interest of all persons whatsoever; except those whose consent is so given or purchased, and who are therein particularly named.

[346] A law, thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance, than as the solemn act of the legislature. It is not therefore allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against, when obtained upon fraudulent suggestions;<sup>c</sup> and no judge or jury is bound to take notice of it, unless the same be specially set forth and pleaded to them. It remains, however, enrolled among the public records of the nation, to be forever preserved as a perpetual testimony of the conveyance or assurance so made or established.<sup>2</sup>

§ 469. 2. The king's grants.—The *king's grants* are also matter of public record. For, as St. Germyn says,<sup>cc</sup> the king's excel-

<sup>c</sup> Richardson v. Hamilton, Canc. 8 Jan. 1733. McKenzie v. Stuart, Dom. Proc. 13 Mar. 1754.

<sup>cc</sup> Dr. & Stud. b. 1. d. 8.

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<sup>2</sup> Legislative power to transfer private titles.—The power of legislatures in this country to transfer private titles is restricted by constitutional principles and express limitations. "The courts of the states, whenever the question has been presented to them for decision, have, without exception, held that it is beyond the legislative power to take, against his will, the property of one and give it to another for what the court deems private uses, even though full compensation for the taking be required. But the decisions have been rested on different grounds. (1 Lewis, Eminent Domain, 2d ed., § 157.) Some cases proceed on the express and some on the implied prohibitions of state constitutions, and some on the vaguer reasons derived from what seems to the judges, to be the spirit of the constitution or the fundamental principles of free government." *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 606, 13 Ann. Cas. 1008, 52 L. Ed. 637, 28 Sup. Ct. Rep. 331. But there are, nevertheless, circumstances under which statutes changing legal titles are allowed. "The cases in which it has been held that a legislative act may avail in creating a good title to land seem to be of three classes, and the authority to pass such acts seems to be limited to these: 1st. In confirming a title, where the proceedings or sale, by which it has been attempted to convey land, have proved



lency is so high in the law, that no freehold may be given to the king, nor derived from him, but by matter of record. And to this end a variety of offices are erected, communicating in a regular subordination one with another through which all the king's grants must pass, and be transcribed, and enrolled; that the same may be narrowly inspected by his officers, who will inform him if anything contained therein is improper, or unlawful to be granted. These grants, whether of lands, honors, liberties, franchises, or aught besides, are contained in charters, or letters *patent*, that is, open letters, *literæ patentēs*: so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom; and are usually directed or addressed by the king to all his subjects at large. And therein they differ from certain other letters of the king, sealed also with his great seal, but directed to particular persons, and for particular purposes: which, therefore, not being proper for public inspection, are closed up and sealed on the outside, and are thereupon called writs *close*, *literæ clausæ*; and are recorded in the *close-rolls*, in the same manner as the others are in the *patent-rolls*.

§ 470. a. **The practice in royal grants.**—Grants or letters patent must first pass by *bill*: which is prepared by the attorney and solicitor general, in consequence [347] of a warrant from the crown; and is then signed, that is, superscribed at the top, with the king's own *sign manual*, and sealed with his *privy signet*, which is always in the custody of the principal secretary of state; and then sometimes it immediately passes under the great seal, in which case the patent is subscribed in these words, "*per ipsum regem*, by the king himself."<sup>d</sup> Otherwise the course is to carry an extract of the bill to the keeper of the *privy seal*, who makes out a writ or warrant thereupon to the chancery; so that the sign

<sup>d</sup> 9 Rep. 18.

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to be defective or incomplete for informality; 2d. Where the owners of the land to be conveyed have been under a disability, like that of infancy, lunacy, or the like, where the state acts as a kind of *parens patriæ* in taking care of the property of its subjects incapable of managing their own affairs; 3d. Where the sale is made for the purpose of satisfying the debts of a person deceased." 3 Washburn, Real Prop. (6th ed.), § 2053.

manual is the warrant to the privy seal, and the privy seal is the warrant to the great seal: and in this last case the patent is subscribed, "*per breve de privato sigillo*, by writ of privy seal."<sup>e</sup> But there are some grants, which only pass through certain offices, as the admiralty or treasury, in consequence of a *sign manual*, without the confirmation of either the *signet*, the *great*, or the *privy seal*.

§ 471. **b. Construction of royal grants.**—The *manner* of granting by the king does not more differ from that by a subject, than the *construction* of his grants, when made. 1. A grant made by the king, *at the suit of the grantee*, shall be taken most beneficially *for* the king, and *against* the party: whereas the grant of a subject is construed most strongly *against the grantor*.<sup>3</sup> Where-

<sup>e</sup> *Ibid.* 2 Inst. 555.

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3 **Interpretation of public grants.**—Similar rules of construction are often applied to public grants by the state or United States in this country; and correctly so, with the qualification that all construction is now more liberal and equal between the parties than was formerly the case. There is, of course, no opportunity among us for public grants *ex speciali gratia*, or *ex mero motu*; but if there were, these would no doubt be construed more strictly, rather than liberally. Indeed, the fact that a public grant has been made as a matter of interest, for a valuable consideration, has been said with us to relax the rule, and put the grantee on the same footing with the grantee of a private person. (*Charles River Bridge v. Warren Bridge*, 11 Pet. 589, 9 L. Ed. 841.) The strict rule applies rather to the grant of franchises or prerogatives. (*Martin v. Waddell*, 16 Pet. 367, 10 L. Ed. 997; *Dubuque etc. R. Co. v. Litchfield*, 23 How. 66, 16 L. Ed. 500; *Lansing v. Smith*, 4 Wend. (N. Y.) 9; 21 Am. Dec. 89; *Hyman v. Read*, 13 Cal. 444.)—HAMMOND.

**Public grants.**—The place of king's grants is taken in this country by public grants, by which a title is created in an individual to lands previously belonging either to the federal government or to one of the states. The public domain of the United States was acquired by the government by treaty, conquest, cession by the other nations or by individual states of the Union, and by purchase. The Indians are regarded as having only an occupational title. Their rights must, however, be divested either by purchase or by war. *Godfrey v. Beardsley*, 2 McLean, 412, Fed. Cas. No. 5497; *Johnson v. McIntosh*, 8 Wheat. (U. S.) 543, 5 L. Ed. 681. After this right of the Indians has been extinguished, the lands in the public domain are disposed of under the authority of the national government. The system in vogue provides for surveys of the public lands, and their division into townships and sections, and a subdivision

fore it is usual to insert in the king's grants, that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis* (by the special favor, certain knowledge, and mere motion of the king)"; and then they have a more liberal construction.<sup>f</sup> 2. A subject's grant shall be construed to include many things, besides what are expressed, if necessary for the operation of the grant. Therefore, in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut and carry away those profits, are also inclusively granted:<sup>g</sup> and if a feoffment of land was made by a lord to his villein, this operated as a manumission;<sup>h</sup> for he was otherwise unable to hold it. But the king's grant shall not inure to any other intent than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for [348] such grant shall not also inure to make him a denizen, that so he may be capable

<sup>f</sup> Finch. L. 100. 10 Rep. 112.

<sup>h</sup> Litt. § 206.

<sup>g</sup> Co. Litt. 56.

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into halves, quarters, and eighths of sections, the township consisting of 23,040 acres, and each section of 640 acres. In disposing of the public lands, various modes have been adopted. Many of them have been disposed of by public sale; others by private *entry*, as it is called, upon the records of certain officers within the districts where the lands lie; others are selected by persons holding warrants from the government, given as rewards for services or for other causes; and in still other cases, lands have been disposed of by treaty or by special acts of Congress in the way of land grants.

Ordinarily, an acquisition of land from the United States by an individual involves four steps, namely, entry, payment, certificate, and patent. Entry means the designation in the books of the land officer of the specific parcel to be acquired. It is the incipient act which gives to the claimant a *prima facie* right to go on and perform the other acts necessary to complete the title. *Holt v. Murphy*, 207 U. S. 407, 52 L. Ed. 271, 28 Sup. Ct. Rep. 212. The purchaser then makes the required payment and is entitled to a certificate. This certificate makes him the equitable owner of the land, which is then held by the government in trust for him. *Hawley v. Diller*, 178 U. S. 476, 44 L. Ed. 1157, 20 Sup. Ct. Rep. 986. A patent is a deed of grant, signed by the President of the United States, or his authorized agent, sealed with the great seal, and countersigned by the recorder. A federal patent is said by the supreme court of the United States to be the highest and best deed known to the law. *Texas & P. R. Co. v. Smith*, 159 U. S. 66, 68, 40 L. Ed. 77, 15 Sup. Ct. Rep. 994. See 3 Washburn, *Real Prop.* (6th ed.), 164 ff; Reeves, *Real Prop.*, 1405 ff.

of taking by grant.<sup>l</sup> 3. When it appears, from the face of the grant, that the king is mistaken, or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law; in any of these cases the grant is absolutely void.<sup>k</sup> For instance; if the king grants lands to one and his *heirs male*, this is merely void: for it shall not be an estate-tail, because there want words of procreation, to ascertain the body, out of which the heirs shall issue; neither is it a fee simple, as in common grants it would be; because it may reasonably be supposed, that the king meant to give no more than an estate-tail:<sup>l</sup> the grantee is therefore (if anything) nothing more than tenant at will.<sup>m</sup> And, to prevent deceits of the king, with regard to the value of the estate granted, it is particularly provided by the statute 1 Hen. IV, c. 6 (Petitions to the King for Lands, 1399), that no grant of his shall be good, unless, in the grantee's petition for them, express mention be made of the real value of the lands.

§ 472. 3. *Fines*.—We are next to consider a very usual species of assurance, which is also of record; viz., a *fine* of lands and tenements.<sup>4</sup> In which it will be necessary to explain, 1. The *nature* of a fine; 2. Its several *kinds*; and 3. Its *force* and *effect*.

<sup>l</sup> Bro. Abr. Tit. Patent. 62. Finch. L. 110.

<sup>k</sup> Freem. 172.

<sup>l</sup> Finch. 101, 102.

<sup>m</sup> Bro. Abr. tit. Estates. 34. tit. Patents. 104. Dyer. 270. Dav. 45.

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<sup>4</sup> **Abolition of fines and recoveries.**—Fines and common recoveries were abolished by the Fines and Recoveries Act of 1833 (3 & 4 Wm. IV, c. 74). For the forms of conveyance, the disentailing assurance and the deed acknowledged, which have taken the place of the old fictitious lawsuits of fine and recovery, see Jenks, Mod. Land Law, 357 ff.

Fines and common recoveries were never in much use in this country. They have been now abolished by statute, or, in most states, were never in practice. 4 Kent, Comm., 497; Croxall v. Shererd, 5 Wall. (U. S.) 268, 18 L. Ed. 572; Lyle v. Richards, 9 Serg. & R. (Pa.) 322; Stump v. Findlay, 2 Rawle (Pa.), 168, 19 Am. Dec. 632; Dudley v. Sumner, 5 Mass. 438; McGregor v. Comstock, 17 N. Y. 162.

§ 473. a. **Nature of a fine.**—A fine is sometimes said to be a feoffment of record:<sup>n</sup> though it might with more accuracy be called, an acknowledgment of a feoffment on record. By which is to be understood, that it has at least the same force and effect with a feoffment, in the conveying and assuring of land: though it is one of those methods of transferring estates of freehold by the common law, in which livery of seisin is not necessary [349] to be actually given; the supposition and acknowledgment thereof in a court of record, however fictitious, inducing an equal notoriety. But, more particularly, a fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices; whereby the lands in question become, or are acknowledged to be, the right of one of the parties.<sup>o</sup> In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditaments; and the possession thus gained by such composition was found to be so sure and effectual, that fictitious actions were, and continue to be, every day commenced, for the sake of obtaining the same security.

A fine is so called because it puts an *end*, not only to the suit thus commenced, but also to all other suits and controversies concerning the same matter. Or, as it is expressed in an ancient record of parliament,<sup>p</sup> 18 Edw. I (Fines, 1290), “*non in regno Angliæ providetur, vel est, aliqua securitas major vel solennior, per quam aliquis statum certiores habere possit, neque ad statum suum verificandum aliquod solennius testimonium producere, quam finem in curia domini regis levatum: qui quidem finis sic vocatur, eo quod finis et consummatio omnium placitorum esse debet, et hac de causa providebatur* (there is no greater or more common security provided in the kingdom of England, or by which a person can acquire a surer title, than by a fine levied in the king’s court: nor can any testimony be produced more customary for confirming a title. It is called a fine because it is *finis*, that is, the end and consummation of all suits; and for this purpose it was provided).” Fines indeed are of equal antiquity with the first rudiments of

<sup>n</sup> Co. Litt. 50.

<sup>p</sup> 2 Roll. Abr. 13.

<sup>o</sup> Co. Litt. 120.



the law itself; are spoken of by Glanvill<sup>a</sup> and Bracton<sup>r</sup> in the reigns of Henry II and Henry III, as things then well known and long established; and instances have been produced of them even before the Norman invasion.<sup>s</sup> So that the statute 18 Edw. I, called *modus levandi fines* (the manner of levying fines), did not give them original, but only declared and regulated the manner in which they should be levied or carried on. And that is as follows:

§ 474. **b. Mode of levying fines—(1) Writ of *præcipe*.**—The party, to whom the land is to be conveyed or assured, commences an action or suit at law against the other, [350] generally an action of covenant,<sup>t</sup> by suing out a writ or *præcipe*,<sup>5</sup> called a writ of covenant:<sup>u</sup> the foundation of which is a supposed agreement or covenant, that the one shall convey the lands to the other; on the breach of which agreement the action is brought. On this writ there is due to the king, by ancient prerogative, a *primer fine*, or a noble for every five marks of land sued for; that is, one-tenth of the annual value.<sup>v</sup> The suit being thus commenced, then follows,

§ 475. **(2) *Licentia concordandi*.**—The *licentia concordandi*, or leave to agree the suit.<sup>w</sup> For, as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff. Who, accepting them, but having, upon suing out the writ, given

<sup>a</sup> l. 8. c. 1.

<sup>r</sup> l. 5. t. 5. c. 28.

<sup>s</sup> Plowd. 369.

<sup>t</sup> A fine may also be levied on a writ of *mesne*, or *warrantia chartæ* (warranty of the deed), or *de consuetudinibus et servitiis* (of customs and services). (Finch. L. 278.)

<sup>u</sup> See Appendix, No. IV. § 1.

<sup>v</sup> 2 Inst. 511.

<sup>w</sup> Append. No. IV. § 2. In the times of strict feudal jurisdiction, if a vassal had commenced a suit in the lord's court, he could not abandon it without leave: lest the lord should be deprived of his perquisites for deciding the cause. (Robertson. Ch. V. i. 31.)

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<sup>5</sup> ***Præcipe quod teneat conventionem*.**—The writ which commenced the action of covenant in fines, which were abolished by 3 & 4 Wm. IV, c. 74.

pledges to prosecute his suit, which he endangers if he now deserts it without license, he therefore applies to the court for leave to make the matter up. This leave is readily granted, but for it there is also another fine due to the king by his prerogative which is an ancient revenue of the crown, and is called the *king's silver*, or sometimes the *post fine*, with respect to the *primer fine* before mentioned. And it is as much as the *primer fine*, and half as much more, or ten shillings for every five marks of land; that is, threewentieths of the supposed annual value.<sup>x</sup>

§ 476. (3) *Concord or agreement*.—Next comes the *concord*, or agreement itself,<sup>y</sup> after leave obtained from the court; which is usually an acknowledgment from the deforciant (or those who keep the other out of possession) that the lands in question are the right of the complainant. And from this acknowledgment, or recognition of right, the party levying the fine is called the <sup>[351]</sup>*cognizor*, and he to whom it is levied the *cognizee*. This acknowledgment must be made either openly in the court of common pleas, or before one of the judges of that court, or else before commissioners in the country, empowered by a special authority, called a writ of *dedimus potestatem* (we have given power); which judges and commissioners are bound by statute 18 Edw. I, st. 4 (Fines, 1290), to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine are completed: and, if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable,<sup>z</sup> still the fine shall be carried on in all its remaining parts: of which the next is

§ 477. (4) *The note of the fine*.—The *note* of the fine:<sup>a</sup> which is only an abstract of the writ of covenant, and the concord; naming the parties, the parcels of land, and the agreement. This must

<sup>x</sup> 5 Rep. 39. 2 Inst. 511. Stat. 32 Geo. II. c. 14 (Post Fines, 1758).

<sup>y</sup> Append. No. IV. § 3.

<sup>z</sup> Comb. 71.

<sup>a</sup> Append. No. IV. § 4.

be enrolled of record in the proper office, by direction of the statute 5 Hen. IV, c. 14 (Fines, 1403).

§ 478. (5) *The foot of the fine.*—The fifth part is the *foot* of the fine, or conclusion of it: which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied.<sup>b</sup> Of this there are indentures made, or engrossed, at the chirographer's office, and delivered to the cognizor and the cognizee; usually beginning thus, "*hæc est finalis concordia*," this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

§ 479. (6) *Other solemnities.*—By several statutes still more solemnities are superadded, in order to render the fine more universally public, and less liable to be levied by fraud or covin. And, first, by 27 Edw. I, [352] c. 1, (Fines, 1299), the note of the fine shall be openly read in the court of common pleas at two several days in one week, and during such reading all pleas shall cease. By 5 Hen. IV, c. 14 (Fines, 1403), and 23 Eliz., c. 3 (Fines and Recoveries, 1580), all the proceedings on fines either at the time of acknowledgment, or previous, or subsequent thereto, shall be enrolled of record in the court of common pleas. By 1 Rich. III, c. 7 (Fines, 1483), confirmed and enforced by 4 Hen. VII, c. 24 (Fines, 1488), the fine, after engrossment, shall be openly read and proclaimed in court sixteen times; viz., four times in the term in which it is made, and four times in each of the three succeeding terms; during which time all pleas shall cease: but this is reduced to once in each term by 31 Eliz., c. 2 (Fines, 1588), and these proclamations are indorsed on the back of the record.<sup>c</sup> It is also enacted by 23 Eliz., c. 3 (1580), that the chirographer of fines shall every term write out a table of the fines levied in each county in that term, and shall affix them in some open part of the court of common pleas all the next term: and shall also deliver the contents of such table to the sheriff of every county, who shall at the next assizes fix the same in some open place in the court, for the more public notoriety of the fine.

<sup>b</sup> *Ibid.* § 5.

<sup>c</sup> Appendix. No. IV. § 6.

§ 480. c. Kinds of fines.—Fines, thus levied, are of four kinds.

1. What in our law French is called a fine “*sur cognizance de droit, come ceo que il ad de son done*”; or, a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor.<sup>d</sup> This is the best and surest kind of fine; for thereby the deforciant, in order to keep his covenant with the plaintiff, of conveying to him the lands in question, and at the same time to avoid the formality of an actual feoffment and livery, acknowledges in court a former feoffment, or gift in possession, to have been made by him to the plaintiff. This fine is therefore said to be a feoffment of record; the livery thus acknowledged in court, being equivalent to an actual livery: so that this assurance is rather a confession of a former conveyance, than a conveyance now originally made; for the deforciant, or cognizor, acknowledges, [353] *cognoscit*, the right to be in the plaintiff, or cognizee, as that which he hath *de son done*, of the proper gift of himself the, cognizor. 2. A fine “*sur cognizance de droit tantum*,” or, upon acknowledgment of the right merely; not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. For of such reversions there can be no feoffment, or donation with livery, supposed; as the possession during the particular estate belongs to a third person.\* It is worded in this manner: “that the cognizor acknowledges the right to be in the cognizee; and grants for himself and his heirs, that the reversion, after the particular estate determines, shall go to the cognizee.<sup>f</sup>” 3. A fine “*sur concessit*” is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. And this may be done reserving a rent, or the like: for it operates as a new grant.<sup>g</sup> 4. A fine “*sur done, grant, et render*,” is a double fine, comprehending the fine *sur cognizance de droit come ceo etc.*, and the fine *sur concessit*: and may be used to create particular limitations of estate: whereas the

<sup>d</sup> This is that sort, of which an example is given in the Appendix, No. 1V.

• Moor. 629.

<sup>f</sup> West. Symb. p. 2. § 95.

<sup>g</sup> West. p. 2. § 66.

fine *sur cognizance de droit come ceo, etc.*, conveys nothing but an absolute estate, either of inheritance or at least of freehold.<sup>h</sup> In this last species of fine, the cognizee, after the right is acknowledged to be in him, grants back again, or renders to the cognizor, or perhaps to a stranger some other estate in the premises. But, in general, the first species of fine, “*sur cognizance de droit come ceo, etc.*,” is the most used, as it conveys a clean and absolute freehold and gives the cognizee a seisin in law without any actual livery; and is therefore called a fine executed, whereas the others are but executory.

§ 481. d. Force and effect of a fine.—We are next to consider the *force* and *effect* of a fine. These principally depend, at this day, on the common law, and the two statutes, 4 Hen. VII, c. 24 (Fines, 1488), and 32 Hen. VIII, c. 36 (Fines, 1540). The ancient common law, with respect to this point, [354] is very forcibly declared by the statute 18 Edw. I (1290), in these words. “And the reason, why such solemnity is required in the passing of a fine, is this; because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world, who are of full age, out of prison, of sound memory, and within the four seas the day of the fine levied; unless they put in their claim on the foot<sup>1</sup> of the fine within a year and a day.” But this doctrine, of barring the right by *nonclaim*, was abolished for a time by a statute made in 34 Edw. III, c. 16 (Fines, 1360), which admitted persons to claim, and falsify a fine, at any indefinite distance:<sup>1</sup> whereby, as Sir Edward Coke observes,<sup>k</sup> great contention arose, and few men were sure of their possessions, till the parliament held 4 Hen. VII (1488),

<sup>h</sup> Salk. 340.

<sup>1</sup> *Sur la pie* as it is in the Cotton MS. and not *pur la pais* as printed by Berthelet and in 2 Inst. 511. There were then four methods of claiming, so as to avoid being concluded by a fine: 1. By action. 2. By entering such claim on the record at the *foot* of the fine. 3. By entry on the lands. 4. By continual claim. 2 Inst. 518. The second is not now in force under the statute of Henry VII.

<sup>1</sup> Litt. § 441.

<sup>k</sup> 2 Inst. 518.



reformed that mischief, and excellently moderated between the latitude given by the statute and the rigor of the common law. For the statute, then made,<sup>1</sup> restored the doctrine of nonclaim; but extended the time of claim. So that now, by that statute, the right of all strangers whatsoever is bound, unless they make claim, by way of action or lawful entry, not within *one* year and a day, as by the common law, but within *five* years after proclamations made: except feme coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind; who have five years allowed to them and their heirs, after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

It seems to have been the intention of that politic prince, King Henry VII, to have covertly by this statute extended fines to have been a bar of estates-tail, in order to unfetter the more easily the estates of his powerful nobility, and lay [355] them more open to alienations; being well aware that power will always accompany property. But doubts have arisen whether they could, by mere implication, be adjudged a sufficient bar (which they were expressly declared *not* to be by the statute *de donis*), the statute 32 Hen. VIII, c. 36 (Fines, 1540), was thereupon made; which removes all difficulties, by declaring that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail: unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestor, assigned to her in tail for her jointure;<sup>m</sup> or unless it be of lands entailed by act of parliament or letters patent, and whereof the reversion belongs to the crown.

From this view of the common law, regulated by these statutes, it appears, that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that the persons bound by a fine are *parties*, *privies*, and *strangers*.

§ 482. (1) **Parties to a fine.**—The *parties* are either the cognizers, or cognizees; and these are immediately concluded by the

<sup>1</sup> 4 Hen. VII, c. 24 (Fines, 1488).

<sup>m</sup> See statute 11 Hen. VII. c. 20 (Bar of Entail, 1495).

fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And indeed, as this is almost the only act that a *feme covert*, or married woman, is permitted by law to do (and that because she is privately examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband), it is therefore the usual and almost the only safe method, whereby she can join in the sale, settlement, or encumbrance, of any estate.

§ 483. (2) *Privies to a fine.*—Privies to a fine are such as are any way related to the parties who levy the fine, and claim under them by any right of blood, or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry the Eighth, the vendee, the devisee, and all others who must make title by the persons who levied the fine. For the act of the ancestor shall bind the heir, and the act [356] of the principal his substitute, or such as claim under any conveyance made by him subsequent to the fine so levied.<sup>a</sup>

§ 484. (3) *Strangers to a fine.*—Strangers to a fine are all other persons in the world, except only parties and privies. And these are also bound by a fine, unless, within five years after proclamations made, they interpose their claim; provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea: and persons, who are thus incapacitated to prosecute their rights, have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present, but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues.<sup>o</sup> And if within that time they neglect to claim, or (by the statute 4 Ann., c. 16—Fines, 1705), if they do not bring an action to try the right, within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of nonclaim.

<sup>a</sup> 3 Rep. 87.

<sup>o</sup> Co. Litt. 372.

§ 485. (4) Freehold interest essential to a fine.—But, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risk defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo* (in the same condition as before): whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainderman or reversioner,<sup>p</sup> if claimed in proper time. It is not, therefore, to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire,<sup>q</sup> the estate is forever barred by it. Yet where a stranger, whose presumption cannot thus be punished, officiously interferes in an estate which in no wise belongs to him, [357] his fine is of no effect; and may at any time be set aside (unless by such as are parties or privies thereunto<sup>r</sup>) by pleading that “*partes finis nihil habuerunt* (the parties to the fine had no interest in the land).” And, even if a tenant for years, who hath only a chattel interest, and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea.<sup>s</sup> Wherefore, when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first, to displace the estate of the reversioner,<sup>t</sup> and create a new freehold by disseisin. And thus much for the conveyance or assurance by fine: which not only, like other conveyances, binds the grantor himself, and his heirs; but also all mankind, whether concerned in the transfer or no, if they fail to put in their claims within the time allotted by law.

§ 486. 4. Common recovery.—The fourth species of assurance, by matter of record, is a *common recovery*.<sup>6</sup> Concerning the

<sup>p</sup> *Ibid.* 251.

<sup>s</sup> 5 Rep. 123. Hlardr. 401.

<sup>q</sup> 2 Lev. 52.

<sup>t</sup> Hlardr. 402. 2 Lev. 52.

<sup>r</sup> Heb. 334.

<sup>6</sup> Procedure in common recoveries.—It was not till the fifteenth century that a completely effectual method of breaking through the statutory restraint on alienation—or “barring the entail” as we say—was in regular use. This was an elaborate form of collusive lawsuit called a recovery—

original of which, it was formerly observed,<sup>u</sup> that common recoveries were invented by the ecclesiastics to elude the statutes of mortmain; and afterwards encouraged by the finesse of the courts of law in 12 Edw. IV (1472), in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon. I am now, therefore, only to

<sup>u</sup> Pag. 117. 271.

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first, a feigned or fictitious recovery, afterwards, when it was well established and familiar, a "common recovery"—and depending for its efficacy on the doctrine of warranty just mentioned. The device, in its simplest form, was of this nature: the tenant in tail (let us call him Littleton) being in possession, some person (say Brian) acting in concert with him would bring the real action called a "writ of right" for the recovery of the freehold (whence the name of the proceeding) claiming to be himself the true owner. Littleton, instead of defending his title for himself, would "vouch to warranty" a third person (say Catesby), from whom or whose ancestors he professed that his title was derived, and who was supposed bound to warrant the tenant against all comers. Catesby, the "vouchee," as he was called, was brought in as a party, and acknowledged the warranty. Brian, the nominal plaintiff, then asked and obtained leave of the court to "imparl," or privately confer with him, thus providing—if one may be so irreverent as to take an illustration from the stage—a sort of carpenters' scene to cover the production of the final effect. When Brian came back into court, as if to report the result of the "imparlance," it was found that Catesby had disappeared, "departed in contempt of the court," as it was formally recorded. Thereupon judgment went by default against Catesby, and the lands were awarded to Brian for an estate in fee simple; as to Littleton, he and his heirs in tail became entitled to a recompense in lands of equal value against Catesby, by virtue of his supposed warranty. Thus, if Littleton's lineal heirs who would otherwise have succeeded to the entailed estate were to make any claim on it in the future, the answer to them would be that their only remedy was against Catesby, through whose default a stranger claiming in some wholly independent right, or in the technical phrase "by title paramount," had deprived them of their inheritance. It remained to deal with the land according to the preconcerted arrangement: this was the affair not of the court but of the parties. If Littleton's purpose was to make a sale to Brian, then Brian had only to keep the land in which the judgment of the court gave him full title and possession. If not, Brian would dispose of it according to Littleton's directions, by reconveying it to Littleton for an estate in fee simple, or otherwise as might be desired.

The proceeding is here stated, as above said, in its simplest form; and it is supposed that all the steps in the collusive action are really taken in the

consider, first, the *nature* of a common recovery; and, secondly, its *force* and *effect*.

§ 487. a. *Nature of a common recovery.*—And, first, the *nature* of it; or what a common recovery is. A common recovery is so far like a fine that it is a suit or action, either actual or fictitious: and in it the lands are *recovered* against the tenant of the freehold; which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee simple in the recoverer. A recovery, therefore, being in the nature of an action at law, not immediately compromised like a fine, but carried on

regular way. But the practice of later times, as described by Blackstone, and minutely explained by the text-writers on the law of real property before 1833, was more artificial and complex. The action was not merely collusive but fictitious. Nothing was really done in the court of common pleas or its offices, after the issue of the writ which commenced the supposed proceedings, but the making up of a record stating, as in the case of a genuine action, the demand, defense, voucher, imparlance, default, and judgment; the same or equivalent fees, however, were paid to the officers of the court as if everything had been done in detail. Only where the party "suffering the recovery" was a nobleman, he did appear in court, and a serjeant went through the form of pleading for him, as I learn on the authority of those who remember the old practice. On the other hand, the form was complicated by additional precautions intended to make sure that every possible claim of the inheritable issue of the tenant in tail, or of those who in their failure would become entitled under the further dispositions of the grant in tail, or ultimately of the original grantor and his heirs, should be effectually barred. The developed modern shape of a "common recovery" can hardly be understood by anyone but a special historical student of the law, nor is there any need that it should. It was possible, even after these developments, to raise doubts whether the fiction was in theory quite satisfying; and the rationalizing lawyers of the eighteenth century, while some of them at least inclined to think these doubts unanswerable, dismissed them as idle, and considered recoveries "as common assurances, and not at all as real transactions," the artificial reasoning by which a systematic justification of them was attempted being "a thing in its nature inexplicable." One question, however, may naturally occur to the candid reader, and must not be neglected. Was not the vouchee, Catesby, as we called him in our imaginary example, put in an extremely awkward position by being made liable to find a recompense in value for the tenant in tail's issue? And how was he induced to take such a risk? No doubt the position would have been anxious and dangerous for a man of substance: for, in the Middle Ages at any rate, the court could not have confessed that it had lent the forms of its most solemn proceedings to a concerted evasion of the statute. But all



through every regular stage of proceeding, I am greatly apprehensive that its form and method will not be easily understood by the student, who is not yet acquainted <sup>[358]</sup> with the course of judicial proceedings; which cannot be thoroughly explained, till treated of at large in the third book of these Commentaries. However, I shall endeavor to state its nature and progress, as clearly and concisely as I can; avoiding, as far as possible, all technical terms, and phrases not hitherto interpreted.

§ 488. (1) **Single voucher.**—Let us, in the first place, suppose David Edwards<sup>w</sup> to be tenant of the freehold, and desirous to suffer a common recovery, in order to bar all entails, remainders, and reversions, and to convey the same in fee simple to Francis Golding. To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ, called a *præcipe quod reddat* (command him to restore), because those were its initial or most operative words, when the law proceedings were in Latin. In this writ the demandant Golding alleges, that the defendant Edwards (here called the tenant) has no legal title to the land; but that he came into possession of it after one Hugh Hunt

<sup>w</sup> See Appendix, No. V.

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trouble on this score was avoided by choosing as vouchee someone who notoriously had no lands to make recompense withal, and therefore was, as we now say, not worth powder and shot. In later times this office was assigned by settled usage to the crier of the court, who in this capacity was called "the common vouchee," and thus cheerfully and, we presume, not ungainfully passed his life, or so much thereof as was covered by the legal terms, in perpetual contempt of the court of common pleas and liability to be fined at the king's discretion. It may also seem that the nominal plaintiff in the action must have been greatly trusted by the parties: for what if after the judgment in his favor he disavowed the arrangement, and insisted on taking the thing seriously and remaining in possession? He had the strongest possible title on the face of the proceedings, and no remedy known to the old common law could touch him. It is possible that in the earlier days of common recoveries everything was left to his honor. But before the latter end of the fifteenth century the growing jurisdiction of the chancellor, of which we shall have to speak presently, had ample means of enforcing the fulfillment of his undertaking according to its intention. In later times the ingenuity of conveyancers made assurance doubly sure by a complication of provisos and counter-checks which it is needless to specify.—POLLOCK, Land Laws, 80.

had turned the demandant out of it.<sup>x</sup> The subsequent proceedings are made up into a record or recovery roll,<sup>y</sup> in which the writ and complaint of the demandant are first recited: whereupon the tenant appears, and calls upon one Jacob Morland, who is supposed, at the original purchase, to have warranted the title to the tenant; and thereupon he prays, that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty; and Morland is called the *vouchee*. Upon this, Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon, Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private; which is (as usual) allowed him. And soon afterwards the demandant, Golding, returns to court, but Morland the vouchee disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoverer, to recover the lands in question against the tenant, Edwards, who is now the recoveree; [359] and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default; which is agreeable to the doctrine of warranty mentioned in the preceding chapter.<sup>z</sup> This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has only a nominal recompense for the lands so recovered against him by Golding; which lands are now absolutely vested in the said recoverer by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee simple, from Edwards the tenant in tail, to Golding the purchaser.

§ 489. (2) *Double voucher*.—The recovery, here described, is with a *single voucher* only; but sometimes it is with *double*, *treble*, or further voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at the least: by first conveying an estate of freehold to

<sup>x</sup> § 1.

<sup>z</sup> Pag. 301.

<sup>y</sup> § 2.

any indifferent person, against whom the *præcipe* is brought; and then he vouches the tenant in tail, who vouches over the common vouchee.<sup>a</sup> For, if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas, if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered.<sup>b</sup> If Edwards, therefore, be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland, the common vouchee; who is always the last person vouched, and always makes default; whereby the demandant Golding recovers the land against the tenant Edwards, and Edwards recovers a recompense of equal value against Barker, the first vouchee; who recovers the like against Morland, the common<sup>[360]</sup> vouchee, against whom such ideal recovery in value is always ultimately awarded.

§ 490. (3) **Supposed recompense from the common vouchee.** This supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. For, if the recoverer should obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail.<sup>c</sup> This reason will also hold with equal force, as to *most* remaindermen and reversioners; to whom the possibility will remain and revert, as a full recompense for the reality, which they were otherwise entitled to; but it will not *always* hold; and therefore, as Pigott says,<sup>d</sup> the judges have been even *astuti* (cunning), in inventing other reasons to maintain the authority of recoveries. And, in particular, it hath been said, that, though the estate-tail is gone from the recoverer, yet it is not *destroyed*, but only *transferred*; and still subsists, and will ever continue to subsist (by construction of law) in the recoverer, his heirs and assigns: and, as the estate-tail so continues to subsist forever, the remaindermen

<sup>a</sup> See Appendix, pag. xviii.

<sup>c</sup> Dr. & St. b. 1. dial. 26.

<sup>b</sup> Bro. Abr. tit. Taille. 32. Plowd. 8.

<sup>d</sup> Of Com. Recov. 13, 14.

or reversions expectant on the determination of such estate-tail can never take place.

§ 491. (4) *Improvements desirable.*—To such awkward shifts, such subtle refinements, and such strange reasoning, were our ancestors obliged to have recourse, in order to get the better of that stubborn statute *de donis*. The design, for which these contrivances were set on foot, was certainly laudable; the unriveting the fetters of estates-tail, which were attended with a legion of mischiefs to the commonwealth: but, while we applaud the end, we cannot but admire the means. Our modern courts of justice have indeed adopted a more manly way of treating the subject; by considering common recoveries in no other light than as the formal mode of conveyance, by which tenant in tail is enabled to alien his lands. But, since the ill consequences of fettered inheritances are now generally seen and [361] allowed, and of course the utility and expedience of setting them at liberty are apparent, it hath often been wished, that the process of this conveyance was shortened, and rendered less subject to niceties, by either totally repealing the statute *de donis*; which perhaps, by reviving the old doctrine of conditional fees, might give birth to many litigations: or by vesting in every tenant in tail of full age the same absolute fee simple at once, which now he may obtain whenever he pleases, by the collusive fiction of a common recovery; though this might possibly bear hard upon those in remainder or reversion, by abridging the chances they would otherwise frequently have, as no recovery can be suffered in the intervals between term and term, which sometimes continue for near five months together: or, lastly, by empowering the tenant in tail to bar the estate-tail by a solemn deed, to be made in term time and enrolled in some court of record; which is liable to neither of the other objections, and is warranted not only by the usage of our American colonies, but by the precedent of the statute<sup>e</sup> 21 Jac. I, c. 19 (Bankruptcy, 1623), which, in case of a bankrupt tenant in tail, empowers his commissioners to sell the estate at any time, by deed indented and enrolled. And if, in so national a concern, the emoluments of the officers, concerned in passing recoveries, are thought to be worthy attention,

• See pag. 286.

those might be provided for in the fees to be paid upon each enrollment.

§ 492. *b. Force and effect of common recoveries.*—The *force* and *effect* of common recoveries may appear, from what has been said, to be an absolute bar not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may, by this method of assurance, convey the lands held in tail to the recoverer, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail, and of all remainders and reversions. But, by statute 34 & 35 Hen. VIII, c. 20 (Fines and Recoveries, 1543), no recovery had against tenant in tail, of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-tail, or the remainder or reversion of the crown. And by the statute 11 Hen. VII, c. 20 (Bar of Entail, 1495), no <sup>[362]</sup> woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband or settled on her husband and her by any of his ancestors. And by statute 14 Eliz., c. 8 (Recoveries, 1572), no tenant for life, of any sort, can suffer a recovery, so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail, and other remainders over, and the tenant for life is desirous to suffer a valid recovery; either he, or the tenant to the *præcipe* by him made, must *vouch* the remainderman in tail, otherwise the recovery is void: but if he does *vouch* such remainderman, and he appears and *vouches* the common vouchee, it is then good; for if a man be *vouched* and appears, and suffers the recovery to be had, it is as effectual to bar the estate-tail as if he himself were the recoveree.<sup>f</sup>

§ 493. (1) *Recoveree must be seised of the freehold.*—In all recoveries it is necessary that the recoveree, or tenant to the *præcipe*, as he is usually called, be actually seised of the freehold, else the recovery is void.<sup>g</sup> For all actions, to recover the seisin of lands, must be brought against the actual tenant of the freehold, else the suit will lose its effect; since the freehold cannot be recovered of him who has it not. And, though these recoveries are in

<sup>f</sup> Salk. 571.

<sup>g</sup> Pigott. 28.



themselves fabulous and fictitious, yet it is necessary that there be *actores fabulæ* (actors of the fiction), properly qualified. But the nicety thought by some modern practitioners to be requisite in conveying the legal freehold, in order to make a good tenant to the *præcipe*, is removed by the provisions of the statute 14 Geo. II, c. 20 (Common Recoveries, 1740), which enacts, with a retrospect and conformity to the ancient rule of law,<sup>a</sup> that, though the legal freehold be vested in lessees, yet those who are entitled to the next freehold estate in remainder or reversion may make a good tenant to the *præcipe*: and that, though the deed or fine which creates such tenant be subsequent to the judgment of recovery; yet, if it be in the same term, the recovery shall be valid in law: and that, though the recovery itself do not appear to be entered, or be not regularly entered, on record, yet the deed to make a tenant to the *præcipe*, and declare the uses of the recovery, shall [363] after a possession of twenty years be sufficient evidence, on behalf of a purchaser for valuable consideration, that such recovery was duly suffered. And this may suffice to give the student a general idea of common recoveries, the last species of assurances by matter of record.

§ 494. c. Deeds to lead or declare uses.—Before I conclude this head, I must add a word concerning deeds to *lead*, or to *declare*, the *uses* of fines, and of recoveries. For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, inure only to the use of him who levies or suffers them.<sup>1</sup> And if a consideration appears, yet as the most usual fine, “*sur cognizance de droit come ceo, etc.*,” conveys an absolute estate, without any limitations, to the cognizee; and as common recoveries do the same to the recoverer; these assurances could not be made to answer the purpose of family settlements (wherein a variety of uses and designations is very often expedient), unless their force and effect were subjected to the direction of other more complicated deeds, wherein particular uses can be more particularly expressed. The fine or recovery itself, like a power once gained in mechanics, may be applied and directed to give efficacy to an infinite variety of movements, in the

<sup>a</sup> Pigott. 41, etc. 4 Burr. I. 115.

<sup>1</sup> Dyer. 18.

vast and intricate machine of a voluminous family settlement. And, if these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As, if A tenant in tail, with reversion to himself in fee, would settle his estate on B for life, remainder to C in tail, remainder to D in fee; this is what by law he has no power of doing effectually, while his own estate-tail is in being. He therefore usually covenants to levy a fine (or, if there be any intermediate remainders, to suffer a recovery) to E, and that the same shall inure to the uses in such settlement mentioned. This is now a deed to *lead* the uses of the fine or recovery; and the fine when levied, or recovery when suffered, shall inure to the uses so specified and no other. For though E, the cognizee or recoverer, hath a fee simple vested in himself by the fine or recovery; yet, by the operation of [364] this deed, he becomes a mere instrument or conduit-pipe seised only to the use of B, C, and D, in successive order: which use is executed immediately, by force of the statute of uses.<sup>k</sup> Or, if a fine or recovery be had without any previous

<sup>k</sup> This doctrine may perhaps be more clearly illustrated by example. In the deed or marriage settlement in the appendix, No. II. § 2. we may suppose the lands to have been originally settled on Abraham and Cecilia Barker for life, remainder to John Barker in tail, with divers other remainders over, reversion to Cecilia Barker in fee; and now intended to be settled to the several uses therein expressed, viz., to Abraham and Cecilia Barker till the marriage; remainder to John Barker for life; remainder to trustees to preserve the contingent remainders: remainder to his widow for life, for her jointure; remainder to other trustees, for a term of five hundred years; remainder to their first and other sons in tail; remainder to their daughters in tail; remainder to John Barker in tail; remainder to Cecilia Barker in fee. Now it is necessary, in order to bar the estate-tail of John Barker, and the remainders expectant thereon, that a recovery be suffered of the premises: and it is thought proper (for though usual, it is by no means necessary: see Forrester. 167.) that in order to make a good tenant of the freehold, or tenant to the *præcipe*, during the coverture, a fine should be levied by Abraham, Cecilia, and John Barker; and that the recovery itself be suffered against this tenant to the *præcipe*, who shall vouch John Barker, and thereby bar his estate-tail, and become tenant of the fee simple by virtue of such recovery: the uses of which estate, so acquired, are to be those expressed in this deed. Accordingly the parties covenant to do these several acts (see pag. viii.): and in consequence thereof the fine and recovery are had and suffered (No. IV. and No. V.) of which this conveyance is a deed to *lead* the uses.

settlement, and a deed be *afterwards* made between the parties, *declaring* the uses to which the same shall be applied, this will be equally good, as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by statute 4 & 5 Ann., c. 16 (1705), indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall inure to such uses, and be esteemed to be only in trust, notwithstanding the statute of frauds 29 Car. II, c. 3 (1677), enacts that all trusts shall be declared in writing, *at* (and not *after*) the time when such trusts are created.

## [365] CHAPTER THE TWENTY-SECOND.

### OF ALIENATION BY SPECIAL CUSTOM.

§ 495. **Alienation of copyhold and customary estates.**—We are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property.<sup>1</sup> This, therefore, is a very narrow title; being confined to copyhold lands, and such customary estates, as are holden in ancient demesne, or in manors of a similar nature: which, being of a very peculiar kind, and originally no more than tenancies in pure or privileged villeinage, were never alienable by deed; for, as that might tend to defeat the lord of his seignior, it is therefore a forfeiture of a copyhold.<sup>a</sup> Nor are they transferable by matter of record, even in the king's courts, but only in the court-baron of the lord. The method of doing this is generally by *surrender*; though in some manors, by special custom, recoveries may be suffered of copyholds:<sup>b</sup> but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court-baron of the manor, I shall confine myself to conveyances by *surrender*, and their consequences.

§ 496. **Surrender.**—Surrender, *sursumredditio*, is the yielding up of the estate by the tenant into the hands of the lord, for such

<sup>a</sup> Litt. § 74.

<sup>b</sup> Moor. 637.

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<sup>1</sup> **Special customs in United States.**—Copyhold does not exist in the United States, and the English law on the subject has been much modified by modern statutes. See 1 Stephen's Comm. (16th ed.), 520 ff.

Alienation by special custom has very little interest in the United States, for "there are practically no important special customs in this country affecting real property. The right of a tenant for years, by custom in some jurisdictions, to take away-going crops may be considered as one such incident of real property interests (Shaw v. Bowman, 91 Pa. St. 414; Van Doren v. Everitt, 5 N. J. L. 460 (539), 8 Am. Dec. 615); and the local usages or customs, whereby fixtures that otherwise would remain on the land are made the property of temporary owners and may be removed by them, may simply be mentioned for the sake of completeness (Bircher v. Parker, 40 Mo. 118; 13 Am. & Eng. Ency. of Law, pp. 655, 661)."—REEVES, Real Prop., 1568.

purposes as in the surrender are expressed. As, it may be, to the use and behoof of A and his heirs; to the use of his own will: and the like. The process, in most manors, is, that [366] the tenant comes to the steward, either in court (or, if the custom permits, out of court), or else to two customary tenants of the same manor, provided there be also a custom to warrant it; and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate; in trust to be again granted out by the lord, to such persons and for such uses as are named in the surrender, and the custom of the manor will warrant. If the surrender be made out of court, then, at the next or some subsequent court, the jury or homage must present and find it upon their oaths; which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestuy que use* (who is sometimes, though rather improperly, called the surrenderee), to hold by the ancient rents and customary services; and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name, and as the symbol, of corporal seisin of the lands and tenements. Upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

§ 497. 1. Feudal origin of surrender.—In this brief abstract of the manner of transferring copyhold estates we may plainly trace the visible footsteps of the feudal institutions. The fief, being of a base nature and tenure, is unalienable without the knowledge and consent of the lord. For this purpose it is resigned up, or surrendered into his hands. Custom, and the indulgence of the law, which favors liberty, has now given the tenant a right to name his successor; but formerly it was far otherwise. And I am apt to suspect that this right is of much the same antiquity with the introduction of uses with respect to freehold lands: for



the alienee of a copyhold had merely *jus fiduciarium* (a right of trust), for which [367] there was no remedy at law, but only by *subpœna* in chancery.<sup>c</sup> When, therefore, the lord had accepted a surrender of his tenant's interest, upon confidence to regrant the estate to another person, either then expressly named or to be afterwards named in the tenant's will, the chancery enforced this trust as a matter of conscience; which jurisdiction, though seemingly new in the time of Edward IV,<sup>d</sup> was generally acquiesced in, as it opened the way for the alienation of copyholds, as well as of freehold estates, and as it rendered the *use* of them both equally devisable by testament. Yet, even to this day, the new tenant cannot be admitted but by composition with the lord, and paying him a fine by way of acknowledgment for the license of alienation. Add to this the plain feudal investiture, by delivering the symbol of seisin in presence of the other tenants in open court; "*quando hasta vel aliud corporeum quidlibet porrigitur a domino se investituram facere dicente; quæ saltem coram duobus vasallis solemniter fieri debet* (when a spear, or other corporeal thing, is presented by the lord, saying, that he hereby invested him; which should be solemnly done in the presence of at least two vassals)";<sup>e</sup> and, to crown the whole, the oath of fealty annexed, the very bond of feudal subjection. From all which we may fairly conclude, that, had there been no other evidence of the fact in the rest of our tenures and estates, the very existence of copyholds, and the manner in which they are transferred, would incontestably prove the very universal reception, which this northern system of property for a long time obtained in this island; and which communicated itself, or at least its similitude, even to our very villeins and bondmen.

§ 498. 2. Surrender only conveyance of copyholds. — This method of conveyance is so essential to the nature of a copyhold estate, that it cannot possibly be transferred by any other assurance. No feoffment, fine, or recovery (in the king's court) has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at

<sup>c</sup> Cro. Jac. 568.

<sup>e</sup> Feud. l. 2. t. 2.

<sup>d</sup> Bro. Abr. tit. Tenant. per copie. 10.

the common law; but we must surrender to each other's use, and the lord will admit us accordingly. If I would devise a copyhold, I must surrender [368] it to the use of my last will and testament; and in my will I must declare my intentions, and name a devisee, who will then be entitled to admission.<sup>†</sup>\*

§ 499. 3. The several parts of conveyance by surrender.—In order the more clearly to apprehend the nature of this peculiar assurance, let us take a separate view of its several parts; the surrender, the presentment, and the admittance.

§ 500. a. Surrender.—A surrender, by an admittance subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention than a transfer of any interest in possession. For, till admittance of *cestuy que use*, the lord taketh notice of the surrenderer as his tenant; and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo* (conditionally); for he cannot pass away the land to any other, or make it subject to any other encumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser and punishable in an action of trespass: and if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto* can be confirmed. For though he be admitted in pursuance of the original surrender, and thereby acquires afterwards a sufficient and plenary interest as absolute owner, yet his second surrender previous to his own admittance is absolutely void *ab initio* (from the beginning); because at the time of such sur-

\* Ninth edition adds, "A fine or recovery had of copyhold lands in the king's court may indeed, if not duly reversed, alter the tenure of the lands, and convert them into frank-fee,<sup>h</sup> which is defined in the old book of tenures<sup>i</sup> to be 'land pleadable at the common law'; but upon an action on the case, in the nature of a writ of *deceit*, brought by the lord in the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold."<sup>i</sup> [<sup>h</sup> Old Nat. Brev. t. *briefe de recto clauso*. F. N. B. 13. <sup>i</sup> t. *tenir en franke-fee*. <sup>‡</sup> See vol. III. p. \*166.]

<sup>†</sup> Co. Copyh. § 36.

render he had but a possibility of an interest, and could therefore transfer nothing: and no subsequent admittance can make an act good, which was *ab initio* void. Yet, though upon the original surrender the nominee hath but a possibility, it is, however, such a possibility as may whenever he pleases be reduced to a certainty: for he cannot either by force or fraud be deprived or deluded of the effect and fruits of the surrender; but if the lord refuse to admit him, he is compellable to do it by a bill in chancery, or a *mandamus*:<sup>g</sup> and the surrenderer can in nowise defeat his grant; his hands being forever bound from disposing of the land [369] in any other way, and his mouth forever stopped from revoking or countermanding his own deliberate act.<sup>h</sup>

§ 501. b. Presentment.—As to the *presentment*: that, by the *general* custom of manors, is to be made at the next court-baron immediately after the surrender; but by *special* custom in some places it will be good, though made at the second or other subsequent court. And it is to be brought into court by the *same* persons that took the surrender, and then presented by the homage; and in all points material must correspond with the true tenor of the surrender itself. And therefore, if the surrender be conditional, and the presentment be absolute, both the surrender, presentment, and admittance thereupon are wholly void:<sup>i</sup> the surrender, as being never truly presented; the presentment, as being false; and the admittance, as being founded on such untrue presentment. If a man surrenders out of court, and dies before presentment, and presentment be made after his death, according to the custom, this is sufficient.<sup>k</sup> So, too, if *cestuy que use* dies before presentment, yet, upon presentment made after his death, his heir according to the custom shall be admitted. The same law is, if those, into whose hands the surrender is made, die before presentment; for, upon sufficient proof in court that such a surrender was made, the lord shall be compelled to admit accordingly. And if the steward, the tenants, or others into whose hands such surrender is made, refuse or neglect to bring it in to be presented, upon a petition preferred to the lord in his court-baron, the party grieved shall find remedy. But if the lord will not do him right

<sup>g</sup> 2 Roll. Rep. 107.

<sup>i</sup> Co. Copyh. 40.

<sup>h</sup> Co. Copyh. § 39.

<sup>k</sup> Co. Litt. 62.

and justice, he may sue both the lord, and them that took the surrender, in chancery, and shall there find relief.<sup>1</sup>

§ 502. **c. Admittance.**—[370] Admittance is the last stage, or perfection, of copyhold assurances. And this is of three sorts: first, an admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and thirdly, an admittance upon a descent from the ancestor.

§ 503. (1) **Admittance upon a voluntary grant.**—In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For, though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure, by granting an absolute fee simple, a freehold, or a chattel interest therein; and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord; yet if he will still continue to dispose of them as copyhold, he is bound to observe the ancient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration; for that were to create a new copyhold: wherefore in this respect the law accounts him custom's instrument. For if a copyhold for life falls into the lord's hands, by the tenant's death, though the lord may destroy the tenure and enfranchise the land, yet if he grants it out again by copy, he can neither add to nor diminish the ancient rent, nor make any the minutest variation in other respects:<sup>m</sup> nor is the tenant's estate, so granted, subject to any charges or encumbrances by the lord.<sup>n</sup>

§ 504. (2) **Admittance upon a surrender.**—In admittances upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument: and the tenant admitted shall likewise be subject to no charges or encumbrances of the lord; for his claim to the estate is solely under him that made the surrender.<sup>o</sup>

§ 505. (3) **Admittance upon a descent.**—And, as in admittances upon surrenders, so in admittances *upon descents* by the death of the ancestor, the lord [371] is used as a mere instrument; and, as no manner of interest passes into him by the sur-

<sup>1</sup> Co. Copyh. § 40.

<sup>m</sup> Co. Cop. § 41.

<sup>n</sup> 8 Rep. 63.

<sup>o</sup> 4 Rep. 27. Co. Litt. 59.

render or the death of his tenant, so no interest passes out of him by the act of admittance. And therefore neither in the one case, nor the other, is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material; since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial, acts, which every lord in possession is bound to perform.<sup>p</sup>

Admittances, however, upon surrender differ from admittances upon descent in this: that by surrender nothing is vested in *cestuy que use* before admittance, no more than in voluntary admittances; but upon descent the heir is tenant by copy immediately upon the death of his ancestor: not, indeed, to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant; but to most intents the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits; may punish any trespass done upon the ground;<sup>q</sup> nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases. For which reasons we may conclude, that the admittance of an heir is principally for the benefit of the lord, to entitle him to his fine, and not so much necessary for the strengthening and completing the heir's title. Hence, indeed, an observation might arise, that if the benefit, which the heir is to receive by the admittance, is not equal to the charges of the fine, he will never come in and be admitted to his copyhold in court; and so the lord may be defrauded of his fine. But to this we may reply in [372] the words of Sir Edward Coke,<sup>r</sup> "I assure myself, if it were in the election of the heir to be admitted or not to be admitted, he would be best contented without admittance; but the custom in every manor is in this point compulsory. For, either upon pain of forfeiture of their copyhold, or of incurring some great penalty, the heirs of copyholders are enforced, in every manor, to come into court and be admitted according to the custom, within a short time after notice given of their ancestor's decease."

<sup>p</sup> 4 Rep. 27. 1 Rep. 140.

<sup>r</sup> Copyh. § 41.

<sup>q</sup> 4 Rep. 23.



## CHAPTER THE TWENTY-THIRD. [373]

### OF ALIENATION BY DEVISE.

§ 506. **Conveyance by devise.**—The last method of conveying real property is by *devise*, or disposition contained in a man's last will and testament.<sup>1</sup> And, in considering this subject, I shall not at present inquire into the nature of wills and testaments, which are more properly the instruments to convey personal estates; but only into the original and antiquity of devising real estates by will, and the construction of the several statutes upon which that power is now founded.

§ 507. **1. Feudal restraints on power to devise.**—It seems sufficiently clear, that, before the Conquest, lands were devisable by will.<sup>a</sup> But, upon the introduction of the military tenures, the restraint of devising lands naturally took place, as a branch of

<sup>a</sup> Wright of Tenures. 172.

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<sup>1</sup> **Power to devise.**—The best account of the origin of wills in Roman law is in Maine's *Ancient Law*, c. 6, 7, pp. 166–231. For their history in England, see Digby's *History of the Law of Real Property*, esp. c. 8, pp. 298–312. The right to devise land may undoubtedly be considered a common-law right in America, the statute of 1540 having been passed before the settlement of the country, and applying from the beginning to all socage lands. All lands in the colonies were socage.

In most, if not all of the United States, the power to devise is expressly given and regulated by statute. As a rule, a person of full age and sound mind may dispose by will of all his property, except what is needed to pay his debts, or what is allowed as a homestead or otherwise given by law as privileged property to his wife and family. As to title by devise generally, see Jarman on Wills (Am. ed. by Perkins); Redfield on Wills; Redfield's *Leading Cases on the Law of Wills*; Cruise's *Digest*, tit. 38 (occupying the whole of vol. 6); 4 Kent, Lect., 68; 3 Washburn, c. 6, pp. 421–465 (top); 2 Hilliard, c. 90–98, inclusive; and latest and best on this subject, the treatment in Woerner, *American Law of Administration*, 2 vols.

An instrument may be partly a deed and partly a devise. If it passes a present interest, although the right to its possession and enjoyment may not accrue till some future time, it is a deed or contract; but if the instrument does not pass an interest or right till the death of the maker, it is a will or testamentary paper. (*Burlington University v. Barrett*, 22 Iowa, 60, with cases cited pp. 72, 73.)—HAMMOND.

the feudal doctrine of nonalienation without the consent of the lord.<sup>b</sup> And some have questioned, whether this restraint (which we may trace even from the ancient Germans<sup>c</sup>) was not founded upon truer principles of policy than the power of wantonly disinheriting the heir by will, and transferring the estate, through the dotage or caprice of the ancestor, from those of his blood to utter strangers. For this, it is alleged, maintained the balance of property, and prevented one man from growing too big or powerful for his neighbors; since it rarely happens [374] that the same man is heir to many others, though by art and management he may frequently become their devisee. Thus the ancient law of the Athenians directed that the estate of the deceased should always descend to his children; or, on failure of lineal descendants, should go to the collateral relations: which had an admirable effect in keeping up equality and preventing the accumulations of estates. But when Solon<sup>d</sup> made a slight alteration, by permitting them (though only on failure of issue) to dispose of their lands by testament, and devise away estates from the collateral heir, this soon produced an excess of wealth in some, and of poverty in others: which, by a natural progression, first produced popular tumults and dissensions; and these at length ended in tyranny, and the utter extinction of liberty; which was quickly followed by a total subversion of their state and nation. On the other hand, it would now seem hard, on account of some abuses (which are the natural consequence of free agency, when coupled with human infirmity) to debar the owner of lands from distributing them after his death, as the exigence of his family affairs, or the justice due to his creditors, may perhaps require. And this power, if prudently managed, has with us a peculiar propriety; by preventing the very evil which resulted from Solon's institution, the too great accumulation of property: which is the natural consequence of our doctrine of succession by primogeniture, to which the Athenians were strangers. Of this accumulation the ill effects were severely felt even in the feudal times: but it should always be strongly discouraged in a commercial country, whose welfare depends on the number of moderate fortunes engaged in the extension of trade.

<sup>b</sup> See pag. 57.

<sup>d</sup> Plutarch. in Vita Solon.

<sup>c</sup> Tacit. de Mor. Germ. c. 21.

However this be, we find that, by the common law of England since the Conquest, no estate, greater than for term of years, could be disposed of by testament;<sup>a</sup> except only in Kent, and in some ancient burghs, and a few particular manors, where their Saxon immunities by special indulgence subsisted.<sup>f</sup> And though the feudal restraint on alienations [375] by deed vanished very early, yet this on wills continued for some centuries after; from an apprehension of infirmity and imposition on the testator *in extremis* (in his last moments), which made such devises suspicious.<sup>g</sup> Besides, in devises there was wanting that general notoriety, and public designation of the successor, which in descents is apparent to the neighborhood, and which the simplicity of the common law always required in every transfer and new acquisition of property.

§ 508. 2. Devise of the use; Statute of Wills, 1540.—But when ecclesiastical ingenuity had invented the doctrine of uses, as a thing distinct from the land, uses began to be devised very frequently,<sup>h</sup> and the devisee of the use could in chancery compel its execution. For it is observed by Gilbert,<sup>i</sup> that, as the popish clergy then generally sat in the court of chancery, they considered that men are most liberal when they can enjoy their possessions no longer; and therefore at their death would choose to dispose of them to those who, according to the superstition of the times, could intercede for their happiness in another world. But, when the statute of uses<sup>j</sup> had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable: which might have occasioned a great revolution in the law of devises, had not the statute of wills been made about five years after, viz., 32 Hen. VIII, c. 1 (Wills, 1540), explained by 34 Hen. VIII, c. 5 (Wills, 1542), which enacted that all persons being seised in fee simple (except feme covert, infants, idiots and persons of nonsane memory)<sup>2</sup> might by will and testament in writing

<sup>a</sup> 2 Inst. 7.

<sup>h</sup> Plowd. 414.

<sup>f</sup> Litt. § 167. 1 Inst. 111.

<sup>i</sup> On Devises. 7.

<sup>g</sup> Glanv. l. 7. c. 1.

<sup>j</sup> 27 Hen. VIII. c. 10 (1535). See Dyer. 143.

<sup>2</sup> For the modern law of the testamentary capacity of married women, infants and insane persons, see notes on pp. \*497 and \*498, *post*.

devise to any other person, but not to bodies corporate, two-thirds of their lands, tenements, and hereditaments, held in chivalry, and the whole of those held in socage: which now, through the alteration of tenures by the statute of Charles the Second, amounts to the whole of their landed property, except their copyhold tenements.

§ 509. 3. **Devises to corporations for charitable uses.**—Corporations were excepted in these statutes, to prevent the extension of gifts in mortmain;<sup>3</sup> but now, by construction [376] of the statute 43 Eliz., c. 4 (Charitable Gifts, 1601), it is held, that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment*, rather than of a *bequest*. And indeed the piety of the judges hath formerly carried them great

**3 Statutes of mortmain.**—The statutes of mortmain never having been regarded as a part of our common law, or re-enacted in terms, and there being no power of a corporation to devise or make a will of any kind, in the very nature of the case the only question that can arise with us is not of the right of the testator to give, but that of the corporation to take a devise. And this depends on the general statutes of the state or the constitutive acts of the corporation. Most charters contain the power to take real estate requisite for the use of the corporation, or in cases where it is necessary to secure debts due it, etc. Some few have unlimited power to take it as an investment. A corporation may be formed under general incorporation acts for the purpose of buying and selling lands for profit, as well as for dealing in other property.

But it is conceived that the power of a corporation to take land by devise is not entirely free from question, where it is not given by positive law, and that it is going too far to say, as some of the books do, that they have the right at common law to take, hold and dispose of real property for any purposes not inconsistent with the object of their creation. Like most questions of the limitation upon free disposal of land, this has attracted little attention during the century in which our national domain has seemed inexhaustible, and public opinion is but just awakened to it. The natural consequence will be legislative, if not judicial, restraints upon any ownership that tends toward monopoly.

The statutes of mortmain as they are commonly reckoned are the following: (1) Magna Carta. 9 Hen. III, c. 36, A. D. 1225. (2) De Religiosis. 7 Edw. I, stat. 2, A. D. 1279. (3) Recoveries of land by default. Westm. 2, or 13 Edw. I, c. 32, A. D. 1285. (4) Proviso in *quia emptores*. 18 Edw. I, c. 3, A. D. 1290. (5) What shall be mortmain (lands purchased to the use of religious houses, etc.). 15 Rich. II, c. 5, 1392. (6) Of superstitious uses. 23 Hen. VIII, c. 10, A. D. 1532.—HAMMOND.

lengths in supporting such charitable uses;<sup>k</sup> it being held that the statute of Elizabeth, which favors appointments to charities, supercedes and repeals all former statutes,<sup>l</sup> and supplies all defects of assurances:<sup>m</sup> and therefore not only a devise to a corporation, but a devise by a copyhold tenant without surrendering to the use of his will,<sup>n</sup> and a devise (nay, even a settlement) by tenant in tail without either fine or recovery, if made to a charitable use, are good by way of appointment.<sup>o</sup>

§ 510. 4. Statute of Frauds, 1677.—With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law; which are so nicely constructed and so artificially connected together, that the least breach in any one of them disorders for a time the texture of the whole. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance: for so loose was the construction made upon this act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute.<sup>p</sup> To remedy which, the statute of frauds and perjuries, 29 Car. II, c. 3 (1677), directs, that all devises of lands and tenements shall not only be in writing, but signed by the testator, or some other person in his presence, and by his express direction; and be subscribed, in his presence, by three or four credible witnesses.<sup>4</sup> And a solemnity nearly similar is requisite for revoking a devise.\*

\* Ninth edition adds, "by writing; though the same may be also revoked by burning, canceling, tearing, or obliterating thereof by the devisor, or in his presence and with his consent: as likewise *impliedly*, by such a great and entire alteration in the circumstances and situation of the devisor, as arises from marriage and the birth of a child." [Christopher v. Christopher, Saccb. 6 Jul. 1771. Spragge v. Stone, at the Cockpit, 27 Mar. 1773, by Wilmot, de Grey and Parker. See page 502.]

<sup>k</sup> Ch. Prec. 272.

<sup>l</sup> Gilb. Rep. 45. 1 P. Wms. 248.

<sup>m</sup> Duke's Charit. Uses. 84.

<sup>n</sup> Moor. 890.

<sup>o</sup> 2 Vern. 453. Ch. Prec. 16.

<sup>p</sup> Dyer. 72. Cro. Eliz. 100.

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<sup>4</sup> A similar provision is incorporated into the statutes of all the American states, varying, however, as to the number of witnesses required, and as to the



§ 511. a. **Signing; witnesses.**—In the construction of this last statute, it has been adjudged that the testator's name, written with his own hand, at the beginning of his will, as, "I John Mills do make this my [377] last will and testament," is a sufficient signing, without any name at the bottom;<sup>a</sup> though the other is the safer way. It has also been determined, that though the witnesses must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times.<sup>r</sup> But they must all subscribe their names as witnesses *in his presence*, lest by any possibility they should mistake the instrument.<sup>s</sup> And, in one case determined by the court of king's bench,<sup>t</sup> the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses: for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will; for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This determination, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom, that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney whose very attendance made them creditors, or by the minister of the parish who had any demand for tithes or ecclesiastical dues (and these are the persons most likely to be present in the testator's last illness), and if in such case the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned the statute 25 Geo. II, c. 6 (Legatees, 1751), which restored both the competency and the credit of such *legatees*, by declaring void all legacies given to witnesses, and thereby re-

<sup>a</sup> 3 Lev. 1.

<sup>r</sup> Freem. 486. 2 Ch. Cas. 109. Pr. Ch. 185.

<sup>s</sup> 1 P. Wms. 740.

<sup>t</sup> Stra. 1253.

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further requirement that the witnesses shall subscribe in the presence of each other. Woerner, Administration (2d ed.), 66. The required number of attesting witnesses in England was reduced to two by the Wills Act, 1837.

moving all possibility of their interest affecting their testimony. The same statute likewise established the competency of *creditors*, by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court [378] and jury before whom such will shall be contested. And in a much later case<sup>a</sup> the testimony of three witnesses, who were creditors, was held to be sufficiently credible, though the land was charged with the payment of debts; and the reasons given on the former determination were said to be insufficient.

§ 512. **b. Specialty creditors.**—Another inconvenience was found to attend this new method of conveyance by devise; in that creditors by bond and other specialties, which affected the *heir* provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M., c. 14 (Wills, 1691), hath provided, that all wills, and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee simple or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void: and that such creditors may maintain their actions jointly against both the heir and the devisee.

§ 513. **5. Distinction between wills of land and of chattels.**—A will of lands, made by the permission and under the control of these statutes, is considered by the courts of law not so much in the nature of a testament, as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual *subscription* of the witnesses is not required by law,<sup>w</sup> though it is prudent for them so to do, in order to assist their memory when living and to supply their evidence when dead; but in devises of lands such subscription is now absolutely necessary by statute, in order to identify a conveyance, which in its nature can never be set up till after the death of the devisor. And upon this notion, that a devise affecting lands is merely a species of conveyance, is founded this distinction between such devises and testa-

<sup>a</sup> M. 31 Geo. II. 4 Bur. I. 430.

<sup>w</sup> See pag. 307.

ments of personal chattels;<sup>5</sup> that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estates as were his at the time of executing and publishing his will.<sup>x</sup> Wherefore no [379] after-purchased lands will pass under such devise,<sup>y</sup> unless, subsequent to the purchase or contract,<sup>z</sup> the devisor republishes his will.<sup>a</sup> <sup>6</sup>

x 1 P. Wms. 575. 11 Mod. 148.  
y Moor. 255. 11 Mod. 127.

z 1 Ch. Cas. 39. 2 Ch. Cas. 144.  
a Salk. 238.

5 **Devise as conveyance.**—Even the making of a will does not take away the distinction between real and personal property, as to the passage of title. If a man deviseth, either by special name or generally, goods or chattels, real or personal, and dieth, the devisee cannot take them without the assent of the executors. But when a man is seised of lands in fee and deviseth the same, in fee or tail, for life or for years, the devisee shall enter; for in that case the executor has no meddling therewith. And in the case of a devise by will of lands whereof the devisor is seised in fee, the freehold or interest in law is in the devisee before he enter, and in that case nothing (having regard to the estate or interest devised) descendeth to the heir. But if the heir of the devisor entereth and hold the devisee out, he may enter, as Littleton here saith (§ 167) or have his writ, called *Ex gravi querela*. After an actual possession this writ lieth not, for then the devisee may have his ordinary remedy by the common law. (Co. Litt. 111 c.)

Consistently with this doctrine it will be seen that in all the older books devise is treated quite apart from other matters relating to the will, and as a species of conveyance from the devisor directly to the devisee, with which the ecclesiastical courts, the proper forum for probate matters, had nothing to do. But the law does not cast the estate on the devisee as it does upon the heir, without reference to his own consent. The acceptance of the devisee will ordinarily be presumed, but he may disclaim it, and it will then go to the heir. (3 Washburn, c. 6, pl. 43. And see cases collected in n. 1, p. 461.)

"The earliest definite juristic conception which was formed of an English will of lands, seems to have been that it operated as a declaration of the testator's intention, as to the use or beneficial interest in lands; as in fact a conveyance of the particular beneficial interest intended to be dealt with. Thus a will of land has always been regarded as a conveyance of a particular interest, coming into operation immediately upon the death of the testator, and not as creating a succession in the sense of Roman law. . . . After the statute of Hen. VIII, a will operated as a conveyance, dealing with the legal interest possessed by the testator at the date of the will, and intended to be disposed of, but coming into effect only at his death, and being of course subject to revocation at any time before his death." (Digby, *Hist. of the Law of Real Property*, pp. 301-303.)—HAMMOND.

6 **Operation of devise.**—This view of a devise was no doubt due in the first place to historical facts: especially to the desire to keep devises of land

§ 514. Rules and maxims for construing conveyances.—We have now considered the several species of common assurances, whereby a title to lands and tenements may be transferred and conveyed from one man to another. But, before we conclude this head, it may not be improper to take notice of a few general rules and maxims, which have been laid down by courts of justice, for the construction and exposition of them all. These are,<sup>7</sup>

entirely free from the ecclesiastical jurisdiction over testamentary matters. It originated long before the statute of 32 Hen. VIII, c. 1, to which it has sometimes been ascribed. (Ld. Mansfield in Cowp. 90.) But it is now so completely obsolete, and wills of land and of chattels so generally identified, that both are regarded as speaking from the time of testator's death, and operating on all property, real or personal, then owned by him, even when this is not declared by statute, as it now is in most of the United States, and even in England. (Stat. 1 Vict., c. 26, § 24.) After-acquired lands pass by a will, unless a contrary intention shall appear in the will itself.

It is not a real, even if apparent exception to this rule (that the will speaks from the date of death) that when the testator's ability or capacity to make a will is in question, it is with reference to the date when the will offered was actually executed, and not to the date of death that the proof must be directed. A will made in sound mind is not shaken by subsequent incapacity. A will made in a fit of lunacy is not validated by his subsequent death in sound mind. A will made under disability remains invalid though the disability be removed before death. (Girard v. Philadelphia, 4 Rawle (Pa.), 323, 336, 26 Am. Dec. 145, and cases cited.) Of course the law at the time of death governs the interpretation of devises as well as bequests, and even the formalities of execution. In one respect, however, devises of real property must be distinguished from bequests of personalty. The latter are governed by the law of the domicile: the former by the law of the state in which they lie. This is a general principle of universal application; but is modified by statute in many states, which admit to proof and effect wills of land within their borders, executed in conformity with the law of the testator's domicile. How far this shall go in respect to effect must of course depend in each state upon the language of its statutes.—HAMMOND.

7 Principles of construction.—1. The rules for construing conveyances are correctly given by Blackstone. A modern statement of them would consist largely in annotations and in setting forth the variety of circumstances under which they have been applied. As to the intention of the parties, the rule is that the intention is to be ascertained by considering all the provisions of the deed, as well as the situation of the parties, and then, when practicable, to give effect to the intention so ascertained. Pike v. Munroe, 36 Me. 309, 58 Am. Dec. 751; Clute v. New York Cent. & H. R. R. Co., 120 N. Y. 267, 24 N. E. 317; Burnett v. Piercy, 149 Cal. 178, 86 Pac. 603. Chief Justice Shaw has

§ 515. 1. **Favorable to apparent intent.**—That the construction be *favorable*, and as near the minds and apparent intents of the parties as the rules of law will admit.<sup>b</sup> For the maxims of law are, that “*verba intentioni debent inscrivere* (words should be subservient to the intention)”; and “*benigne interpretamur chartas propter simplicitatem laicorum* (we interpret deeds favorably on account of the ignorance of the laity).” And therefore the construction must also be *reasonable*, and agreeable to common understanding.<sup>c</sup>

b And. 60.

c 1 Bulstr. 175. Hob. 304.

thus expressed the method to be adopted in arriving at the intent of the parties: “The same individual owning two tenements adjoining, may carve out and sell any portion that he pleases, and the terms of the grant, as they can be learned either by words clearly expressed, or by just and sound construction, will regulate and measure the rights of the grantee. In construing the words of such a grant, where the words are doubtful or ambiguous, several rules are applicable, all, however, designed to aid in ascertaining what was the intent of the parties, such intent, when ascertained, being the governing principle of construction.

“And first, as the language of the deed is the language of the grantor, the rule is, that all doubtful words shall be construed most strongly against the grantor, and most favorably and beneficially for the grantee. Again, every provision, clause and word in the same instrument shall be taken into consideration in ascertaining the meaning of the parties, whether words of grant, of covenant or description, or words of qualification, restraint, exception or explanation. Again, every word shall be presumed to have been used for some purpose, and shall be deemed to have some force and effect, if it can have. And further, although parol evidence is not admissible, to prove that the parties intended something different from that which the written language expresses, or which may be the legal inference and conclusion to be drawn from it, yet it is always competent to give in evidence existing circumstances, such as the actual condition and situation of the land, buildings, passages, water-courses, and other local objects, in order to give a definite meaning to language used in the deed, and to show the sense, in which particular words were probably used by the parties, especially in matters of description.” *Salisbury v. Andrews*, 19 Pick. (Mass.) 250, 252.

2. “A grammatical construction is not always to be followed, and it has been well said that neither false English nor bad Latin will make void a deed when the meaning of the party is apparent. In construing an instrument, that construction is always to be adopted which will accomplish the object for which the instrument was executed.” *Cope, J.*, in *Hancock v. Watson*, 18 Cal. 137, 139. *Cotting v. Boston*, 201 Mass. 97, 87 N. E. 205; *Jackson v. Topping*, 1



§ 516. 2. Words taken in ordinary sense.—That *quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est* (where there is no ambiguity in the words, they should be construed according to their obvious meaning):<sup>a</sup> but that, where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words*; *nam qui hæret in litera, hæret in cortice* (for he who confines himself to the letter, goes but half-way). Therefore, by a grant of a remainder a reversion may well

<sup>a</sup> 2 Saund. 157.

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Wend. (N. Y.) 388, 19 Am. Dec. 515. "Punctuation," says Mr. Justice Baldwin, "is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail; but the court will first take the instrument by its four corners in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it." *Ewing v. Burnet*, 11 Pet. (U. S.) 41, 54, 9 L. Ed. 624.

3. A deed should be construed in its entirety; it should be viewed as a whole; effect should be given to every part, if possible. If a person claims under a deed, he must accept it as a whole, and cannot adopt those parts which are favorable, and reject those that are unfavorable. *Lyford v. Laconia*, 75 N. H. 220, 139 Am. St. Rep. 680, 22 L. R. A. (N. S.) 1062, 72 Atl. 1085; *Davenport v. Gwilliams*, 133 Ind. 142, 22 L. R. A. 244, 31 N. E. 790; *Jones v. Pashby*, 62 Mich. 614, 29 N. W. 374; *Crocker v. Cotting*, 166 Mass. 183, 33 L. R. A. 245, 44 N. E. 214; *Young v. Camp Mfg. Co.*, 110 Va. 678, 66 S. E. 843.

4. "The plaintiffs insist that the part of the deed which precedes the granting clause manifests an intention of the grantor to convey the interest he owned in the lands or to which he was, by curtesy, entitled as tenant for life; and, further, that this theory is strengthened and made more tenable by the *habendum* clause. If this be true, then, bearing in mind what has been said of the granting clause, two conflicting intentions are expressed, and the deed should be construed according to the well-recognized rules of interpretation. One of the cardinal rules is that deeds of bargain and sale founded upon a valuable consideration are to be construed most strongly against the grantor and in favor of the grantee. *Seay v. McCormick*, 68 Ala. 549; 2 Devlin on Deeds, § 848; *Lamb v. Medsker*, 35 Ind. App. 662, 74 N. E. 1012; *Whetstone v. Hunt*, 78 Ark. 230, 8 Ann. Cas. 443, 93 S. W. 979; *Budd v. Brooke*, 3 Gill (Md.), 198, 43 Am. Dec. 321." *Denson, J.*, in *Dickson v. Van Hoose*, 157 Ala. 459, 19 L. R. A. (N. S.) 719, 47 South. 718.

5. In illustration of the rule that conveyances will, if possible, be given effect, the following case may be cited. A father gave and granted to his daughter, in consideration of love and affection, "all that tract of land constituting his residence in said county, to have and hold the aforesaid premises

pass, and *e converso*.\* And another maxim of law is, that "*mala grammatica non vitiat chartam* (bad grammar does not vitiate a deed); neither false English nor bad Latin will destroy a deed."

\* Hob. 27.

† 10 Rep. 133. Co. Litt. 223. 2 Show. 334.

after his death during her natural life." The grantor reserved the right of controlling the premises during his lifetime, and expressed his desire that at his daughter's death the property should be sold and divided between the balance of his children. In construing this instrument, the court said: "It is not easy to say what this instrument is. It has the form and general requisites of a deed, including the attestation. Construed as a deed, it would have validity and take effect; construed as a will, it would be a nullity, as it has but two witnesses, and the law requires three. We do not certainly know what it is. Its construction is very doubtful. Taking all its terms together, it would seem that the grantor intended to pass something presently, for he defines what it was his purpose to reserve, namely: the control during his own life. By control, he most probably meant possession, use and enjoyment; not absolute title, with power of disposition beyond the term of his own life. To hold the instrument to be a will would be to make the reservation altogether idle and useless. By holding it to be a deed, effect can be given to the reservation as a part of the instrument—to all the words, without rejecting any as superfluous. This, we think, is the safer and better construction." Bleckley, J., in *Dismukes v. Parrott*, 56 Ga. 513.

6. While the courts will avoid, if possible, a construction which will create a repugnance between different parts of a deed, *Chew v. Kellar*, 171 Mo. 215, 71 S. W. 172; if a deed contains two clauses clearly repugnant to each other, the first will prevail. *Blackwell v. Blackwell*, 124 N. C. 269, 32 S. E. 676; *Owensboro & N. R. Co. v. Griffith*, 92 Ky. 137, 17 S. W. 277. In the case of wills, however, the latter of two inconsistent dispositions must prevail. *Van Nostrand v. Moore*, 52 N. Y. 12; *Iglehart v. Kirwan*, 10 Md. 559; *Snively v. Stover*, 78 Pa. St. 484; *Orr v. Moses*, 52 Me. 287; *Brownfield v. Wilson*, 78 Ill. 467; *Holdefer v. Teifel*, 51 Ind. 343; *Hendershot v. Shields*, 42 N. J. Eq. 317, 3 Atl. 355; *Armstrong v. Crapo*, 72 Iowa, 604, 34 N. W. 437.

7. A summary of the rules of construction of wills may be found in 2 *Bigelow's Jarman on Wills*, \*1654 ff. Also see 2 *Woerner, Am. Law of Administration* (2d ed.), \*870 ff. For a full treatment of the principles of construction of deeds, see 2 *Devlin, Real Estate and Deeds* (3d ed.), 1504 ff. As a comment on the whole subject the remarks of Mr. Justice Sanderson are well worth observing: "In the construction of written instruments, we have never derived much aid from the technical rules of the books. The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as near as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it." *Walsh v. Hill*, 38 Cal. 481, 487.

Which perhaps a classical critic may think to be no unnecessary caution.

§ 517. 3. Effect to every part.—That the construction be made upon the entire deed, and not merely upon disjointed parts of it. “*Nam ex antecedentibus et consequentibus fit optima interpretatio* (for a deed is best interpreted by the bearing of all its parts).”<sup>g</sup> And [380] therefore that every part of it, be (if possible) made to take effect; and no word but what may operate in some shape or other.<sup>h</sup> “*Nam verba debent intelligi cum effectu, ut res magis valeat quem pareat* (for words should be understood with an effect that may tend more to strengthen than destroy the subject matter).”<sup>i</sup>

§ 518. 4. Taken most strongly against maker.—That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party. “*Verba fortius accipiuntur contra proferentem* (words should be taken most strongly against him who uses them).” As, if tenant in fee simple grants to anyone an estate for life, generally, it shall be construed an estate for the life of the grantee.<sup>j</sup> For the principle of self-preservation will make men sufficiently careful, not to prejudice their own interest by the too extensive meaning of their words: and hereby all manner of deceit in any grant is avoided; for men would always affect ambiguous and intricate expressions, provided they were afterwards at liberty to put their own construction upon them. But here a distinction must be taken between an indenture and a deed poll: for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, but the other party hath given his consent to every one of them. But in a deed poll, executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him.<sup>k</sup> And, in general, this rule being a rule of some strictness and rigor, is the last to be resorted to, and is never to be relied upon, but where all other rules of exposition fail.<sup>l</sup>

<sup>g</sup> 1 Bulstr. 101.

<sup>h</sup> 1 P. Wms. 457.

<sup>i</sup> Plowd. 156.

<sup>j</sup> Co. Litt. 42.

<sup>k</sup> *Ibid.* 134.

<sup>l</sup> Bacon's Elem. c. 3.

§ 519. 5. **Validity preferred.**—That, if the words will bear two senses, one agreeable to, and another against, law; that sense be preferred, which is most agreeable thereto.<sup>m</sup> As if tenant in tail lets a lease for life generally, it shall be construed for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

§ 520. 6. **Where clauses repugnant.**—<sup>(381)</sup> That, in a deed, if there be two clauses so totally repugnant to each other, that they cannot stand together, the first shall be received and the latter rejected:<sup>n</sup> wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand.<sup>o</sup> Which is owing to the different natures of the two instruments; for the first deed, and the last will are always most available in law. Yet in both cases we should rather attempt to reconcile them.<sup>p</sup>

§ 521. 7. **The devisor's intention to be attained.**—That a devise be most favorably expounded, to pursue, if possible, the will of the devisor, who for want of advice or learning may have omitted the legal or proper phrases. And therefore many times the law dispenses with the want of words in devises, that are absolutely requisite in all other instruments. Thus a fee may be conveyed without words of inheritance;<sup>q</sup> and an estate-tail without words of procreation.<sup>r</sup> By a will, also, an estate may pass by mere implication, without any express words to direct its course. As, where A devises lands to his heir at law, after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication;<sup>s</sup> for the intent of the testator is clearly to postpone the heir till after her death; and, if she does not take it, nobody else can. So, also, where a devise is of black-acre to A and of white-acre to B in tail, and if they both die without issue, then to C in fee; here A and B have *cross-remainders* by implication, and on the failure of either's issue, the other or his issue shall take the whole; and C's remainder over shall be postponed till the issue of both shall fail.<sup>t</sup> But, to avoid confusion,

<sup>m</sup> Co. Litt. 42.

<sup>n</sup> Hardr. 94.

<sup>o</sup> Co. Litt. 112.

<sup>p</sup> Cro. Eliz. 420. 1 Vern. 30.

<sup>q</sup> See pag. 108.

<sup>r</sup> See pag. 115.

<sup>s</sup> H. 13 Hen. VII. 17. 1 Ventr. 376.

<sup>t</sup> Freem. 484.

no such cross-remainders are allowed between more than two devisees:<sup>u</sup> and, in general, where any implications are allowed, they must be such as are *necessary* (or at least highly [382] *probable*) and not merely *possible* implication.<sup>w</sup> And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses,<sup>x</sup> is construed in each with equal favor and benignity, and expounded rather on its own particular circumstances, than by any general rules of positive law.

§ 522. Recapitulation of subject of common assurances.—And thus we have taken the transient view, in this and the three preceding chapters, of a very large and diffusive subject, the doctrine of common assurances: which concludes our observations on the *title* to things real, or the means by which they may be reciprocally lost and acquired. We have before considered the *estates* which may be had in them, with regard to their duration or quantity of interest, the time of their enjoyment, and the number and connections of the persons entitled to hold them: we have examined the *tenures*, both ancient and modern, whereby those estates have been, and are now, holden: and have distinguished the object of all these inquiries, namely, things real, into the corporeal or substantial, and incorporeal or ideal *kind*; and have thus considered the rights of real property in every light wherein they are contemplated by the laws of England. A system of laws that differs much from every other system, except those of the same feudal origin, in its

<sup>u</sup> Cro. Jac. 655. 1 Ventr. 224. 2 Show. 139.

<sup>w</sup> Vaugh. 262.

<sup>x</sup> Fitzg. 236. 11 Mod. 153.

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<sup>8</sup> Cross-remainders.—This restriction was done away with soon after Blackstone wrote, as is shown by a note of his first commentator, Christian. Lord Mansfield said that there was a presumption against cross-remainders between more than two, but the intention of the testator would defeat it. (Pery v. White, 2 Cowp. 777, 797, 98 Eng. Reprint, 1356; Doe v. Burville, 2 East, 47, 102 Eng. Reprint, 285; Atherton v. Pye, 4 Term Rep. 710, 100 Eng. Reprint, 1258.) Stronger evidence in favor of that intention is required of a cross-remainder among three or more, than when it is to two only. (Hannaford v. Hannaford, L. R. 7 Q. B. 116; Re Ridge's Trusts, L. R. 7 Ch. App. 665; Powell v. Howells, L. R. 3 Q. B. 654.)—HAMMOND.



notions and regulations of landed estates; and which therefore could in this particular be very seldom compared with any other.

The subject, which has thus employed our attention, is of very extensive use, and of as extensive variety. And yet, I am afraid, it has offered the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume. To say the truth, the vast alterations which the doctrine of real property has undergone from the Conquest to the present time; the infinite determinations upon points that continually arise, and which have been heaped one upon another for a course of seven centuries, without any order or [383] method; and the multiplicity of acts of parliament which have amended, or sometimes only altered the common law: these causes have made the study of this branch of our national jurisprudence a little perplexed and intricate. It hath been my endeavor principally to select such parts of it, as were of the most general use, where the principles were the most simple, the reasons of them the most obvious, and the practice the least embarrassed. Yet I cannot presume that I have always been thoroughly intelligible to such of my readers, as were before strangers even to the very terms of art, which I have been obliged to make use of: though, whenever those have first occurred, I have generally attempted a short explication of their meaning. These are indeed the more numerous, on account of the different languages which our law has at different periods been taught to speak; the difficulty arising from which will insensibly diminish by use and familiar acquaintance. And therefore I shall close this branch of our inquiries with the words of Sir Edward Coke:† “Albeit the student shall not at any one day, do what he can, reach to the full meaning of all that is here laid down, yet let him no way discourage himself but proceed; for on some other day, in some other place” (or perhaps upon a second perusal of the same), “his doubts will be probably removed.”

† *Præm.* to 1 *Inst.*

## CHAPTER THE TWENTY-FOURTH. [384]

### OF THINGS PERSONAL.

§ 523. **Former inferiority of things personal.**—Under the name of things *personal* are included all sorts of things *movable*, which may attend a man's person wherever he goes;<sup>1</sup> and therefore, being only the objects of the law while they remain within the limits of its jurisdiction, and being also of a perishable quality, are not esteemed of so high a nature, nor paid so much regard to by the

1 **Definition of things personal; choses in action.**—Blackstone's account of things personal has been criticised without any reference to his own limitation of the term "things" to the objects of the right of property, and to such as are "unconnected with the person" (2 Comm. 1); and therefore he has been accused of an error in not making his definitions large enough to include damages for purely personal wrongs, which are not things in his estimation. On the other hand, he has been judged by a definition which limited "things" to "permanent objects, sensible or perceptible through the senses" (Austin, Lect. xiii), and therefore accused of overlooking things incorporeal altogether. (Williams on Personal Property, p. 4.) A recent writer has even succeeded in combining the two objections in one. (Schouler on Personal Property, § 11.) Again, he has been criticised for choosing mobility as the distinctive mark of things personal, when Lord Coke had given him the choice between that and "for that they are to be recovered in personal actions" (Co. Litt. 118 b; Williams on Personal Property, \*2), and *per contra* has been criticised for not confining personal property more carefully to movables. (Amos, Systematic Jurisprudence, pp. 134, 135.) Mr. Rawle, the American editor of Williams, has defended Blackstone's position on this last question, without going into the inquiry as to the historical origin of the term.

I have expressed elsewhere my opinion as to the reasons that led Blackstone deliberately to reject all the civilian distinctions based on the difference of remedies *in rem* and *in personam*, and it is enough to say here that he would have been inconsistent with his plan, in choosing that definition. The one he adopts was perhaps the most important trait, when he wrote, of personal property in general, though it is of modern origin, and therefore unknown to the Roman law. It appears to have originated with the writers on the "conflict of laws" or Private International Law, who express it in the form *mobilia ossibus inhaerent* or *mobilia legibus domicilii judicantur*. (See Story, Conflict of Laws, §§ 377–379.) It is founded on the character of personal property as *movable*, which is by no means fully conclusive as a test, and has become of less importance since Blackstone wrote.

It is now very generally held that personal property may have its own situs. The right of a state to tax it, when within its jurisdiction, even though it may

law, as things that are in their nature more permanent and *immovable*, as lands, and houses, and the profits issuing thereout. These being constantly within the reach, and under the protection of the law, were the principal favorites of our first legislators: who took all imaginable care in ascertaining the rights, and directing the disposition, of such property as they imagined to be lasting, and which would answer to posterity the trouble and pains that their ancestors employed about them; but at the same time entertained a very low and contemptuous opinion of all personal estate, which they regarded only as a transient commodity. The amount of it indeed was, comparatively, very trifling, during the scarcity of money and the ignorance of luxurious refinements, which prevailed

be taxed also in the owner's domicile, is distinctly affirmed in *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475; and for many other purposes the *lex rei sitæ* is now extended to it.

It should be noticed that Blackstone does not use the term "property" for the *things*, but for the ownership or title to the things which constitute personal property in the modern sense. He treats in this chapter of property in the recent sense, and in the next of "property in things personal." The word itself is ambiguous, as Mr. Smith long ago pointed out (*Real and Personal Property*, p. 1; and compare Austin, ii. 816, 836), and leads to the same confusion of thought as that by which "tenements," "hereditaments," and other things real have been mixed up with the "estates" in them, as shown in a previous note. The same confusion now lurks under the ancient common-law distinction of "things in possession" and "things in action," and if it has not led Blackstone himself into a false classification, it has certainly sent some of his critics and improvers astray when they try to combine it with the distinction of things *corporeal* and things *incorporeal*, "objects of the sense and mere rights," in order to cover the forms of personal property, of which the common law knew nothing. (E. g., Schouler on *Personal Property*, § 11.) Kent's designation of things in action as *quasi tangible* (2 *Comm.* 340, n.) is much nearer the true notion. Wooddesson long ago pointed out that the two terms corresponded to the *jus in re*, *jus ad rem*, of the civilians, except that the latter was a distinction of rights (*jura*), and the common law expresses it as a distinction of the objects of rights, the things themselves. (2 *Lectures*, 235.) This last point must not be lost sight of in discussing our own law. It deserves attention, because some recent attempts to improve on Blackstone's classification of things personal seem to rest on the assumption that things in action and things incorporeal are of the same nature, or the one only an extension of the other. This leads to another great mistake—the identification of the thing in action with the right to the thing, which appears in so many forms in recent books, and even in the new codes of New York and other

in the feudal ages. Hence it was, that a tax of the *fifteenth, tenth*, or sometimes a much larger proportion, of all the movables of the subject, was frequently laid without scruple, and is mentioned with much unconcern by our ancient historians, though now it would justly alarm our opulent merchants and stockholders. And hence likewise may be derived the frequent forfeitures inflicted by the common [385] law, of all a man's goods and chattels, for misbehaviors and inadvertencies that at present hardly seem to deserve so severe a punishment. Our ancient law books, which are founded upon the feudal provisions, do not, therefore, often condescend to

states. (N. Y. 1885, §§ 502, 503.) The proof seems easy: all choses in action are *jura incorporalia*; all rights to things are *jura incorporalia*; therefore all choses in action are rights to things. Not only is the syllogism fallacious, but the first premise is also untrue. Whether in possession or in action, the thing or *chose* is always the object of a right, and not the right itself.

Blackstone never treats a chose in action as a mere right or title to choses in possession, or to other property, as it is so frequently regarded now. It is to him distinctly a kind of property, not of right to property. This is implied in his entire treatment of the subject, beginning with the first statement of the distinction in chapter 25, and carried out in his enumeration of the various titles to personal property, which are all placed in the same series and on the same level, whether they give title in possession or in action, as in chapter 30.

It need hardly be pointed out that this is inconsistent with any distinction between rights *in rem* and *in personam*. If he had intended to deny the existence of any such distinction in English law, he could hardly have done so more plainly. For example, in this chapter 30, the gift or grant transfers a title *in rem*, the property in the chattel or the chattel itself in possession; but the contract, as he himself says, gives property in action only, or in civilian terms rights *in personam*, obligations, or at the most rights *ad rem*. I cannot believe that Blackstone did this without being fully aware of its meaning. He saw that the common law recognized no such distinction between rights *in rem* and *in personam* as was fundamental in the civil law. This is more commonly stated in a different form, by saying that the common law recognized no right *in rem* to chattels. But this is not quite accurate. Property in chattels is not protected by so elaborate a system of actions as that in land was, while the real actions were in use, but it was essentially of the same nature where it existed. The most important difference was that property in land depended on seisin, which was very rigidly defined, while property in chattels might pass from one person to another without delivery of possession and even without formal act or writing of any kind.

Savigny has pointed out very clearly, in his *System* (§ 56, Bd. 1, pp. 371-375), that the distinction of *jura in rem* and *jura in personam*, or of property

regulate this species of property. There is not a chapter in Britton or the Mirror, that can fairly be referred to this head; and the little that is to be found in Glanvill, Bracton, and Fleta, seems principally borrowed from the civilians.

§ 524. *Modern importance of things personal.*—But of later years, since the introduction and extension of trade and commerce, which are entirely occupied in this species of property, and have greatly augmented its quantity and of course its value, we have learned to conceive different ideas of it. Our courts now regard a man's personalty in a light nearly, if not quite, equal to his realty: and have adopted a more enlarged and less technical mode of considering the one than the other; frequently drawn from the rules

and obligations, can only be fully carried out where actions *in rem* and *in personam* are kept distinct, and each preserved in its purity—and that when this is not done property rights may become merely the incidents of obligations (as in Domat's treatment), or obligations be treated as merely the mode of acquiring property rights. The latter condition seems to have been the primitive one in English (Germanic law) and justifies Blackstone's studied disregard of the division of rights themselves as above.

Mr. Williams (Personal Property, p. 4) was the first modern writer, I think, to point out the true nature of the "choses in action," after judges and authors had long been trying to decide whether notes and bills, bank stock, and other shares, etc., were in action or in possession by the mere test of assignability. Whether he is right in saying that incorporeal hereditaments were the only *res incorporales* known to the common law or not, must be discussed apart; but he is certainly right in saying that *res incorporales*, as such, were not choses in action. The latter always implied choses in possession: a thing in action was, so to speak, the complement, the shadow of the thing in possession, and it was a thing *in action*, because the very purpose of an action was to make of it a thing in possession, to the proper owner. But this was equally true whether the thing itself was corporeal or incorporeal.

It may be true, as Mr. Williams and others have said, that the common law originally dealt with tangible chattels only, and knew nothing of *res incorporales* except in the form of incorporeal *hereditaments* (Personal Property, p. \*2), yet we must not suppose this crude state of legal conceptions to have governed the formation of such a term as "choses in action." The date at which that term made its appearance could not have been before Bracton, for it was by him that the word "action" was introduced into English law. But Bracton and his contemporaries were familiar with the notion of *res incorporales*. No man of clerical education or of training in the civil and canon law could have been otherwise in the middle ages. Moreover, the word "choses"



which they found already established by the Roman law, wherever those rules appeared to be well-grounded and apposite to the case in question, but principally from reason and convenience, adapted to the circumstances of the times; preserving withal a due regard to ancient usages, and a certain feudal tincture, which is still to be found in some branches of personal property.

§ 525. Meaning of things personal, or chattels.—But things personal, by our law, do not only include things *movable*, but also something more: the whole of which is comprehended under the general name of *chattels*, which, Sir Edward Coke says <sup>a</sup> is a French

<sup>a</sup> 1 Inst. 118.

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is of itself a sufficient proof that tangible things were not the only ones then regarded. The identification of this word with *causa* (Lat.) is philologically certain, however different the meaning of the two afterward became; and neither *causa* nor *res* could ever have been used by an educated man for tangible things only. The chose in possession itself was not necessarily then a tangible object. Beside incorporeal hereditaments, the law was full of terms denoting mere abstractions which might be possessed, sued for, transferred. The very expressions *do ut facias*, etc., which Blackstone has copied from Bracton, are sufficient to show that something to be *done* (i. e., a mere act or prestation in civilian language), was a chose as well as something that could be *given*. The actions of debt and detinue, originally one, differentiated themselves as the object was a corporeal or incorporeal thing: though in both alike this object was a chose in action to the plaintiff, a chose in possession to the defendant. Whether freehold or chattel, corporeal or incorporeal, when “they are things whereof a man is not possessed, but for recovery of them is driven to his action, they are called things in action.” (*Termes de la Ley, sub voce.*)

It is not inconsistent with this that in the great majority of actual cases, the familiar actions by which most men’s notions of law are formed, the thing in possession was a tangible chattel, the thing in action a mere abstraction; but an abstraction, be it remembered, of that chattel, not of the *right* to it. It is probable, too, that as the middle ages with their realism gave place to later modes of thought, there was a tendency to limit the term “possession” to tangible objects, and to disregard abstractions generally. “Things” became less definitely the *objects* of rights, until Blackstone at last treated them as the objects of property rights only, “unconnected with the person.” (See note 3 to book 1, page 332, and introduction to Sandar’s Justinian, pp. l. lvi.) Thus the chose in action came to mean the object of any action for the recovery of money or property, of any right to have money or property not already in plaintiff’s possession, as it appears in the text.—HAMMOND.

word, signifying goods. The appellation is in truth derived from the technical Latin word "*catalla*"; which primarily signified only beasts of husbandry, or (as we still call them) *cattle*, but in its secondary sense was applied to all movables in general.<sup>b</sup> In the *grand coustumier* of Normandy<sup>c</sup> a *chattel* is described as a mere movable, but at the same time it is set in opposition to a fief or feud: so that not only goods, but whatever was not a feud, were accounted chattels. And it is in this latter, more [386] extended, negative sense, that our law adopts it; the idea of goods, or movables only, being not sufficiently comprehensive to take in everything that the law considers as a chattel interest. For since, as the commentator on the *coustumier*<sup>d</sup> observes, there are two requisites to make a fief or heritage, duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage or fief; or, according to us, is not a *real* estate: the consequence of which in both laws is, that it must be a personal estate, or chattel.

§ 526. Division of chattels.—Chattels, therefore, are distributed by law into two kinds: chattels *real*, and chattels *personal*.<sup>e</sup>

§ 527. 1. Chattels real.—Chattels *real*, saith Sir Edward Coke,<sup>f</sup> are such as concern, or savor of, the realty; as terms for years of land, wardships in chivalry (while the military tenures subsisted) the next presentation to a church, estates by statute-merchant, statute-staple, *elegit*, or the like; of all which we have already spoken. And these are called real chattels, as being interests issuing out

<sup>b</sup> Dufresne. II. 409.

<sup>c</sup> C 87.

<sup>d</sup> *Il conviendrait quil fust non mouuable, et de duree a tousiours* (it must be immovable and last forever). Fol. 107. a.

<sup>e</sup> So, too, in the Norman law, *Cateux sont meubles et immeubles: sicomme vrais meubles sont qui transporter se peuvent, et ensuivre le corps; immeubles sont choses qui ne peuvent ensuivre le corps, niestre transportees, et tout ce qui n'est point en heritage*. (Chattels are movable and immovable: those which can be transported and follow the person are movable; immovable chattels are such as cannot follow the person, or be transported from place to place; and everything which is not in the inheritance.) LL. Will. Nothi, c. 4. apud. Dufresne. II. 409.

<sup>f</sup> 1 Inst. 118.

of, or annexed to, real estates: of which they have one quality, viz., immobility, which denominates them *real*; but want the other, viz., a sufficient, legal, indeterminate duration: and this want it is that constitutes them *chattels*. The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income; so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life: their tenants were considered upon feudal principles, as merely bailiffs or farmers; and the tenant of the freehold might at any time have destroyed their interest, till the reign of Henry VIII.<sup>g</sup> A freehold, which alone is a real estate, and seems (as has been said) to answer to the fief in Normandy, is conveyed by corporal investiture and [387] livery of seisin; which gives the tenant so strong a hold of the land, that it never after can be wrested from him during his life, but by his own act, of voluntary transfer or of forfeiture; or else by the happening of some future contingency, as in estates *pur autre vie*, and the determinable freeholds mentioned in a former chapter.<sup>h</sup> And even these, being of an uncertain duration, may by possibility last for the owner's life; for the law will not presuppose the contingency to happen before it actually does, and till then the estate is to all intents and purposes a life estate, and therefore a freehold, interest. On the other hand, a chattel interest in lands, which the Normans put in opposition to fief, and we to freehold, is conveyed by no seisin or corporal investiture, but the possession is gained by the mere entry of the tenant himself; and it will certainly expire at a time prefixed and determined, if not sooner. Thus a lease for years must necessarily fail at the end and completion of the term; the next presentation to a church is satisfied and gone the instant it comes into possession, that is, by the first avoidance and presentation to the living; the conditional estates by statutes and *elegit* are determined as soon as the debt is paid; and so guardianships in chivalry expired, of course, the moment that the heir came of age. And if there be any other chattel real, it will be found to correspond with the rest in this essential quality, that its duration is limited to a time certain, beyond which it cannot subsist.

<sup>g</sup> See pag. 141, 142.

<sup>h</sup> Pag. 121.

§ 528. 2. **Chattels personal.**—Chattels *personal* are, properly and strictly speaking, things *movable*; which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion, and transferred from place to place. And of this kind of chattels it is that we are principally to speak in the remainder of this book; having been unavoidably led to consider the nature of chattels real, and their incidents, in the former chapters which were [388] employed upon real estates: that kind of property being of a mongrel amphibious nature, originally endowed with one only of the characteristics of each species of things; the immobility of things real, and the precarious duration of things personal.

Chattel interests being thus distinguished and distributed, it will be proper to consider, first, the nature of that *property*, or dominion, to which they are liable; which must be principally, nay solely, referred to personal chattels: and, secondly, the *title* to that property, or how it may be lost and acquired. Of each of these in its order.

## OF PROPERTY IN THINGS PERSONAL.

§ 529. **Property in possession.**—Property, in chattels personal, may be either in *possession*; which is where a man hath not only the right to enjoy, but hath the actual enjoyment of, the thing: or else it is in *action*; where a man hath only a bare right, without any occupation or enjoyment. And of these the former, or property in *possession*, is divided into two sorts, an *absolute* and a *qualified* property.

§ 530. 1. **Absolute property.**—First, then, of property in *possession absolute*; which is where a man hath, solely and exclusively, the right, and also the occupation, of any movable chattels; so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like: such, also, may be all *vegetable* productions, as the fruit or other parts of a plant, when severed from the body of it; or the whole plant itself when severed from the ground; none of which can be moved out of the owner's possession without his own act or consent, or at least without doing him an injury, which it is the business of the law to prevent or remedy. Of these, therefore, there remains little to be said.

§ 531. a. **Property in animals.**—But with regard to *animals*, which have in themselves a principle and power of motion, and (unless particularly confined) can convey themselves from one part of the world to [390] another, there is a great difference made with respect to their several classes, not only in our law, but in the law of nature and of all civilized nations.

§ 532. (1) **Tame animals.**—They are distinguished into such as are *domitæ*, and such as are *feræ, naturæ*: some being of a tame and others of a *wild* disposition. In such as are of a nature tame and domestic (as horses, kine, sheep, poultry, and the like), a man may have as absolute a property as in any inanimate beings; because these continue perpetually in his occupation, and will not stray



from his house or person, unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property: <sup>a</sup> in which our law agrees with the laws of France and Holland.<sup>b</sup> The stealing, or forcible abduction, of such property as this, is also felony; for these are things of intrinsic value, serving for the food of man, or else for the use of husbandry.<sup>c</sup> But in animals *feræ naturæ* a man can have no absolute property.

Of all tame and domestic animals, the brood belongs to the owner of the dam or mother; the English law agreeing with the civil, that "*partus sequitur ventrem* (the offspring follows the condition of the mother)" in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England,<sup>d</sup> as well as Rome,<sup>e</sup> "*si equam meam equus tuus prægnantem fecerit, non est tuum sed meum quod natum est* (if my mare be with foal by your horse, the offspring is not yours but mine)." And, for this, Puffendorf<sup>f</sup> gives a sensible reason: not only because the male is frequently unknown; but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with greater expense and care: wherefore, as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets; which belong equally to the owner of the cock and hen, and shall be divided between them.<sup>g</sup> But here the reasons of the general rule cease, [391] and "*cessante ratione cessat et ipsa lex* (the reason ceasing, the law itself ceases)": for the male is well known, by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage, during the time of pregnancy and nurture, than the owner of the other.

§ 533. 2. *Qualified property*.—Other animals, that are not of a tame and domestic nature, are either not the objects of property at all,<sup>1</sup> or else fall under our other division, namely, that of *quali-*

<sup>a</sup> 2 Mod. 319.

<sup>e</sup> Ff. 6. 1. 5.

<sup>b</sup> Vinn. in Inst. 1. 2. tit. 1. § 15.

<sup>f</sup> L. of N. l. 4. c. 7.

<sup>c</sup> 1 Hal. P. C. 511, 512.

<sup>g</sup> 7 Rep. 17.

<sup>d</sup> Bro. Abr. tit. Propertie. 29.

<sup>1</sup> The Case of Swans (1592), 7 Co. Rep. 15 b, 77 Eng. Reprint, 435; Hannam v. Mockett (1824), 2 Barn. & C. 934, 107 Eng. Reprint, 629; Reg. v. Read (1878), 3 Q. B. D. 131.

*fied, limited, or special property*: which is such as is not in its nature permanent, but may sometimes subsist, and at other times not subsist. In discussing which subject I shall, in the first place, show how this species of property may subsist in such animals as are *feræ naturæ*, or of a wild nature; and then, how it may subsist in any other things, when under particular circumstances.

§ 534. a. **Property in wild animals.**—First, then, a man may be invested with a qualified, but not an absolute, property, in all creatures that are *feræ naturæ*, either *per industriam*, *propter impotentiam*, or *propter privilegium* (by the industry of man, on account of the inability of the animal, or by reason of privilege).

§ 535. (1) **Property in wild animals per industriam.**—A qualified property may subsist in animals *feræ naturæ*, *per industriam hominis* (by the industry of man): by a man's *reclaiming* and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty. And under this head some writers have ranked all the former species of animals we have mentioned, apprehending none to be originally and naturally tame, but only made so by art and custom: as horses, swine, and other cattle; which if originally left to themselves, would have chosen to rove up and down, seeking their food at large,<sup>2</sup> and are only made domestic by use and familiarity; and are therefore, say they, called *mansueta*, *quasi manui assueta* (tame, as accustomed to the hand). But however well this notion may be founded, abstractedly considered, our law apprehends the most obvious distinction to be, between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitæ naturæ*; [392] and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *feræ naturæ*, though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. Such as are deer in a park, hares or rabbits in an inclosed warren, doves in a dovehouse, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks.

<sup>2</sup> Read v. Edwards (1864), 17 Com. B., N. S., 245, 258, 144 Eng. Reprint, 99.

These are no longer the property of a man, than while they continue in his keeping or actual possession: but if at any time they regain their natural liberty, his property instantly ceases; unless they have *animum revertendi* (the intention of returning), which is only to be known by their usual custom of returning.<sup>h</sup> A maxim which is borrowed from the civil law; <sup>1</sup> “*revertendi animum videntur desinere habere tunc, cum revertendi consuetudinem deseruerint* (they seem no longer to have the intention of returning when they forsake the custom).” The law therefore extends this possession further than the mere manual occupation; for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property; for he hath *animum revertendi*. So are my pigeons, that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester: all which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them.<sup>k</sup> But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure; or if a wild swan is taken, and marked and turned loose in the river, the owner’s property in him still continues, and it is not lawful for anyone else to take him:<sup>1</sup> but otherwise, if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *feræ naturæ*; but, when hived and reclaimed, a man may have a qualified property in them, by the law of nature, as well as by the civil law.<sup>m</sup> And to the same purpose, [393] not to say in the same words, with the civil law, speaks Bracton:<sup>n</sup> occupation, that is, hiving or including them, gives the property in bees; for, though a swarm lights upon my tree, I have no more property in them till I have hived them, than I have in the birds which make their nest thereon; and therefore if another hives them, he shall be their proprietor: but a swarm, which fly from and out of my hive, are mine so long as I can keep them in sight, and have power to pursue

<sup>h</sup> Bracton l. 2. c. 1. 7 Rep. 17.

<sup>i</sup> Inst. 2. 1. 15.

<sup>k</sup> Finch. L. 177.

<sup>1</sup> Crompt. of Courts. 167. 7 Rep. 16.

<sup>m</sup> Puff. l. 4. c. 6. § 5. Inst. 2. 1. 14.

<sup>n</sup> l. 2. c. 1. § 3.

them; and in these circumstances no one else is entitled to take them. But it hath been also said,<sup>o</sup> that with us the only ownership in bees is *ratione soli* (on account of the soil); and the charter of the forest,<sup>p</sup> which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.<sup>3</sup>

In all these creatures, reclaimed from the wildness of their nature, the property is not absolute, but defeasible: a property, that may be destroyed if they resume their ancient wildness, and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *feræ naturæ* again; and are free and open to the first occupant that has ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law, as if they were absolutely and indefeasibly mine: and an action will lie against any man that detains them from me, or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals:<sup>q</sup> but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing birds;<sup>r</sup> because their value is not intrinsic, but depending only on the caprice of the owner:<sup>s</sup> though it is such an invasion of property as may [<sup>394</sup>] amount to a civil injury, and be redressed by a civil action.<sup>t</sup> Yet to steal a reclaimed hawk is felony both by common law and statute;<sup>u</sup> which seems to be a relic of the tyranny of our ancient sportsmen.<sup>4</sup> And among our

<sup>o</sup> Bro. Abr. tit. Propertie. 37. cites 43 Edw. III. 24.

<sup>p</sup> 9 Hen. III. c. 13.

<sup>q</sup> 1 Hal. P. C. 512.

<sup>r</sup> Lamb. Eiren. 275.

<sup>s</sup> 7 Rep. 18. 3 Inst. 109.

<sup>t</sup> Bro. Abr. tit. Trespass. 407.

<sup>u</sup> 1 Hal. P. C. 512. 1 Hawk. P. C. c. 33.

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<sup>3</sup> Carta de Foresta (1217), c. 13 (Stubbs, Charters, p. 350); Hannam v. Mockett (1824), 2 Barn. & C. 934, 107 Eng. Reprint, 629.

<sup>4</sup> By modern legislation the protection of the criminal law is given to property in all species of confined animals. Larceny Act, 1861.

elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value; and the killing or stealing one was a grievous crime, and subjected the offender to a fine; especially if it belonged to the king's household, and was the *custos horrei regii* (the guard of the royal granary), for which there was a very peculiar forfeiture.<sup>w</sup> And thus much of qualified property in wild animals, reclaimed *per industriam*.

§ 536. (2) Property in wild animals propter impotentiam.—A qualified property may also subsist with relation to animals *feræ naturæ, ratione impotentia*, on account of their own inability. As when hawks, herons, or other birds build in my trees, or conies or other creatures make their nests or burrows in my land, and have young ones there; I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires: \* but, till then, it is in some cases trespass, and in others, felony, for a stranger to take them away.<sup>y</sup> For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined: for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him.

§ 537. (3) Property in wild animals propter privilegium.—A man may, lastly, have a qualified property in animals *feræ naturæ, propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion [395] of other persons. Here he has a transient property in these animals, usually called

<sup>w</sup> "Si quis felem, horrei regii custodem, occiderit vel furto abstulerit, felis summa cauda suspendatur, capite aream attingente, et in eam grana tritici effundantur, usquedum summitas caudæ tritico co-operiatur. (If anyone should kill or steal a cat, being the guard of the royal granary, the cat shall be suspended by the end of its tail, its head touching the floor, and they shall pour on it small measures of wheat until the tip of the tail be covered.)" Wotton. LL. Wall. 1. 3. c. 5. § 5. An amercement similar to which Sir Edward Coke tells us (7 Rep. 18.) there anciently was for stealing swans; only suspending them by the beak, instead of the tail.

\* Carta de Forest, 9 Hen. III. c. 13.

<sup>y</sup> 7 Rep. 17. Lamb. Eiren. 274.



game, so long as they continue within his liberty;<sup>z</sup> and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases. The manner in which this privilege is acquired will be shown in a subsequent chapter.

§ 538. **b. Property in air, light, and water.**—The qualified property which we have hitherto considered, extends only to animals *feræ naturæ*, when either reclaimed, impotent, or privileged. Many other things may also be the objects of qualified property. It may subsist in the very elements, of fire or light, of air, and of water. A man can have no absolute permanent property in these, as he may in the earth and land; since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another, and deprives him of the lawful enjoyment of these; if one obstructs another's ancient windows,<sup>a</sup> corrupts the air of his house or gardens,<sup>b</sup> fouls his water,<sup>c</sup> or unpens and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow;<sup>d</sup> the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession: for, when no man is engaged in their actual occupation, they become again common, and every man has an equal right to appropriate them to his own use.

§ 539. **c. Qualified property arising from circumstances.**—These kinds of qualification in property depend upon the peculiar circumstances of the subject matter, which is not capable of being under the absolute dominion of any proprietor. But property may also be of a qualified or special nature, on account of the peculiar

<sup>z</sup> Cro. Car. 554. Mar. 48. 5 Mod. 376. 12 Mod. 144.

<sup>a</sup> 9 Rep. 58.

<sup>b</sup> *Ibid.* 59. Lutw. 92.

<sup>c</sup> 9 Rep. 59.

<sup>d</sup> 1 Leon. 273. Skin. 389.

circumstances of the owner, when the thing itself is very capable of absolute ownership. [396] As in case of *bailment*, or delivery, of goods to another person for a particular use; as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering, or him to whom it is delivered: for the bailor hath only the right, and not the immediate possession, the bailee hath the possession, and only a temporary right. But it is a qualified property in them both; and each of them is entitled to an action, in case the goods be damaged or taken away: the bailee on account of his immediate possession; the bailor, because the possession of the bailee is, mediately, his possession also.\* So, also, in case of goods pledged or pawned upon condition, either to repay money or otherwise; both the pledgor and the pledgee have a qualified, but neither of them an absolute, property therein: the pledgor's property is conditional, and depends upon the performance of the condition of repayment, etc.; and so, too, is that of the pledgee, which depends upon its nonperformance.† The same may be said of goods distrained for rent, or other cause of distress: which are in the nature of a pledge, and are not, at the first taking, the absolute property of either the distrainor or party distrained; but may be redeemed, or else forfeited, by the subsequent conduct of the latter. But a servant, who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession either absolute or qualified, but only a mere charge or oversight.‡

§ 540. *Property in action: choses in action.*—Having thus considered the several divisions of property in *possession*, which subsists there only, where a man hath both the right and also the occupation of the thing; we will proceed next to take a short view of the nature of property in *action*, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question; the possession whereof may, however, be recovered by a suit or action at law: from whence the thing so recoverable is called

\* 1 Roll. Abr. 607.

‡ 3 Inst. 108.

† Cro. Jac. 245.

[397] a thing, or *chose*, in action.<sup>h 5</sup> Thus money due on a bond is a *chose* in action; for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises, or covenants with me, to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action: for though a right to some recompense vests in me, at the time of the damage

<sup>h</sup> The same idea, and the same denomination of property prevailed in the civil law. "*Rem in bonis nostris habere intelligimur, quotiens ad recuperandam eam actionem habeamus.* (We are supposed to have a property in our goods whenever we can have an action to recover them.)" (Ff. 41. 1. 52.) And again, "*æque bonis adnumerabitur etiam, si quid est in actionibus, petitionibus, persecutionibus. Nam et hæc in bonis esse videntur.* (All things to which we have a right by action, petition, or prosecution, are justly reckoned among our possessions. For these also appear to belong to us.)" (Ff. 50. 16. 49.)

5 Meaning of *chose* in action.—"It is to be observed that since the day when the French was the familiar language of our courts, the term 'chose in action' has been generally used to convey the same idea as 'right of action.' But it cannot be said that this phrase, however ancient and familiar, is a happy one. *Chose* in action literally means 'thing in action,' and 'right of action' does not embody the idea of 'thing' at all. Indeed, it is the very absence of the notion of 'thing' which is the chief characteristic of the mere right of action. In its essence the mere right of action is an intangible entity. . . . Rastell's *Termes de la Ley* is a book which, like St. Germain's *Doctor and Student*, reflects the common law at the close of the year-book period with much fidelity. In it is to be found a definition of *chose* in action which is worth noting. It is there said: 'Chose or thing in action is when a man hath cause or may bring an action for some duty due to him; as an action of debt upon an obligation, annuity, or rent, action of covenant or ward, trespass of goods taken away, beating or such like; and because they are things whereof a man is not possessed, but for recovery of them is driven to his action, they are called things in action.'

"If we let the mind dwell upon the situations which this old book fits to the term *chose* in action, it must strike us that 'chose' in sense of thing is a misnomer, and at most can be used only in a metaphorical sense. What is here meant is the *cause* or *right* of action, a conception as far removed from that of material thing as can possibly be. Still, it must be observed that there has always been a sort of mental difficulty in conceiving of the right of action in this highly abstract and immaterial sense. The visualizing faculty constantly impels us to think of the thing to be recovered, albeit only damages, as a specific material thing. Even Blackstone seems to have been unable to conceive of the *chose* in action in any other sense than that of a specific chattel

done, yet what and how large such recompense shall be, can only be ascertained by verdict; and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe that the property, or right of action, depends upon an *express* contract or obligation to pay a stated sum: and in the latter it depends upon an *implied* contract, that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected, that all property in action depends entirely

wrongfully withheld and recoverable by a proper action. Joshua Williams, a lucid and accurate writer, says, with perfect truth, that the chose in action is 'the liberty of proceeding in courts of law either to recover pecuniary damage for the infliction of a wrong or the nonperformance of a contract, or else to procure the payment of money due.' According to this definition the term 'chose in action' includes all personal rights of action arising either from the breach of a contract or from a tort, and there can be no question that such is its true import."—STREET, 3 Foundations of Legal Liability, 78.

"If we examine the nature of things in action, we shall soon see that they are merely claims enforceable at law; and that a man entitled to a thing in action has no *thing* (in the primary sense), and has not even anything which he can take. For example, in the case of a chose in action proper, as a debt, what is the thing, which is or lies in action, and which the person entitled thereto is said to have? It cannot be anything tangible, for the contracting of a debt (otherwise than by judgment and except to the crown) gives the creditor no interest whatever in, or charge upon, any money or other property of the debtor. If the debtor refuse payment, the creditor cannot take the amount due to him out of the debtor's money without committing theft; he has no legal remedy but to sue the debtor. When a debt is paid, the creditor ceases to have a chose in action: but the true effect of payment is not that the thing, which he had before in action, is handed over to him and so becomes a thing in possession. It is that the debtor's obligation is discharged and extinguished, and the former creditor (if paid in cash) acquires the ownership of certain coins, in which he previously had no interest at all. The thing, therefore, which lies in or is to be exacted by action, and which the creditor has, appears to be no tangible object, but to be the debtor's duty to pay the amount owing. That is to say, what the creditor has is the right to enforce an obligation, which has always been considered to be an incorporeal thing. The incorporeal nature of a debt is emphasized by the fact that the obligation to pay may be discharged by the debtor's bankruptcy. That the right which constitutes a debt is valuable is sufficiently apparent from the fact that people are found to pay money for its transfer to them. That the right is property is proved by the fact that it will pass under a bequest of all the creditor's property, or to the trustee, on the creditor's bankruptcy."—T. CYPRIAN WILLIAMS, "Prop-

upon contracts, either express or implied; which are the only regular means of acquiring a *chose* in action, and of the nature of which we shall discourse at large in a subsequent chapter.

At present we have only to remark, that upon all contracts or promises, either express or implied, and the infinite variety of cases into which they are and may be spun out, the law gives an action of some sort or other to the party injured in case of non-performance; to compel the wrongdoer to do justice to the party with whom he has contracted, and, on failure of performing the identical thing he engaged to do, to render a satisfaction equivalent to the damage sustained. But while the thing, or its equivalent, remains in suspense, and the injured party has only the right and not the occupation, it is called a *chose* in action; being a thing rather *in potentia* (in possibility) than *in esse* (in being): though the owner may have as absolute a property <sup>[398]</sup> in, and be as well entitled to, such things in action, as to things in possession.<sup>6</sup>

erty, Things in Action and Copyright," in 11 Law Quart. Rev. 223, 228. See, also, articles by H. W. Elphinstone, "What is a Chose in action?" 9 Law Quart. Rev. 311; by Charles Sweet, "Choses in Action," 10 Law Quart. Rev. 303; by Spencer Brodhurst, "Is Copyright a Chose in Action?" 11 Law Quart. Rev. 64. Professor Hammond has a learned note on the origin of property in action. (2 Hammond's Black. 612.)

Chose in action is defined in California Civil Code, § 953, as the right to recover money or other personal property by judicial proceeding. *Driscoll v. Driscoll*, 143 Cal. 528, 77 Pac. 471. It includes all debts and all claims for damages for breach of contract: *Bushnell v. Kennedy*, 9 Wall. 387, 19 L. Ed. 736; open or unliquidated accounts: *Sere v. Pitot*, 6 Cranch, 332, 3 L. Ed. 240; certificates of deposit: *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. Rep. 415; personal rights not reduced to possession, but recoverable by suit at law, including money due on bond, note, or other contract, damages due for breach of covenant, for the detention of chattels, or for torts: 2 Kent, Comm., 351. On the question of the assignability of choses in action see note, p. \*442, *post*.

<sup>6</sup> Chose in action and debt.—"Chose in action" is a known legal expression used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession." *Tarkington v. Magee*, [1902] 2 K. B. 427, 430. "It now includes all personal chattels which are not in possession: 11 App. Cas. 440. It includes an annuity: 3 Mer. 86; unless charged on land: 14 Sim. 76; consols: 1 Ves. Jun. 198; shares: 11 Ad. & E. 205; a ticket in a Derby sweepstakes: 8 Q. B. 134; all debts and all claims for damages for breach of contract: *Bushnell v. Kennedy*,



§ 541. **Time of enjoyment of personal property.**—And, having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment*, and the *number* of their *owners*; in conformity to the method before observed in treating of the property of things real.

First, as to the *time of enjoyment*. By the rules of the ancient common law, there could be no future property, to take place in expectancy, created in personal goods and chattels; because, being things transitory, and by many accidents subject to be lost, destroyed, or otherwise impaired, and the exigencies of trade requiring also a frequent circulation thereof, it would occasion perpetual suits and quarrels, and put a stop to the freedom of commerce, if such limitations in remainder were *generally* tolerated and allowed. But yet in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were per-

9 Wall. (U. S.) 387, 19 L. Ed. 736; open accounts or unliquidated accounts: *Sere v. Pitot*, 6 Cranch (U. S.), 332, 3 L. Ed. 240; *Wilkinson v. Wilkinson*, 2 Curt. 582, Fed. Cas. No. 17,677; contracts for the delivery of chattels or money: *Bushnell v. Kennedy*, 9 Wall. (U. S.) 387, 19 L. Ed. 736; certificates of deposit: *Basket v. Hassell*, 107 U. S. 602, 27 L. Ed. 500, 2 Sup. Ct. Rep. 415; a check on a bank: L. R. 6 Eq. 198; a personal right not reduced into possession but recoverable by a suit at law: 2 Kent, 351; a mere right of action as to a chattel, not in actual possession: *Yerby v. Lynch*, 3 Gratt. (Va.) 460, 494.—BOUVIER, 1 Law Dict. (Rawle's 3d rev.) 483.

The term "choses in action" may be used either in the broad sense of all rights of action, whether *ex contractu* or *ex delicto*, or in the narrower, but more general, sense as referring to assignable rights of action *ex contractu* and perhaps *ex delicto*, for injuries to property, but not for personal injuries. *Gibson v. Gibson*, 43 Wis. 23, 28 Am. Rep. 527.

"The phrases 'chose in action' and 'debt' are often used as synonymous. But they are rather correlative than synonymous. They represent the same thing, but viewed from opposite sides. The 'chose in action' is the right of the creditor to be paid, while the 'debt' is the obligation of the debtor to pay. This distinction is brought out in the common phrase, 'the *choses in action* and *debts* of a partnership, upon the death of one of the partners, survive.' Here both terms are used in the same sentence, but with opposite meanings: the former term signifying the firm's right to be paid certain sums of money, the latter signifying the firm's obligation to pay certain sums of money. Yet the term 'debt' is often used indiscriminately to convey both these ideas. Much confusion has resulted from the failure to observe this distinction, and perhaps

mitted:<sup>1</sup> though originally that indulgence was only shown, when merely the *use* of the goods, and not the goods themselves, was given to the first legatee;<sup>k</sup> the property being supposed to continue all the time in the executor of the devisor. But now that distinction is disregarded:<sup>1</sup> and therefore if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But where an estate-tail in things personal is given to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation.<sup>m</sup> For this, if allowed, would tend to a perpetuity, as the devisee or grantee in tail of a chattel has no method of barring the entail: and therefore the law vests in him at once the entire dominion of the goods, being analogous to the fee simple which a tenant in tail may acquire in a real estate.

§ 542. Number of owners of personal property.—[399] Next, as to the *number of owners*. Things personal may belong to their owners, not only in severalty, but also in joint tenancy, and in common, as well as real estates. They cannot, indeed, be vested in coparcenary; because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse, or other personal chattel, be given to two or more, absolutely, they

<sup>1</sup> 1 Equ. Cas. Abr. 360.

<sup>1</sup> 2 Freem. 206.

<sup>k</sup> Mar. 106.

<sup>m</sup> 1 P. Wms. 290.

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still more from the failure to notice carefully the essential characteristics of these several conceptions.

"The *chose in action*, or right of the creditor, is a personal right which adheres to him wherever his *situs* may be. It may for some purposes be his *legal situs* (or domicile), for others his *actual situs*. Just as, in the case of tangible chattels, though the *title* thereto follows the owner, and its transfer will be regulated by the law of the owner's *situs*, yet his or his transferee's *ability* to enforce that title may be in the exceptional cases determinable by a different system of law should the chattels be actually situated elsewhere; so also in the case of debts, though the *right* to enforce them follows the owner (the creditor), and his transfer is therefore to be governed by the law of his *situs*, actual or legal, yet his or his transferee's *ability* to enforce that right may depend upon another jurisdiction and system of law, if he has to resort to another state to sue the debtor. In other words, though the *situs* of the creditor's right follows the creditor, the *situs* of the debtor's obligation follows the debtor, in the sense that the debtor's legal obligation exists only in the state where it can be enforced against him."—MINOR, *Conflict of Laws*, 275.

are joint tenants hereof; and, unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements.<sup>n</sup> And, in like manner, if the jointure be severed, as by either of them selling his share, the vendee and the remaining part owner shall be tenants in common, without any *jus accrescendi* or survivorship.<sup>o</sup> So, also, if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common;<sup>p</sup> as we have formerly seen,<sup>q</sup> the same words would have done, in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking, by way of partnership in trade, shall always be considered as common and not as joint property; and there shall be no survivorship therein.<sup>r</sup><sup>7</sup>

<sup>n</sup> Litt. § 282. 1 Vern. 482.

<sup>q</sup> Pag. 193.

<sup>o</sup> Litt. § 321.

<sup>r</sup> 1 Vern. 217. Co. Litt. 182.

<sup>p</sup> 1 Equ. Cas. Abr. 292.

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<sup>7</sup> So far as the legal ownership is concerned, partners may be joint tenants of the partnership property; and, in such a case, the survivor or his representative can pass the legal ownership, and, if the conveyance is made in due exercise of his powers, or is made to an innocent purchaser for value, can give a good title. (Lindley, Partnership (7th ed.), p. 379; *West of England Bank v. Murch* (1883), 23 Ch. D. 138; *Re Clough* (1885), 31 Ch. D. 324.)—STEPHEN.  
2 Comm. (16th ed.), 13.

## CHAPTER THE TWENTY-SIXTH. [400]

### OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

§ 543. The modes of acquiring things personal.—We are next to consider the *title* to things personal, or the various means of *acquiring*, and of *losing*, such property as may be had therein: both which considerations of gain and loss shall be blended together in one and the same view, as was done in our observations upon real property; since it is for the most part impossible to contemplate the one, without contemplating the other also. And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift, or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

§ 544. 1. Title by occupancy.—And, first, a property in goods and chattels may be acquired by *occupancy*: which, we have more than once<sup>a</sup> remarked, was the original and only primitive method of acquiring any property at all; but which has since been restrained and abridged, by the positive laws of society, in order to maintain peace and harmony among mankind. For this purpose, by the laws of England, gifts, and contracts, testaments, legacies, and administrations have been introduced and countenanced, in order to transfer and continue that property and possession in things personal, which [401] has once been acquired by the owner. And, where such things are found without any other owner, they for the most part belong to the king by virtue of his prerogative; except in some few instances, wherein the original and natural right of occupancy is still permitted to subsist, and which we are now to consider.

§ 545. 1. Goods of alien enemy.—Thus, in the first place, it hath been said, that anybody may seize to his own use such goods as belong to an alien enemy.<sup>b</sup> For such enemies, not being looked upon as members of our society, are not entitled during their state

<sup>a</sup> See pag. 3. 8. 258.

<sup>b</sup> Finch, L. 178.

of enmity to the benefit or protection of the laws; and therefore every man that has opportunity is permitted to seize upon their chattels, without being compelled as in other cases to make restitution or satisfaction to the owner. But this, however generally laid down by some of our writers, must in reason and justice be restrained to such captors as are authorized by the public authority of the state, residing in the crown;<sup>c</sup> and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it hath been holden,<sup>d</sup> that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged, that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker; unless they were retaken the same day, and the owner before sunset puts in his claim of property.<sup>e</sup> Which is agreeable to the law of nations, as understood in the time of Grotius,<sup>f</sup> even with regard to captures made at sea, which were held to be the property of the captors after a possession of twenty-four hours; though the modern authorities<sup>g</sup> require that before the property can be changed, the goods must have been brought into port, [402] and have continued a night *intra præsidia*, in a place of safe custody, so that all hope of recovering them was lost.<sup>2</sup>

<sup>c</sup> Freem. 40.

<sup>d</sup> Bro. Abr. tit. Propertie. 38. Forfeiture. 57.

<sup>e</sup> *Ibid.*

<sup>f</sup> De j. b. & p. l. 3. c. 6. § 3.

<sup>g</sup> Bynkersh. Quæst. Jur. Publ. I. 4. Rocc. de Assecur. Not. 66.

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1 The Declaration of Paris, of 1856, greatly limited the former practice of valid capture at sea by abolishing privateering, that is, the authorization of private persons to make captures. The same document also protected enemies' goods carried in neutral ships, except in cases of contraband and blockade running.

2 By the modern usage of nations neither the twenty-four hours' possession, nor the prize *intra præsidia*, is sufficient to change the property in the case of a maritime capture. Until the capture becomes invested with the character of prize by a sentence of condemnation, the right of property is in abeyance. Wheaton, Internat. Law (4th Eng. ed.), § 359.



And, as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property, by taking him a prisoner in war: <sup>h</sup> at least till his ransom be paid.<sup>1</sup> And this doctrine seems to have been extended to negro servants,<sup>j</sup> who are purchased, when captives, of the nations with whom they are at war, and are therefore supposed to continue in some degree the property of their masters who buy them: though, accurately speaking, that property (if it indeed continues) consists rather in the perpetual *service*, than in the *body* or *person* of the captive.<sup>k</sup>

§ 546. 2. **Treasure-trove.**—Thus again, whatever movables are found upon the surface of the earth, or in the sea, and are unclaimed by any owner, are supposed to be abandoned by the last proprietor; and, as such, are returned into the common stock and mass of things: and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen,<sup>1</sup> are vested by law in the king, and form a part of the ordinary revenue of the crown.

§ 547. 3. **Light, air, and water.**—Thus, too, the benefit of the elements, the light, the air, and the water can only be appropriated by occupancy. If I have an ancient window overlooking my neighbor's ground, he may not erect any blind to obstruct the light: but if I build my house close to his wall, which darkens it, I cannot

<sup>h</sup> Bro. Abr. tit. Propertie. 18.

<sup>i</sup> We meet with a curious writ of trespass in the register (102.) for breaking a man's house, and setting such his prisoner at large. "*Quare domum ipsius A. apud W. (in qua idem A. quendam H. Scotum per ipsum A. de guerra captum tanquam prisonem suam, quousque sibi de centum libris, per quas idem H. redemptionem suam cum præfato A. pro vita sua salvanda fecerat, satisfactum foret detinuit) fregit, et ipsum H. cepit et abduxit, vel quo voluit abire permisit, etc.*" (Wherefore he broke into the house of the said A. at W. (in which the said A. detained a certain Scotchman named H., taken by him in battle, as his prisoner, until he should satisfy him in the sum of one hundred pounds, which he had agreed upon as his ransom with the aforesaid A. for saving his life) and took the said H. and carried him away, or permitted him to go wherever he pleased.)"

<sup>j</sup> 2 Lev. 201.

<sup>k</sup> Carth. 396. Ld. Raym. 147. Salk. 667.

<sup>1</sup> Book. I. ch. 8.

compel him to demolish his wall; for there the first occupancy is rather in him, than in me. If my neighbor <sup>[403]</sup> makes a tannery, so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is my own seeking, and may continue.<sup>3</sup> If a stream be unoccupied, I may erect a mill thereon, and detain the water; yet not so as to injure my neighbor's prior mill, or his meadow; for he hath by the first occupancy acquired a property in the current.

§ 548. 4. Wild animals.—With regard likewise to animals *feræ naturæ*, all mankind had by the original grant of the Creator a

3 Coming to a nuisance.—Blackstone declared (Commentaries, vol. II, p. 403) that if one fixes his habitation near a nuisance, he has no remedy for the damage which the nuisance causes him, on the ground of "*volenti non fit injuria*." This view has long been discredited, both in England (St. Helen's Smelting Co. v. Tipping (1865), 11 H. L. C. 642, 11 Eng. Reprint, 1482, 35 L. J. Q. B. 66; Bamford v. Turnley (1862), 3 B. & S. 62, 66, 122 Eng. Reprint, 25, 27), and in this country. (Hartbut v. McKone (1857), 55 Conn. 31, 3 Am. St. Rep. 17, 36 A. L. J. 168, 10 Atl. 164; Ladin & Rand Powder Co. v. Tearney (1890), 131 Ill. 322, 19 Am. St. Rep. 34, 7 L. R. A. 262, 23 N. E. 389; Susquehanna Fertilizer Co. v. Malone (1890), 73 Md. 268, 25 Am. St. Rep. 595, 9 L. R. A. 737, 20 Atl. 900; Bushnell v. Robeson (1883), 62 Iowa, 540, 17 N. W. 888; King v. Morris etc. Ry. Co. (1867), 18 N. J. Eq. 397; Campbell v. Seaman (1876), 63 N. Y. 568, 584, 20 Am. Rep. 567; Sherman v. Langham (1890), 13 S. W. 1042). If one property owner by devoting his premises to a particular trade, at a time when the surrounding property is vacant, can acquire a right to continue the business, however offensive it may be to dwellers coming into the neighborhood, then he has it in his power to virtually control the uses to which such property may be put, or to destroy its value.

Nor is it any answer for the defendant, whose use of his premises amounts to a nuisance, that the place is a convenient one for him and for the public. "In the eye of the law, no place can be convenient for the carrying on of a business which is a nuisance and which causes substantial injury to the property of another. Nor can any use of one's land be said to be a reasonable use, which deprives an adjoining owner of the lawful use and enjoyment of his property." (Susquehanna Fertilizer Co. v. Malone, 73 Md. 268, 277, 25 Am. St. Rep. 595, 9 L. R. A. 737, 20 Atl. 900. A contrary doctrine seems to be applied in Dolan v. Chicago etc. Ry. Co. (1903), 118 Wis. 362, 95 N. W. 385. But see Anderson v. Chicago etc. Ry. Co. (1902), 85 Minn. 337, 88 N. W. 1001.)—BURDICK, Torts (3d ed.), 462.

The above statement is approved in Jones v. F. S. Royster Guano Co., 6 Ga. App. 506, 65 S. E. 361.

right to pursue and take any fowl or insect of the air, any fish or inhabitant of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. And when a man has once so seized them, they become while living his *qualified* property, or, if dead, are *absolutely* his own: so that to steal them, or otherwise invade this property, is, according to their respective values, sometimes a criminal offense, sometimes only a civil injury. The restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals, which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

§ 549. 5. Emblements.—To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground, or other *emblements*, by any *possessor* [<sup>404</sup>] of the land who hath sown or planted it, whether he be owner of the inheritance in fee or in tail, or be tenant for life, for years, or at will: which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending personal chattels. They were devisable by testament before the statute of wills,<sup>m</sup> and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action:<sup>n</sup> and by the statute 11 Geo. II, c. 19 (Distress for Rent, 1737), though not by the common law,<sup>o</sup> they

<sup>m</sup> Perk. § 512.

<sup>n</sup> Bro. Abr. tit. Emblements. 21. 5 Rep. 116.

<sup>o</sup> 1 Roll. Abr. 666.

may be distrained for rent arrear. The reason for admitting the acquisition of this special property, by tenants who have temporary interests, was formerly given;<sup>p</sup> and it was extended to tenants in fee, principally for the benefit of their creditors: and therefore, though the emblements are assets in the hands of the executor, are forfeitable upon outlawry, and distrainable for rent, they are not in other respects considered as personal chattels; and particularly they are not the object of larceny, before they are severed from the ground.<sup>q</sup>

§ 550. 6. Accession.—The doctrine of property arising from *accession* is also grounded on the right of occupancy.<sup>4</sup> By the

<sup>p</sup> Pag. 122, 146.

<sup>q</sup> 3 Inst. 109.

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<sup>4</sup> Accession and confusion.—The general rule of accession is that the thing added goes with the principal thing. The subject is one which is regarded as difficult to reduce to precise rules, and the general rules which have been laid down are subject to qualifications and exceptions. *Lampton v. Preston*, 24 Ky. 454, 19 Am. Dec. 104; *Peirce v. Goddard*, 22 Pick. (Mass.) 559, 33 Am. Dec. 764. If the materials of one person are united by labor to the materials of another forming a joint product, the owner of the principal material acquires the right of property in the whole. *Pulcifer v. Page*, 32 Me. 404, 54 Am. Dec. 582; *Merritt v. Johnson*, 7 Johns. (N. Y.) 473, 5 Am. Dec. 289; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298, 305.

Sometimes the test of relative values is used in determining the ownership of a joint product. "No test which satisfied the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundred-fold, is of more importance in the adjustment than any chemical change or mechanical transformation, which, however radical, neither is expensive to the party making it, nor adds materially to the value." *Cooley, J.*, in *Wetherbee v. Green*, 22 Mich. 311, 320, 7 Am. Rep. 653.

Where by the labor of one man the property of another has been converted into a different species, so that its identity is lost, the title to the new product goes to the person effecting the change, if he believed the material to belong to him. Examples effecting a change of species are: When wheat is made into grain or into whisky, grapes into wine, olives into oil. Examples of changes not amounting to the creation of a new species are the making of leather into shoes, of cloth into garments, or timber into boards or shingles. *Lampton v. Preston*, 24 Ky. 454, 19 Am. Dec. 104; *Silisbury v. McCoon*, 4 Denio (N. Y.),

Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement:† but if the thing itself, by such operation, was changed into a different species, as by making wine, oil, or bread, out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction to the former proprietor for the materials, which he had so converted.\* And these doctrines are implicitly

† Inst. 2. 1. 25, 26, 31. Ff. 6. 1. 5.    \* Inst. 2. 1. 25. 34.

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332. Where the change was made by a willful trespasser, the original owner is entitled to recover the property, or its value in its new form. *Hyde & Everit v. Cookson*, 21 Barb. (N. Y.) 92; *E. E. Bolles Woodenware Co. v. United States*, 106 U. S. 432, 27 L. Ed. 230, 1 Sup. Ct. Rep. 398.

Where goods of similar character belonging to two persons are so mixed that the mass is indistinguishable, the two owners, if the mixture is through the consent of both parties, by mistake or accident, or the wrongful act of a stranger, have an interest in proportion to their respective shares. *Silsbury & Calkins v. McCoon & Sherman*, 6 Hill (N. Y.), 425, 41 Am. Dec. 753; *Moore v. Bowman*, 47 N. H. 494; *Bryant v. Ware*, 30 Me. 295. If the mixture has been brought about by the fault of one party there is some difference of opinion as to the rule to be applied. Lord Eldon, in *Lupton v. White*, 15 Ves. 432, 442, 33 Eng. Reprint, 817, said: "What are the cases in the old law of a mixture of corn or flour? If one man mixes his corn or flour with that of another and they were of equal value, the latter must have the given quantity, but if articles of different values are mixed, producing a third value, the aggregate of both, and through the fault of the person mixing them, the other party cannot tell what was the original value of his property, he must have the whole." Upon this Professor Williston remarks: "The first part of this quotation indicates that Lord Eldon thought that even if the confusion of similar goods was brought about by a tort, the wrongdoer would not be punished by losing all interest in the mass. Commenting upon this passage, Mr. Justice O. W. Holmes, before his elevation to the bench, wrote: 'This seems hardly borne out by the old cases, but would perhaps be followed, as there seems to be no substantial reason for depriving the wrongdoer of his whole property in such a case. *Hesseltine v. Stockwell*, 30 Me. 237, 50 Am. Dec. 627; *Moore v. Bowman*, 47 N. H. 494, 502; *Story, Bailm.*, § 40; *Ryder v. Hathaway*, 21 Pick. (Mass.) 298. But see *Spence v. Union Marine Ins. Co.*, L. R. 3 C. P. 427, 437, bottom. It may be observed also that it is hardly probable that Lord Eldon



copied and adopted by our Bracton,<sup>t</sup> in the reign of King Henry III; [405] and have since been confirmed by many resolutions of the courts.<sup>u</sup> It hath even been held, that if one takes away another's wife or son, and clothes them, and afterwards the husband or father retakes them back, the garments shall cease to be the property of him who provided them, being now annexed to the person of the child or woman.<sup>w</sup>

<sup>t</sup> 1. 2. c. 2. & 3.

<sup>u</sup> Bro. Abr. tit. Propertie. 23. Moor. 20. Poph. 38.

<sup>w</sup> Moor. 214.

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thought legal proceedings necessary for a partition in this instance.' 6 Am. L. Rep. 455. Chancellor Kent lays down the rule that where the goods of two persons are indistinguishably mingled, they become tenants in common if the mingling was by consent, but if made wrongfully by one of the owners, the common law gave the entire property to the other. 2 Kent, Comm., 264, 365." Williston, Sales, § 153 n.

This matter of confusion of goods finds one of its best applications in the case of grain elevators. On this subject Professor Williston speaks as follows: "It is the practice to mingle grain as it is brought into the elevator with grain of similar kind and quality, previously delivered by other owners. The authorities cited in the previous section make it clear that there is no reason why the depositor, by consenting to such practice, should lose the property in his grain unless it is so intended. It is the further practice of the elevators, however, to deliver from the mass, as called upon by holders of the warehouseman's receipts for the grain, such quantities as the receipts call for. The deliveries of grain to and by the warehouseman may result in the entire contents of the elevator being changed several times over before a particular depositor reclaims the grain which he deposited, so that we must deal with a situation where not only has the plaintiff's property been mingled with other property so that its identity is confused, but also the whole mass with which it was confused has given place to another mass of goods of the same sort. Even in this case, however, there seems no reason why the intention of the parties cannot be effectuated. That their intention is that the depositor shall retain a property right, there can be little doubt. It is the duty of the warehouseman to keep in his elevator sufficient grain to meet all outstanding receipts. The American cases clearly recognize the validity of the custom in use in regard to grain elevators, and give effect to the intention of the parties that the depositor shall retain title. (*Rahilly v. Wilson*, Fed. Cas. No. 11,532, 3 Dill. 420; *National Bank of Pontiac v. Langan*, 28 Ill. App. 401; *Woodward v. Semans*, 125 Ind. 330, 21 Am. St. Rep. 225, 25 N. E. 444; *Arthur v. Chicago, Rock Island & Pac. Ry.*, 61 Iowa, 648, 17 N. W. 24; *Moses v. Teetors*, 64 Kan. 149, 57 L. R. A. 267, 67 Pac. 526; *Ledyard v. Hibbard*, 48 Mich. 421, 42 Am. Rep. 474, 12 N. W.

§ 551. 7. *Confusion*.—But in the case of *confusion* of goods, where those of two persons are so intermixed, that the several portions can be no longer distinguished, the English law partly agrees with, and partly differs from, the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common, in proportion to their respective shares.<sup>x</sup> But, if one willfully intermixes his money, corn, or hay, with that of another man, without his approbation or knowledge, or casts gold in like manner into another's melting pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost.<sup>y</sup> But our law, to guard against fraud, allows no remedy in such a case; but gives the entire property, without any account, to him, whose original dominion is invaded, and endeavored to be rendered uncertain, without his own consent.<sup>z</sup>

§ 552. 8. *Copyright*.—There is still another species of property, which (if it subsists) being grounded on labor and invention, is more properly reducible to the head of occupancy than any

<sup>x</sup> Inst. 2. 1. 27, 28. 1 Vern. 217.

<sup>y</sup> Inst. 2. 1. 28.

<sup>z</sup> Poph. 38. 2 Bulstr. 325. 1 Hal. P. C. 513. 2 Vern. 516.

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637; Hall v. Pillsbury, 43 Minn. 33, 19 Am. St. Rep. 209, 7 L. R. A. 529, 44 N. W. 673; James v. Plank, 48 Ohio St. 255, 26 N. E. 1107; McBee v. Caesar, 15 Or. 62, 13 Pac. 652; Savage v. Salem Mills Co., 48 Or. 1, 10 Ann. Cas. 1065, 85 Pac. 69; Millhiser Mfg. Co. v. Gallego Mills Co., 101 Va. 579, 44 S. E. 760; Young v. Miles, 20 Wis. 615, 23 Wis. 643. See, also, Bretz v. Diehl, 117 Pa. St. 589, 2 Am. St. Rep. 706, 11 Atl. 893. Compare South Australian Ins. Co. v. Randell, L. R. 3 P. C. 101. . . . For a full discussion of the principles involved in the storage of grain in elevators, see an article in 6 Am. L. Rep. 450, which, though not signed, is known to have been written by O. W. Holmes, now an associate justice of the supreme court of the United States.) The warehouseman is thus a bailee to keep the grain with power to change the bailor's ownership in severalty into a tenancy in common of a larger mass and back again, and with a continuous power of sale, substitution and resale. At any given moment, however, all the holders of receipts for the grain are tenants in common of the amount in store, the share of such being proportionate to the amount of his receipts as compared with the total number of receipts outstanding."—WILLISTON, Sales, § 154.

other;<sup>5</sup> since the right of occupancy itself is supposed by Mr. Locke,<sup>a</sup> and many others,<sup>b</sup> to be founded on the personal labor of the occupant. And this is the right, which an author may be supposed to have in his own original literary compositions: so that no other person without his leave may publish or make profit of the copies.<sup>6</sup> When a man by the exertion of his rational powers has produced an original work, he has clearly [406] a right to dispose of that identical work as he pleases, and any attempt to take it

<sup>a</sup> On Gov. part 2. ch. 5.

<sup>b</sup> See page 8.

**5 Trademarks.**—"The right to the exclusive use of particular *distinctive trademarks*, or of a particular partnership firm (7 Sim. 421), for enabling the public to know if it is dealing with, or buying the manufactures of, a particular person, is somewhat analogous to literary copyright, and, though partially founded on the notion of protecting the public from fraud (3 Myl. & Cr. 338; 8 Sim. 477), is an example of a right much more evidently arising out of occupancy. (See 3 Doug. 293; 3 B. & Cr. 541; 2 Ves. & B. 218; 2 Keen, 213; 3 Myl. & Cr. 1, 338; 5 Scott, N. R., 562)." Sweet, in 2 Wendell's Blackstone, 405 n. Trademarks in Great Britain are now governed by the Trademarks Act, 1905. See 2 Stephen's Comm. (16th ed.), 58. The office of a trademark is to point out the origin or ownership of the article to which it is affixed; or, in other words, to give notice who was the producer. *Brown Chemical Co. v. Meyer*, 139 U. S. 540, 35 L. Ed. 247, 11 Sup. Ct. Rep. 625. The exclusive right to a trademark or device does not rest on invention, but on such use as makes it point out the origin of the claimant's goods, and must be early enough for that. *Tetlow v. Tappan*, 85 Fed. 774. A trademark may be part of the goodwill of a firm, and a transfer of all the property of a business carries the right to use all the trademarks used in it. *Menendez v. Holt*, 128 U. S. 514, 32 L. Ed. 526, 9 Sup. Ct. Rep. 143; *Williams v. Farrand*, 88 Mich. 473, 14 L. R. A. 161, 50 N. W. 446; *Fish Bros. Wagon Co. v. La Belle Wagon Works*, 82 Wis. 546, 33 Am. St. Rep. 72, 16 L. R. A. 453, 52 N. W. 595.

**6 Copyright.**—As Blackstone states, much doubt has existed whether copyright in published books existed at common law. "Much discussion of the principles involved in the question of 'copyright at common law' may be found in the great case of *Jefferys v. Boosey* (1854), 4 H. L. C. 815, 10 Eng. Reprint, 681, where, however, it is unavoidably mixed up with points of detail arising on the facts. The arguments for and against the existence of such a right are most distinctly put in the opinions of Erle, J., Maule, J., and Coleridge, J. (*pro*); and Pollock, C. B., Lord Brougham, and Lord St. Leonards (*contra*). The negative conclusion is now generally accepted by lawyers. Mr. Herbert Spencer, whose philosophy of political and legal institutions really belongs to the eighteenth century, has consistently maintained the older view." Pollock, *First Book of Jurisprudence*, 189 n. The law of copyright in Great Britain

from him, or vary the disposition he has made of it, is an invasion of his right of property. Now, the identity of a literary composition consists entirely in the *sentiment* and the *language*; the same conceptions, clothed in the same words, must necessarily be the same composition: and whatever method be taken of conveying that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so conveyed; and no other man (it hath been thought) can have a right to convey or transfer it without his consent, either tacitly or expressly given. This consent may perhaps be tacitly given, when

is now mainly governed by the Copyright Act, 1907. See 2 Stephen's Comm. (16th ed.), 41 ff.

The supreme court of the United States has stated the American law of copyright as follows: "As a result of the decisions of this court certain general propositions may be affirmed. Statutory copyright is not to be confounded with the common-law right. At common law the exclusive right to copy existed in the author until he permitted a general publication. Thus, when a book was published in print, the owner's common-law right was lost. At common law an author had a property in his manuscript, and might have an action against anyone who undertook to publish it without authority. The statute created a new property right, giving to the author, after publication, the exclusive right to multiply copies for a limited period. This statutory right is obtained in a certain way and by the performance of certain acts which the statute points out. That is, the author having complied with the statute and given up his common-law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right; it created a new one." *Caliga v. Inter-Ocean Newspaper Co.*, 215 U. S. 182, 188, 54 L. Ed. 150, 30 Sup. Ct. Rep. 38.

The constitution of the United States (art. 1, § 8) has authorized Congress "to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and inventions." Copyright is now secured by the act of March 4, 1909. A succinct statement of the provisions of this law may be found in 1 Bouvier's Law Dict. (Rawle's 3d Rev.), 674. Copyright is for twenty-eight years from the date of first publication. The copyright may be renewed for an additional period of twenty-eight years by the author, or if not living, by his widow or children, or in default thereof, by his executor or next of kin. See Bowker, Copyright, Its Hist. and Law, with especial reference to the American Code of 1909 and the British Act of 1911.

an author permits his work to be published, without any reserve of right, and without stamping on it any marks of ownership: it is then a present to the public, like the building of a church, or the laying out a new highway: but, in case of a bargain for a single impression, or a total sale or gift of the copyright, in the one case the reversion hath been supposed to continue in the original proprietor; in the other the whole property, with all its exclusive rights, to be perpetually transferred to the grantee. On the other hand, it is urged, that though the exclusive property of the manuscript, and all which it contains, undoubtedly belongs to the author, *before* it is printed or published; yet from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates; as being a right of too subtile and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged, that if one man wrote anything, though never so elegantly, on the paper or parchment of another, the writing should belong to the original owner of the materials on which it was written:<sup>c</sup> meaning certainly [407] nothing more thereby than the mere mechanical operation of writing, for which it directed the scribe to receive a satisfaction; especially as in works of genius and invention, such as a picture painted on another man's canvas, the same law<sup>d</sup> gave the canvas to the painter. We find no other mention in the civil law of any property in the works of the understanding, though the sale of literary copies, for the purposes of recital or multiplication, is certainly as ancient as the times of Terence,<sup>e</sup> Martial,<sup>f</sup> and Statius.<sup>g</sup> Neither with us in England

<sup>c</sup> *Si in chartis membranisque tuis carmen vel historiam vel orationem Titius scripserit, hujus corporis non Titius sed tu dominus esse videris.* (If Titius shall have written any poem, history, or speech on your paper or parchment, the manuscript belongs to you, not to him.) Inst. 2. 1. 33.

<sup>d</sup> *Ibid.* § 34.

<sup>e</sup> Prol. in Eunuch. 20.

<sup>f</sup> Epigr. i. 67. iv. 72. xiii. 3. xiv. 194.

<sup>g</sup> Juv. vii. 83.



hath there been (till very lately) any final<sup>b</sup> determination upon the right of authors at the common law.

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Ann., c. 19 (Copyright, 1709) (amended by statute 15 Geo. III. c. 53—Copyright, 1774), hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, and no longer;<sup>1</sup> and hath also protected that property by additional penalties and forfeitures: directing, further, that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration: and a similar privilege is extended to the inventors of prints and engravings, for the term of eight and twenty years, by the statutes 8 Geo. II. c. 13 (Engraving, Copyright, 1734), and 7 Geo. III. c. 38 (Engraving, Copyright, 1766).<sup>7</sup> All which parliamentary protec-

<sup>b</sup> [The following note appeared in the eighth edition:] Since this was written, it was determined in the case of *Miller v. Taylor* in B. R. Pasch. 9 Geo. III. 1769, that an exclusive copyright in authors subsisted by the common law. But afterwards, in the case of *Donaldson v. Becket*, before the house of lords, which was finally determined 22 Febr. 1774, it was held that no copyright subsists in authors, after the expiration of the several terms created by the statute of Queen Anne. [But the note first appeared in the fourth edition in this shape: "In the case of *Miller v. Taylor* in B. R. Pasch. 9 Geo. III. it was determined (upon solemn argument and great consideration) by the opinion of three judges against one, that an exclusive copyright in authors subsists by the common law. But a writ of error hath been since brought in the exchequer chamber, to take the sense of the rest of the judges upon this nice and important question.]

<sup>1</sup> By statute 15 Geo. III. c. 53, some additional privileges in this respect are granted to the universities, and certain other learned societies.

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<sup>7</sup> Patent rights.—The early history of patent law in England may be found in an article in 12 Law Quart. Rev. 141, and the provisions of the Patents and Designs Act of 1907 may be found discussed in 2 Stephen's Comm. (16th ed.), 26 ff.

The provision of the United States Constitution (art. 1, § 8) quoted in the last note empowers Congress to grant letters patent to inventors for limited periods of time. The act of July 8, 1870, repealed all previous laws, and, with amendments of minor importance, is the prevailing law on the subject. The grant of letters patent is for seventeen years. The law provides for the granting of a patent to the first inventor or discoverer of any new and useful art

tions appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I, c. 3 (1623), which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held that a temporary property therein becomes vested in the king's patentee.<sup>1</sup> \*

\* First edition read, "But much may be gathered from the frequent injunction of the court of chancery, prohibiting the invasion of this property: especially where either the injunctions have been *perpetual*,<sup>b</sup> or have related to unpublished manuscripts,<sup>i</sup> or to such ancient books, as were not within the provisions of the statute of Queen Anne.<sup>k</sup> Much may also be collected from several legislative recognitions of copyrights;<sup>l</sup> and from those adjudged cases at common law, wherein the crown hath been considered as invested with certain prerogative copyrights;<sup>m</sup> for, if the crown is capable of an exclusive right in any one book, the subject seems also capable of having the same right in another.

"But, exclusive of such copyright as may subsist by the rules of the common law, the statute 8 Ann. c. 19, hath protected by additional penalties the property of authors and their assigns for the term of fourteen years; and hath directed that if, at the end of that term, the author himself be living, the right shall then return to him for another term of the same duration: and a similar privilege is extended to the inventors of prints and engravings, for the term of fourteen years, by the statute 8 Geo. II. c. 13. Both which appear to have been copied from the exception in the statute of monopolies, 21 Jac. I. c. 3, which allows a royal patent of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof a temporary property becomes vested in the patentee." [h Knaplock v. Curl. 9 Nov. 1722. Viner Abr. tit. Books, pl. 3.—Baller v. Watson. 6 Dec. 1737. i Webb v. Rose. 24 May, 1732.—Pope v. Curl. 5 Jun. 1741.—Forrester v. Waller. 13 Jun. 1741.—Duke of Queensbury v. Shebbeare. 31 July, 1758. k Knaplock v. Curl. before cited.—Eyre v. Walker. 9 Jun. 1735.—Motte v. Faulkner. 28 Nov. 1735.—Walthoe v. Walker, 25 Jan. 1736.—Tonson v. Walker. 12 May, 1739; and 30 Apr. 1752. l A. D. 1649. c. 60. Scobell. 92. 13 & 14 Car. II. c. 33. 10 Ann. c. 19, § 112. 5 Geo. III. c. 12. § 26. m Cart. 89. 1 Mod. 257. 4 Burr. 661. n 1 Vern. 62.]

i 1 Vern. 62.

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or process, machine, manufacture or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented, or described in any printed publication in this or any foreign country before his invention or discovery thereof, and not in public use or on sale for more than two years prior to his application, unless the same is proved to have been abandoned. The adjudications on the many questions involved in the application of the patent laws may be found concisely set forth in 3 Bouvier's Law Dict. (Rawle's 3d Rev.), 2514.

## CHAPTER THE TWENTY-SEVENTH. [408]

### OF TITLE BY PREROGATIVE, AND FORFEITURE.

§ 553. II. Title by prerogative.—A second method of acquiring property in personal chattels is by the *king's prerogative*: whereby a right may accrue either to the crown itself, or to such as claim under the title of the crown, as by grant or by prescription.

§ 554. 1. Taxes and customs.—Such, in the first place, are all *tributes, taxes, and customs*; whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis* or ancient royal revenue, or whether they be occasionally created by authority of parliament; of both which species of revenue we treated largely in the former volume. In these the king acquires and the subject loses a property the instant they become due; if paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither also may be referred all forfeitures, fines, and amercements due to the king, which accrue by virtue of his ancient prerogative, or by particular modern statutes: which revenues created by statute do always assimilate, or take the same nature, with the ancient revenues; and may therefore be looked upon as arising from a kind of artificial or secondary prerogative. And, in either case, the owner of the thing forfeited, and the person fined or amerced, lose and part with the property of the forfeiture, fine, or amercement, the instant the king or his grantee acquires it.

§ 555. 2. King cannot be joint owner.—[409] In these several methods of acquiring property by prerogative there is also this peculiar quality, that the king cannot have a *joint* property with any person in one entire chattel, or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king can, neither by grant nor contract, become a joint tenant of a chattel real with another person;<sup>a</sup> but by such grant

<sup>a</sup> See pag. 184.

or contract shall become entitled to the whole in severalty. Thus, if a horse be given to the king and a private person, the king shall have the sole property: if a bond be made to the king and a subject, the king shall have the whole penalty; the debt or duty being one single chattel;<sup>b</sup> and, so, if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king, or is attainted, whereby his moiety is forfeited to the crown; the king shall have the entire horse, and entire debt.<sup>c</sup> For, as it is not consistent with the dignity of the crown to be partner with a subject, so neither does the king ever lose his right in any instance; but, where they interfere, his is always preferred to that of another person:<sup>d</sup> from which two principles it is a necessary consequence, that the innocent, though unfortunate, partner must lose his share in both the debt and the horse, or in any other chattel in the same circumstances.

§ 556. 3. **King's special property.**—This doctrine has no opportunity to take place in certain other instances of title by prerogative, that remain to be mentioned: as the chattels thereby vested are originally and solely vested in the crown, without any transfer or derivative assignment either by deed or law from any former proprietor. Such is the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans and the [410] like; which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects, as royal franchises, by his bounty. These are ascribed to him, partly upon the particular reasons mentioned in the eighth chapter of the former book; and partly upon the general principle of their being *bona vacantia* (goods having no claimant), and therefore vested in the king, as well to preserve the peace of the public, as in trust to employ them for the safety and ornament of the commonwealth.

§ 557. 4. **Prerogative copyright.**—There is also a kind of prerogative *copyright* subsisting in certain books, which is held

<sup>b</sup> Fitzh. Abr. t. Dette. 38. Plowd. 243.

<sup>c</sup> Cro. Eliz. 263. Plowd. 323. Finch. Law. 178. 10 Mod. 245.

<sup>d</sup> Co. Litt. 30.

to be vested in the crown upon different reasons. Thus, 1. The king, as the executive magistrate, has the right of promulging to the people all acts of state and government. This gives him the exclusive privilege of printing, at his own press, or that of his grantees, all *acts of parliament*, *proclamations*, and *orders of council*. 2. As supreme head of the church, he hath a right to the publication of all *liturgies* and books of divine service. 3. He is also said to have a right by purchase to the copies of such *law books*, *grammars*, and other compositions, as were compiled or translated at the expense of the crown. And upon these two last principles, combined, the exclusive right of printing the translation of the *Bible* is founded.\*

§ 558. 5. Property in game.—There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before; the property of such animals *feræ naturæ*, as are known by the denomination of *game*, with the right of pursuing, taking, and destroying them: which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a freewarren, or free fishery. This may lead us into an inquiry concerning the original of these franchises, or royalties, on which we touched a little in a former chapter;† [411] the right itself being an incorporeal hereditament, though the fruits and profits of it are of a personal nature.

In the first place, then, we have already shown, and indeed it cannot be denied, that by the law of nature every man from the prince to the peasant has an equal right of pursuing, and taking to his own use, all such creatures as are *feræ naturæ*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law, even so late

\* Prior editions have here, "4. *Almanacks* have been said to be prerogative copies, either as things derelict, or else as being substantially nothing more than the calendar prefixed to our liturgy.<sup>c</sup> And indeed the regulation of time has been often considered as a matter of state. The Roman *fasti* were under the care of the pontifical college: and Romulus, Numa, and Julius Cæsar, successively regulated the Roman calendar." [c 1 Mod. 257.]

† Pag. 38, 39.



as Justinian's time: "*feræ igitur, bestię, et volucres, et omnia animalia quę mari, cęlo, et terra nascuntur, simul atque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim nullius est, id naturali ratione occupanti conceditur* (therefore, wild beasts and birds, and all animals which are produced in air, sea, or earth, when taken by anyone, immediately become his property by the law of nations. For that which belongs to no one, belongs by natural reason to the taker)."<sup>¶</sup> But it follows from the very end and constitution of society, that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community.<sup>1</sup> This restriction may be either with respect to the *place* in which this right may, or

¶ Inst. 2. 1. 12.

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<sup>1</sup> **Game laws.**—The supreme court of the United States has upheld a statute of Connecticut providing that "no person shall at any time kill any woodcock, ruffed grouse or quail for the purpose of conveying the same beyond the limits of this state; or shall transport or have in possession, with intent to procure the transportation beyond said limits, any of such birds killed within this state."

In his able opinion, Mr. Justice White, after quoting at length from Blackstone, continues: "The practice of the government of England from the earliest time to the present has put into execution the authority to control and regulate the taking of game.

"Undoubtedly this attribute of government to control the taking of animals *feræ naturę*, which was thus recognized and enforced by the common law of England, was vested in the colonial governments, where not denied by their charters, or in conflict with grants of the royal prerogative. It is also certain that the power which the colonies thus possessed passed to the states with the separation from the mother country, and remains in them at the present day, in so far as its exercise may be not incompatible with, or restrained by, the rights conveyed to the federal government by the constitution. Kent, in his Commentaries, states the ownership of animals *ferę naturę* to be only that of a qualified property. 2 Kent, Comm., 347. In most of the states laws have been passed for the protection and preservation of game. We have been referred to no case where the power to so legislate has been questioned, although the books contain cases involving controversies as to the meaning of some of the statutes. Commonwealth v. Hall, 128 Mass. 410, 35 Am. Rep. 387; Commonwealth v. Wilkinson, 139 Pa. St. 304, 21 Atl. 14; People v. O'Neil, 71 Mich. 325, 39 N. W. 1. There are also cases where the validity of some particular method of enforcement provided in some of the statutes has been drawn in

may not, be exercised; with respect to the *animals* that are the subject of this right; or with respect to the *persons* allowed or forbidden to exercise it. And, in consequence of this authority, we find that the municipal laws of many nations have exerted such power of restraint; have in general forbidden the entering on another man's grounds, for any cause without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize.<sup>b</sup> Many reasons have concurred for making these constitutions: as, 1. For the encourage-

<sup>b</sup> Puff. L. N. 1. 4. c. 6. § 5.

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question. *State v. Saunders*, 19 Kan. 127, 27 Am. Rep. 98; *Territory v. Evans*, 2 Idaho, 634, 23 Pac. 115.

"The adjudicated cases recognizing the right of the states to control and regulate the common property in game are numerous. In *McCready v. Virginia*, 94 U. S. 391, 395, 24 L. Ed. 248, the power of the state of Virginia to prohibit citizens of other states from planting oysters within the tide waters of that state was upheld by this court. In *Manchester v. Massachusetts*, 139 U. S. 240, 35 L. Ed. 159, 11 Sup. Ct. Rep. 559, the authority of the state of Massachusetts to control and regulate the catching of fish within the bays of that state was also maintained. See, also, *Phelps v. Racey*, 60 N. Y. 10, 19 Am. Rep. 140; *Magner v. People*, 97 Ill. 320; *American Express Co. v. People*, 133 Ill. 649, 23 Am. St. Rep. 641, 9 L. R. A. 138, 24 N. E. 758; *State v. Northern Pacific Express Co.*, 58 Minn. 403, 59 N. W. 1100; *State v. Rodman*, 58 Minn. 393, 59 N. W. 1098; *Ex parte Maier*, 103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402; *Organ v. State*, 56 Ark. 267, 270, 19 S. W. 840; *Allen v. Wyckoff*, 48 N. J. L. 90, 93, 57 Am. Rep. 548, 2 Atl. 359; *Roth v. State*, 51 Ohio St. 209, 46 Am. St. Rep. 566, 37 N. E. 259; *Gentile v. State*, 29 Ind. 409, 415; *State v. Farrell*, 23 Mo. App. 176, and cases there cited; *State v. Saunders*, [19 Kan. 127, 27 Am. Rep. 98]; *Territory v. Evans* [2 Idaho, 634, 23 Pac. 115].

"Whilst the fundamental principles upon which the common property in game rests have undergone no change, the development of free institutions has led to the recognition of the fact that the power or control lodged in the state, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good. Therefore, for the purpose of exercising this power, the state, as held by this court in *Martin v. Waddell*, 16 Pet. 367, 410, 10 L. Ed. 997, 1013, represents its people, and the ownership is that of the people in their united sovereignty.

ment of agriculture and improvement of lands, by giving every man an exclusive dominion over his own soil. 2. For preservation of the several species of these animals, which would soon be extirpated by a general liberty. 3. For prevention of idleness and dissipation in husbandmen, artificers, and [412] others of lower rank; which would be the unavoidable consequence of universal license. 4. For prevention of popular insurrections and resistance to the government, by disarming the bulk of the people:<sup>1</sup> which last is a reason oftener meant, than avowed, by the makers of forest or game laws. Nor, certainly, in these prohibitions is there any *natural* injustice, as some have weakly enough supposed: since, as Puffendorf observes, the law does not hereby take from any man

<sup>1</sup> Warburton's Alliance. 324.

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The common ownership, and its resulting responsibility in the state, is thus stated in a well-considered opinion of the supreme court of California:

"The wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or traffic and commerce in it, if it is deemed necessary for the protection or preservation of the public good.' Ex parte Maier [103 Cal. 476, 42 Am. St. Rep. 129, 37 Pac. 402].

"The same view has been expressed by the supreme court of Minnesota, as follows:

"We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common.' State v. Rodman [58 Minn. 393, 59 N. W. 1098].

"The foregoing analysis of the principles upon which alone rests the right of an individual to acquire a qualified ownership in game, and the power of the state, deduced therefrom, to control such ownership for the common benefit, clearly demonstrates the validity of the statute of the state of Connecticut here in controversy. The sole consequence of the provision forbidding the transportation of game, killed within the state, beyond the state, is to confine the use of such game to those who own it, the people of that state. The proposition that the state may not forbid carrying it beyond her limits involves, therefore, the contention that a state cannot allow its own people the enjoyment of the benefits of the property belonging to them in common, without at the same time permitting the citizens of other states to participate in that which they do not own. It was said in the discussion at bar, although it be conceded that the state has an absolute right to control and regulate the killing

his present property, or what was already his own, but barely abridges him of one means of acquiring a future property, that of occupancy; which indeed the law of nature would allow him, but of which the laws of society have in most instances very justly and reasonably deprived him.

Yet, however defensible these provisions in general may be, on the footing of reason, or justice, or civil policy, we must notwithstanding acknowledge that, in their present shape, they owe their immediate original to slavery. It is not till after the irruption of the northern nations into the Roman empire, that we read of any other prohibitions, than that natural one of not sporting on any private grounds without the owner's leave; and another of a more spiritual nature, which was rather a rule of ecclesiastical discipline, than a branch of municipal law. The Roman or civil law, though it knew no restriction as to *persons* or *animals*, so far regarded the article of *place*, that it allowed no man to hunt or sport upon another's ground, but by consent of the owner of the soil. "*Qui alienum fundum ingreditur, venandi aut aucupandi gratia, potest a domino prohiberi ne ingrediatur.*" (He who enters on another man's ground for the purpose of hunting or fowling may be pro-

of game as its judgment deems best in the interest of its people, inasmuch as the state has here chosen to allow the people within her borders to take game, to dispose of it, and thus cause it to become an object of state commerce, as a resulting necessity such property has become the subject of interstate commerce, and is hence controlled by the provisions of article 1, section 8, of the constitution of the United States. But the errors which this argument involves are manifest. It presupposes that where the killing of game and its sale within the state is allowed, that it thereby becomes commerce in the legal meaning of that word. In view of the authority of the state to affix conditions to the killing and sale of game, predicated as is this power on the peculiar nature of such property and its common ownership by all the citizens of the state, it may well be doubted whether commerce is created by an authority given by a state to reduce game within its borders to possession, provided such game be not taken, when killed, without the jurisdiction of the state. The common ownership imports the right to keep the property, if the sovereign so chooses, always within its jurisdiction for every purpose." *Geer v. State of Connecticut*, 161 U. S. 519, 527, 40 L. Ed. 793, 16 Sup. Ct. Rep. 600.

The game laws of Great Britain were revised by the Game Act of 1831 and subsequent statutes. The provisions of these laws may be found in 2 Stephen's Comm. (16th ed.), 18 ff.

hibited from so doing by the owner.)”<sup>k</sup> For if there can, by the law of nature, be any inchoate imperfect property supposed in wild animals before they are taken, it seems most reasonable to fix it in him upon whose land they are found. And as to the other restriction, which relates to *persons* and not to *place*, the pontifical or canon law<sup>l</sup> interdicts “*venationes, et sylvaticas vagationes cum canibus, et accipitribus* (hunting and excursions in the woods with hawks, and hounds)” to all *clergymen* without distinction; grounded on [113] a saying of St. Jerome,<sup>m</sup> that it never is recorded that these diversions were used by the saints, or primitive fathers. And the canons of our Saxon church, published in the reign of King Edgar,<sup>n</sup> concur in the same prohibition: though our secular laws, at least after the Conquest, did even in the times of popery dispense with this canonical impediment; and spiritual persons were allowed by the common law to hunt for their recreation, in order to render them fitter for the performance of their duty: as a confirmation whereof we may observe, that it is to this day a branch of the king’s prerogative, at the death of every bishop, to have his kennel of hounds, or a composition in lieu thereof.<sup>o</sup>

§ 559. a. **Forest and game laws.**—But, with regard to the rise and original of our present civil prohibitions, it will be found that all forest and game laws were introduced into Europe at the same time, and by the same policy, as gave birth to the feudal system; when those swarms of barbarians issued from their northern hive, and laid the foundation of most of the present kingdoms of Europe, on the ruins of the western empire. For when a conquering general came to settle the economy of a vanquished country, and to part it out among his soldiers or feudatories, who were to render him military service for such donations: it behooved him, in order to secure his new acquisitions, to keep the *rustici* or natives of the country, and all who were not his military tenants, in as low a condition as possible, and especially to prohibit them the use of arms. Nothing could do this more effectually than a prohibition of hunting and sporting; and therefore it was the policy of the

<sup>k</sup> Inst. 2. 1. § 12.

<sup>n</sup> Cap. 64.

<sup>l</sup> Decretal. 1. 5. tit. 24. c. 2.

<sup>o</sup> 4 Inst. 309.

<sup>m</sup> Decret. part. 1. dist. 34. l. 1.



conqueror to reserve this right to himself, and such on whom he should bestow it; which were only his capital feudatories, or greater barons. And accordingly we find, in the feudal constitutions,<sup>p</sup> one and the same law prohibiting the *rustici* in general from carrying arms, and also proscribing the use of nets, snares, or other engines for destroying the game. [414] This exclusive privilege well suited the martial genius of the conquering troops, who delighted in a sport<sup>q</sup> which in its pursuit and slaughter bore some resemblance to war. *Vita omnis* (says Cæsar, speaking of the ancient Germans), *in venationibus atque in studiis rei militaris consistit*. (Their whole life consists in hunting, and the study of military affairs.)<sup>r</sup> And Tacitus in like manner observes, that *quotiens bella non ineunt, multum venatibus, plus per otium transigunt* (when-ever they are not engaged in war they pass much time in hunting, and still more in idleness).<sup>s</sup> And indeed, like some of their modern successors, they had no other amusement to entertain their vacant hours; despising all arts as effeminate, and having no other learning than was couched in such rude ditties as were sung at the solemn carousals which succeeded these ancient huntings. And it is remarkable that, in those nations where the feudal policy remains the most uncorrupted, the forest or game laws continue in their highest rigor. In France all game is properly the king's; and in some parts of Germany it is death for a peasant to be found hunting in the woods of the nobility.<sup>t</sup>

§ 560. (1) Saxon customs as to game.—With us in England, also, hunting has ever been esteemed a most princely diversion and exercise. The whole island was replenished with all sorts of game in the times of the Britons; who lived in a wild and pastoral manner, without inclosing or improving their grounds, and derived much of their subsistence from the chase, which they all enjoyed

<sup>p</sup> Feud. l. 2. tit. 27. § 5.

<sup>q</sup> In the laws of Genghiz Khan, founder of the Mogul and Tartarian empire, published A. D. 1205, there is one which prohibits the killing of all game from March to October; that the court and soldiery might find plenty enough in the winter, during their recess from war. (Mod. Univ. Hist. iv. 468.)

<sup>r</sup> De Bell. Gall. l. 6. c. 20.

<sup>s</sup> C. 15.

<sup>t</sup> Mattheus de Crimin. c. 3. tit. 1. Carpzov. Practic. Saxonie. p. 2. c. 84.

in common. But when husbandry took place under the Saxon government, and lands began to be cultivated, improved, and inclosed, the beasts naturally fled into the woody and desert tracts; which were called the forests, and, having never been disposed of in the first distribution of lands, were therefore held to belong to the crown. These were filled with great plenty of game, which our royal sportsmen reserved for their own diversion, on pain of a pecuniary forfeiture [<sup>415</sup>] for such as interfered with their sovereign. But every freeholder had the full liberty of sporting upon his own territories, provided he abstained from the king's forests: as is fully expressed in the laws of Canute,<sup>u</sup> and of Edward the Confessor:<sup>v</sup> “*Sit quilibet homo dignus venatione sua, in sylva, et in agris, sibi propriis, et in dominio suo: et absteineat omnis homo a venariis regis, ubicunque pacem eis habere voluerit* (Let every man be entitled to hunt in his own wood, fields, and manor; and let every man abstain from the royal forests, if he wish to live in peace)”: which indeed was the ancient law of the Scandinavian continent, from whence Canute probably derived it. “*Cuique enim in proprio fundo quamlibet feram quoquo modo venari permissum* (For everyone is permitted to hunt any wild animal on his own grounds, in whatever manner he pleases.)”<sup>w</sup>

§ 561. (2) Norman customs as to game.—However, upon the Norman Conquest, a new doctrine took place; and the right of pursuing and taking all beasts of chase or *venary*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorized under him. And this, as well upon the principles of the feudal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held of him as the chief lord, or lord paramount of the fee; and that therefore he has the right of the universal soil, to enter thereon, and to chase and take such creatures at his pleasure: as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative. As, therefore, the former reason was held to vest in the king a *right* to pur-

<sup>u</sup> C. 77.<sup>v</sup> C. 36.<sup>w</sup> Stiernhook de Jure Sueon. l. 2. c. 8.

sue and take them anywhere; the latter was supposed to give the king, and such as he should authorize, a *sole* and *exclusive* right.

This right, thus newly vested in the crown, was exerted with the utmost rigor, at and after the time of the Norman establishment; not only in the ancient forests, but in the new ones which the conqueror made, by laying together vast [416] tracts of country, depopulated for that purpose, and reserved solely for the king's royal diversion; in which were exercised the most horrid tyrannies, and oppressions, under color of forest law, for the sake of preserving the beasts of chase; to kill any of which, within the limits of the forest, was as penal as the death of a man. And, in pursuance of the same principle, King John laid a total interdict upon the *winged* as well as the *four-footed* creation: *capturam avium per totam Angliam interdixit* (he forbade fowling throughout all England).''\* The cruel and insupportable hardships, which these forest laws created to the subject, occasioned our ancestors to be as zealous for their reformation, as for the relaxation of the feudal rigors and the other exactions introduced by the Norman family; and accordingly we find the immunities of *carta de foresta* as warmly contended for, and extorted from the king with as much difficulty, as those of *magna carta* itself. By this charter, confirmed in parliament,<sup>7</sup> many forests were disafforested, or stripped of their oppressive privileges, and regulations were made in the regimen of such as remained; particularly<sup>2</sup> killing the king's deer was made no longer a capital offense, but only punished by a fine, imprisonment, or abjuration of the realm. And by a variety of subsequent statutes, together with the long acquiescence of the crown without exerting the forest laws, this prerogative is now become no longer a grievance to the subject.

But, as the king reserved to himself the *forests* for his own exclusive diversion, so he granted out from time to time other tracts of lands to his subjects under the names of *chases* or *parks*;<sup>a</sup> or gave them license to make such in their own grounds; which indeed are smaller forests, in the hands of a subject, but not governed by the forest laws; and by the common law no person is at liberty

\* M. Paris. 303.

<sup>7</sup> 9 Hen. III.

<sup>2</sup> Cap. 10.

<sup>a</sup> See pag. 38.

to take or kill any beasts of chase, but such as hath an ancient chase or park; unless they be also beasts of prey.

§ 562. (3) Free fishery and freewarren. — [417] As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise or royalty, derived likewise from the crown, and called *freewarren*; a word, which signifies preservation or custody: as the exclusive liberty of taking and killing fish in a public stream or river is called a *free fishery*; of which, however, no new franchise can at present be granted, by the express provision of *magna carta*, c. 16.<sup>b</sup> The principal intention of granting to anyone these franchises or liberties was in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And no man, but he who has a chase or freewarren, by grant from the crown, or prescription which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all.

§ 563. (4) Sole right of taking originally in king. — However novel this doctrine may seem, it is a regular consequence from what has been before delivered; that the sole right of taking and destroying game belongs exclusively to the king.<sup>2</sup> This appears,

<sup>b</sup> *Mirr.* c. 5. § 2. See pag. 39.

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<sup>2</sup> "By the common law of England the owner of land had no absolute property in animals *feræ naturæ* while at liberty in the wild state, but had a qualified interest or property in such as were found, and so long as they remained, on his territory, and, when killed or captured thereon, became his absolute property. Blackstone's treatment of this subject is not altogether clear, though he seems to have considered the complete ownership of game, in the strictest proprietary sense, to have been in the crown, as a personal prerogative, even since *Magna Carta*. Yet he recognized the right or privilege of one to take game or fish on his own premises without restraint as a substantial and valuable one. 2 *Bl. Comm.* 418, 419. Mr. Christian, in his learned notes, combats, with the approval of Mr. Justice Coleridge, the doctrine apparently laid down by Blackstone to the effect that the sole right to take game rests primarily with the king, and maintains that at common law every person, *ratione soli*, had a right to take game on his own land. 2 *Bl. Comm.* p. 418, note 8. In *Blades*

as well from the historical deduction here made, as because he may grant to his subjects an exclusive right of taking them; which he could not do, unless such a right was first inherent in himself. And hence it will follow, that no person whatever, but he who has such derivative right from the crown, is by common law entitled to take or kill any beasts of chase, or other game whatsoever. It is true, that by the acquiescence of the crown, the frequent grants of freewarren in ancient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered; every man, that is exempted from these modern penalties, looking upon himself as at liberty to do what he pleases with the game: whereas the contrary is strictly true, that no man, however well *qualified* he [418] may vulgarly be esteemed, has a right to encroach on the royal prerogative by the killing of game, unless he can show a particular grant of freewarren: or a prescription which presumes a grant; or some authority under an act of parliament. As for the latter, I know but of two instances wherein an express permission to kill game was ever given by statute; the one by 1 Jac. I, cap. 27 (Game, 1603), altered by 7 Jac. I, cap. 11 (Game, 1609), and virtually repealed by 22 & 23 Car. II, c. 25 (Game, 1670), which gave authority, so long as they remained in force, to the owners of freewarren, to lords of manors, and to all freeholders having 40*l.* *per annum* in lands of inheritance, or 80*l.* for life or lives, or 400*l.* personal estate (and their servants), to take partridges and pheasants upon their own, or their master's, freewarren, inheritance, or freehold: the other by 5 Ann., c. 14 (1705), which empowers lords and ladies of manors to appoint gamekeepers to kill game for the use of such lord or lady; which with some alteration still subsists, and plainly supposes such power not to have been in them before.

*v. Hicks*, 11 H. L. Cas. 621, Lord Westbury says: 'Property *ratione soli* is the common-law right which every owner of land has to kill and take all such animals *feræ naturæ* as may from time to time be found on his land, and as soon as this right is exercised the animals so killed or caught become the absolute property of the owner of the soil.' . . . The American cases not only generally treat the right of the owner of land to take game thereon as a property right inhering from the ownership of the soil, but recognize the establishment of that right at common law." *State v. Mallory*, 73 Ark. 236, 3 Ann. Cas. 852, 67 L. B. A. 773, 83 S. W. 955, 957.



The truth of the matter is, that these game laws (of which we shall have occasion to speak again in the fourth book of these Commentaries) do indeed *qualify* nobody, except in the instance of a game-keeper, to kill game: but only, to save the trouble and formal process of an action by the person injured, who perhaps too might remit the offense, these statutes inflict *additional* penalties, to be recovered either in a regular or summary way, by any of the king's subjects from certain persons of inferior rank who may be found offending in this particular. But it does not follow that persons, excused from these additional penalties, are therefore *authorized* to kill game. The circumstance of having 100*l. per annum*, and the rest, are not properly qualifications, but exemptions. And these persons, so exempted from the penalties of the game statutes, are not only liable to actions of trespass by the owners of the land; but also, if they kill game within the limits of any royal franchise, they are liable to the actions of such who may have the right of chase or freewarren therein.

§ 564. (5) **Privilege of hunting.**—[419] Upon the whole, it appears that the king, by his prerogative, and such persons as have, under his authority, the royal franchises of chase, park, freewarren, or free fishery, are the *only* persons who may acquire any property, however fugitive and transitory, in these animals *feræ naturæ*, while living; which is said to be vested in them, as was observed in a former chapter, *propter privilegium* (by privilege). And it must also be remembered, that such persons as may thus lawfully hunt, fish, or fowl, *ratione privilegii* (by reason of their privilege), have (as has been said) only a qualified property in these animals: it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It is held, indeed, that if a man starts any game within his own grounds, and follows it into another's, and kills it there, the property remains in himself.<sup>c</sup> And this is grounded on reason and natural justice:<sup>d</sup> for the property consists in the possession; which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so, if a stranger starts

<sup>c</sup> 11 Mod. 75.

<sup>d</sup> Puff. L. N. l. 4. c. 6.

game in one man's chase or freewarren, and hunts it into another liberty, the property continues in the owner of the chase or warren; this property arising from privilege,<sup>e</sup> and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there;<sup>f</sup> this property arising *ratione soli* (on account of the soil). Whereas, if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local; nor yet to the owner of the second, because it was not started in his soil; but it vests in the person who started and killed it,<sup>g</sup> though guilty of a trespass against both the owners.

§ 565. III. Title by forfeiture. — [420] I proceed now to a third method, whereby a title to goods and chattels may be acquired and lost, viz., by *forfeiture*; as a punishment for some crime or misdemeanor in the party forfeiting, and as a compensation for the offense and injury committed against him to whom they are forfeited. Of forfeitures, considered as the means whereby *real* property might be lost and acquired, we treated in a former chapter.<sup>h</sup> It remains, therefore, in this place only to mention by what means or for what offenses goods and chattels become liable to forfeiture.

§ 566. 1. Forfeiture for offenses.—In the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures, inflicted by special statutes, for particular crimes and misdemeanors: some of which are *mala in se*, or offenses against the divine law, either natural or revealed; but by far the greatest part are *mala prohibita*, or such as derive their guilt merely from their prohibition by the laws of the land: such as is the forfeiture of 40s. *per month* by the statute 5 Eliz., c. 4 (Artificers and Apprentices, 1562), for exercising a trade without having served seven years as an apprentice thereto; and the forfeiture of 10*l.* by 9 Ann., c. 23 (1710), for printing an almanac without a stamp. I shall there-

<sup>e</sup> Lord Raym. 251.

<sup>f</sup> *Ibid.*

<sup>g</sup> Farr. 18. Lord Raym. *Ibid.*

<sup>h</sup> See pag. 267.

fore confine myself to those offenses only, by which *all* the goods and chattels of the offender are forfeited; referring the student for such, where pecuniary mulcts of different quantities are inflicted, to their several proper heads, under which very many of them have been or will be mentioned: or else to the collections of Hawkins, and Burn, and other laborious compilers. Indeed, as most of these forfeitures belong to the crown, they may seem as if they ought to have been referred to the preceding method of acquiring personal property, namely, by prerogative. But as, in the instance of partial forfeitures, a moiety often goes to the informer, the poor, or sometimes to other persons; and as one total forfeiture, namely, that by a bankrupt who is guilty of felony by concealing [421] his effects, accrues entirely to his creditors, I have therefore made it a distinct head of transferring property.

§ 567. a. **Forfeiture for treason and felony.**—Goods and chattels, then, are totally forfeited by conviction of *high treason*, or *misprision* of treason; of *petit treason*; of *felony* in general, and particularly of *felony de se*, and of *manslaughter*; nay, even by conviction of *excusable homicide*;<sup>1</sup> by *outlawry* for treason or felony; by conviction of *petit larceny*; by *flight* in treason or felony, even though the party be acquitted of the fact; by *standing mute*, when arraigned of felony; by *drawing a weapon on a judge*, or *striking anyone in the presence of the king's courts*; by *præmunire*: by *pretended prophecies*, upon a second conviction; by *owling*; by the *residing abroad* of artificers; and by *challenging to fight* on account of money won at gaming. All these offenses, as will more fully appear in the fourth book of these Commentaries, induce a total forfeiture of goods and chattels.<sup>3</sup>

<sup>1</sup> Co. Litt. 391. 2 Inst. 316. 3 Inst. 350.

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<sup>3</sup> **Forfeitures abolished.**—"The terms 'forfeit' and 'forfeiture' in their original sense in the common law applied to the transfer to the crown or his immediate feudal superior of the lands and goods of a traitor or felon on his conviction and attainder, or of the goods of a person who fled from justice in respect of a capital felony or petty larceny even if he were acquitted. There were numerous other forfeitures of this class (enumerated 2 Burn, Justice, 17th ed., 302, 303), including forfeiture of the goods of a person against whom a verdict of *felo de se* is returned. All these forfeitures, after a gradual relaxa-

§ 568. b. When forfeiture begins.—And this forfeiture commences from the time of *conviction*, not the time of committing the fact, as in forfeitures of real property. For chattels are of so vague and fluctuating a nature, that to affect them by any relation back, would be attended with more inconvenience than in the case of landed estates: and part, if not the whole of them, must be expended in maintaining the delinquent, between the time of committing the fact and his conviction. Yet a fraudulent conveyance of them, to defeat the interest of the crown, is made void by statute 13 Eliz., c. 5 (Fraudulent Conveyances, 1571).

tion of the law, were finally abolished in 1870, 33 & 34 Vict., c. 23; and forfeiture as a common-law punishment now continues only in the case of the virtually defunct procedure in outlawry. The bulk, if not the whole, of the mass of enactments indexed under tit. 'Forfeiture' in the official index to the statutes, if still in force, apply now only to outlawry."—6 Ency. Laws of England, 210.

## CHAPTER THE TWENTY-EIGHTH. [422]

### OF TITLE BY CUSTOM.

§ 569. **IV. Title by custom.**—A fourth method of acquiring property in things personal, or chattels, is by *custom*; whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. It were endless, should I attempt to enumerate all the several kinds of special customs, which may entitle a man to a chattel interest in different parts of the kingdom: I shall therefore content myself with making some observations on three sorts of customary interests, which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern; viz., *heriots*, *mortuaries*, and *heirlooms*.

§ 570. **1. Heriots.**—Heriots, which were slightly touched upon in a former chapter,<sup>a</sup> are usually divided into two sorts, *heriot service* and *heriot custom*. The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent:<sup>b</sup> the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom.<sup>c</sup> Of these, therefore, we are here principally to speak: and they are defined to be a customary tribute of goods and chattels, payable to the lord of the fee on the decease of the owner of the land.<sup>1</sup>

<sup>a</sup> Pag. 97.

<sup>c</sup> Co. Cop. § 24.

<sup>b</sup> 2 Saund. 166.

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<sup>1</sup> **A modern instance of heriot service.**—On heriots, see Pollock and Maitland, *Hist. Eng. Law* (2d ed.). i, 312–314, 316, 317; ii, 259, 322, 338; Holdsworth, *Hist. Eng. Law*, ii, 65, 317; iii, 51, 53, 168. A note in 23 *Law Quart. Rev.* 251, of which the following is an extract, shows that heriot service was claimed as late as 1907: “*Copestake v. Hoper*, [1907] 1 Ch. 366, is a case of great interest to conveyancers and to students of real property law. For one thing it affords an instance of a manor (that of Ewhurst in Sussex), whereof the free tenants still hold their lands by fealty, suit of court, an annual quit rent, a relief on the death of the tenant or alienation of the tenement, and a heriot of the tenant's best beast on his death. Land so held had been mortgaged by the tenant in the year 1887 by an indenture of statutory mortgage;



§ 571. a. **Heriots of Danish origin.**—[423] The first establishment, if not introduction, of compulsory heriots into England, was by the Danes: and we find in the laws of King Canute<sup>a</sup> the several *heregeates* or heriots specified, which were then exacted by the king on the death of divers of his subjects, according to their respective dignities; from the highest *eorle* down to the most inferior *thegne* or landholder. These, for the most part, consisted in arms, horses, and habiliments of war; which the word itself, according to Sir Henry Spelman,<sup>e</sup> signifies. These were delivered up to the sovereign on the death of the vassal, who could no longer use them, to be put into other hands for the service and defense of the country. And upon the plan of this Danish establishment did William the Conqueror fashion his law of reliefs, as was formerly observed;<sup>f</sup> when he ascertained the precise relief to be taken of every tenant in chivalry, and, contrary to the feudal custom and the usage of his own Duchy of Normandy, required arms and implements of war to be paid instead of money.<sup>g</sup>

The Danish compulsive heriots, being thus transmuted into reliefs, underwent the same several vicissitudes as the feudal tenures, and in socage estates do frequently remain to this day, in the shape of a double rent payable at the death of the tenant: the heriots which now continue among us, and preserve that name, seeming rather to be of Saxon parentage, and at first to have been merely discretionary.<sup>h</sup> These are now for the most part confined to copyhold tenures, and are due by custom only, which is the life of all estates by copy; and perhaps are the only instance where custom has favored the lord. For this payment was originally a voluntary donation, or gratuitous legacy of the tenant; perhaps in acknowledgment of his having been raised a degree above villcinage, when

<sup>a</sup> C. 69.

<sup>e</sup> Of Feuds, c. 18.

<sup>f</sup> Pag. 65.

<sup>g</sup> LL. Guil. Cong. c. 22, 23, 24.

<sup>h</sup> Lambard. Peramb. of Kent. 492.

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the mortgagor remained in possession until his death; and thereupon the lord claimed a heriot. The claim was resisted on the ground that the mortgagee was seised of the land as tenant of the manor, and was still living. Mr. Justice Kekewich, however, decided in favor of the lord's claim, on the ground that the mortgagee was not, before entry into possession, seised as a freehold tenant of the land."

all his goods and chattels were quite at the mercy of the lord: and custom, which has on the [424] one hand confirmed the tenant's interest in exclusion of the lord's will, has on the other hand established this discretionary piece of gratitude into a permanent duty. An heriot may also appertain to free land, that is held by service and suit of court; in which case it is most commonly a copyhold enfranchised, whereupon the heriot is still due by custom. Bracton<sup>1</sup> speaks of heriots as frequently due on the death of both species of tenants: "*Est quidem alia præstatio quæ nominatur herietum; ubi tenens, liber vel servus in morte sua dominum suum, de quo tenuerit, respicit de meliori averio suo, vel de secundo meliori, secundum diversam locorum consuetudinem* (There is indeed another prestation, which is called a heriot; where a tenant at his death, whether a freeman or a slave, acknowledges the lord of whom he held, by giving his best beast or the second best, according to the custom of the place)." And this, he adds, "*magis fit de gratia quam de jure* (it is more a matter of favor than of right)"; in which Fleta<sup>k</sup> and Britton<sup>1</sup> agree: thereby plainly intimating the original of this custom to have been merely voluntary, as a legacy from the tenant; though now the immemorial usage has established it as of right in the lord.

§ 572. b. Heriots always personal chattels.—This heriot is sometimes the best live beast, or *averium*, which the tenant dies possessed of (which is particularly denominated the villein's relief in the twenty-ninth law of King William the Conqueror), sometimes the best inanimate good, under which a jewel or piece of plate may be included: but it is always a *personal* chattel, which, immediately on the death of the tenant who was the owner of it, being ascertained by the option of the lord,<sup>m</sup> becomes vested in him as his property; and is no charge upon the lands, but merely on the goods and chattels. The tenant must be the owner of it, else it cannot be due; and therefore on the death of a feme covert no heriot can be taken; for she can have no ownership in things personal.<sup>n</sup> In some places there is a customary composition in money,

<sup>1</sup> 1. 2. c. 36. § 9.

<sup>k</sup> 1. 3. c. 18.

<sup>1</sup> C. 69.

<sup>m</sup> Hob. 60.

<sup>n</sup> Keplw. 84. 4 Leon. 239.

as ten or twenty shillings in lieu of a heriot, by which the lord and tenant are both bound, if it be an indisputably ancient custom: but a new composition of this sort will not bind the representatives of either party; for that amounts to the creation of a new custom, which is now impossible.<sup>o</sup>

§ 573. 2. **Mortuaries.**—[425] Mortuaries are a sort of ecclesiastical heriots being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. They seem originally to have been, like lay heriots, only a voluntary bequest to the church; being intended, as Lyndewode informs us from a constitution of Archbishop Langham, as a kind of expiation and amends to the clergy for the personal tithes, and other ecclesiastical duties, which the laity in their lifetime might have neglected or forgotten to pay. For this purpose, *after*<sup>p</sup> the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary: "*Si decedens plura habuerit animalia, optimo cui de jure fuerit debitum reservato, ecclesiæ suæ sine dolo, fraude, seu contradictione qualibet, pro recompensatione subtractionis decimarum personalium, necnon et oblationum, secundum melius animal reservetur, post obitum, pro salute animæ suæ* (if a man when dying shall have many animals, the best being reserved for him to whom it was of right due, let the second best, after his death, be set apart for the church for the good of his soul, without any deceit, fraud, or objection, as an amends for the withholding of personal tithes and oblations)."<sup>q</sup> And therefore in the laws of King Canute<sup>r</sup> this mortuary is called soul-seot (sawlsecat) or *symbolum animæ* (passport of the soul). And, in pursuance of the same principle, by the laws of Venice, where no personal tithes have been paid during the life of the party, they are paid at his death out of his merchandise, jewels, and other movables.<sup>s</sup> So, also, by a similar policy, in France, every man that died without bequeathing a part of his estate to the church, which was called *dying without confession*, was formerly deprived of Christian burial: or, if he died intestate, the relations of the

<sup>o</sup> Co. Cop. § 31.

<sup>r</sup> C. 13.

<sup>p</sup> Co. Litt. 185.

<sup>s</sup> Panormitan. ad Decretal l. 3. t. 20. c. 32.

<sup>q</sup> Provinc. l. 1. tit. 3.

deceased, jointly with the bishop, named proper arbitrators to determine what he ought to have given to the church, in case he had made a will. But the parliament, in 1409, redressed this grievance.<sup>t</sup>

It was anciently usual in this kingdom to bring the mortuary to church along with the corpse when it came to be buried; and thence<sup>u</sup> it is sometimes called a *corse-present*: a [426] term, which bespeaks it to have been once a voluntary donation. However, in Bracton's time, so early as Henry III we find it riveted into an established custom: insomuch that the bequests of heriots and mortuaries were held to be necessary ingredients in every testament of chattels. "*Imprimis autem debet quilibet, qui testamentum fecerit, dominum suum de meliori re quam habuerit recognoscere; et postea ecclesiam de alia meliori* (whoever shall make a will, should in the first place acknowledge his lord by a bequest of the best chattel he may possess; and afterwards the church by the second best)": the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places: "*in quibusdam locis habet ecclesia melius animal de consuetudine; in quibusdam secundum, vel tertium melius; et in quibusdam nihil: et ideo consideranda est consuetudo loci* (in some places the church has the best animal by custom; in others the second or third best; and in others again nothing; and therefore it is the custom of the place which determines the matter)." <sup>w</sup> This custom still varies in different places, not only as the mortuary to be paid, but the person to whom it is payable. In Wales a mortuary or corse-present was due upon the death of every clergyman to the bishop of the diocese; till abolished, upon a recompense given to the bishop, by the statute 12 Ann., st. 2, c. 6 (Mortuaries, 1713). And in the archdeaconry of Chester a custom also prevailed, that the bishop, who is also archdeacon, should have at the death of every clergyman dying therein his best horse or mare, bridle, saddle, and spurs, his best gown or cloak, hat, upper garment under his gown, and tippet, and also his best signet or ring.<sup>x</sup> But by statute 28 Geo. II, c. 6 (Mortuaries, 1754), this mortuary is directed to cease, and the act has settled upon the bishop an equivalent in its room. The king's

<sup>t</sup> Sp. L. b. 28. c. 41.

<sup>w</sup> Bracton. l. 2. c. 26. Flet. l. 2. c. 57.

<sup>u</sup> Selden. Hist. of Tithes. c. 10.

<sup>x</sup> Cro Car. 237.

claim to many goods, on the death of all prelates in England, seems to be of the same nature: though Sir Edward Coke<sup>1</sup> apprehends, that this is a *duty due upon death* and not a *mortuary*: a distinction which seems to be without a difference. For not only the king's ecclesiastical character, as supreme ordinary, but also the species of the goods claimed, which bear so near a resemblance to those in the archdeaconry of Chester, which was an acknowledged mortuary, puts the matter out of dispute. The king, according to the record vouched by Sir Edward Coke, is entitled to six things: the bishop's best horse or palfrey, with his furniture: his cloak, [427] or gown, and tippet: his cup, and cover: his basin and ewer: his gold ring: and lastly, his *muta canum*, his mew or kennel of hounds; as was mentioned in the preceding chapter.<sup>2</sup>

This variety of customs, with regard to mortuaries, giving frequently a handle to exactions on the one side, and frauds or expensive litigations on the other; it was thought proper by statute 21 Hen. VIII, c. 6 (Mortuaries, 1529) to reduce them to some kind of certainty. For this purpose it is enacted, that all mortuaries, or corse-presents to parsons of any parish, shall be taken in the following manner; unless where by custom less or none at all is due: viz., for every person who does not leave goods to the value of ten marks, nothing: for every person who leaves goods to the value of ten marks and under thirty pounds, 3s. 4d. if above thirty pounds, and under forty pounds, 6s. 8d. if above forty pounds, of what value soever they may be, 10s. and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme covert; nor for any child; nor for anyone of full age, that is not a housekeeper; nor for any wayfaring man; but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day.

§ 574. 3. Heirlooms.—Heirlooms are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor.<sup>2</sup> The termination, *loom*, is of Saxon

<sup>1</sup> 2 Inst. 491.

<sup>2</sup> Pag. 413.

2 What is the meaning of the words "special custom" here and in the rest of this passage? Certainly not that of the *particular* customs mentioned, 1



original; in which language it signifies a limb or member;<sup>a</sup> so that an heirloom is nothing else, but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold: otherwise the general rule is, that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor.<sup>b</sup> But deer in a real authorized park, fishes in a pond, doves in a dove-house, etc., though in themselves personal [428] chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall accompany the land wherever it vests, by either descent or purchase.<sup>c</sup> For this reason, also, I apprehend it is, that the ancient jewels of the crown are held to be heirlooms;<sup>d</sup> for they are necessary to maintain the state, and support the dignity, of the sovereign for the time being. Charters likewise, and deeds, court rolls, and other evidences of the land, together with the chests in which they are contained, shall pass together with the land to the heir, in the nature of heirlooms, and shall not go to the executor.<sup>e</sup> By special custom also, in some places, carriages, utensils, and other

<sup>a</sup> Spelm. Gloss. 277.

<sup>b</sup> Co. Litt. 388.

<sup>c</sup> Co. Litt. 8.

<sup>d</sup> *Ibid.* 18.

<sup>e</sup> Bro. Abr. tit. Chattels. 18.

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Comm. \*74, and 2 Comm. \*263, which are of local force. Nor is it a custom "used among one set of subjects" like the law-merchant and trade usages (1 Comm. \*75), for the heirloom is not so used. It is plain, too, that by the reasoning of 2 Comm. \*263, \*264, the right to an heirloom must be prescriptive and not customary in its nature, and thus again a part of the common law: which defeats the reasoning of Blackstone (p. \*429), where he tries to show that a devise must necessarily be postponed to such a custom. For while that may be true of a local custom, which, by its nature, excludes common-law rights, it is meaningless when applied to a rule of the common law itself. And even if the heirloom be considered as a fixture, or as an extension of the same principle by which fixtures are made a part of the realty, this would not account for the rule that a devise of the heirloom by a tenant in fee simple is void, as Blackstone states in the passage last cited. \* \* \*—HAMMOND.

3 **Heirlooms in United States.**—Heirlooms, in the accurate sense as used by Blackstone, have probably never been recognized in this country, unless title deeds passing with the land may be so treated. But they are not regarded as property in and of themselves, and cannot, it would seem, be treated as heirlooms. See *Parrott v. Avery*, 159 Mass. 594, 38 Am. St. Rep. 465, 22 L. R. A. 153, 35 N. E. 94; *Huse v. Den*, 85 Cal. 390, 20 Am. St. Rep. 232, 24

household implements, may be heirlooms;<sup>f</sup> but such custom must be strictly proved. On the other hand, by almost general custom, whatever is strongly affixed to the freehold or inheritance, and cannot be severed from thence without violence or damage, "*quod ab ædibus non facile revellitur* (whatever is not easily severed from houses),"<sup>g</sup> is become a member of the inheritance, and shall thereupon pass to the heir; as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like.<sup>h</sup> A very similar notion to which prevails in the Duchy of Brabant; where they rank certain things movable among those of the immovable kind, calling them by a very particular appellation, *prædia volantia*, or volatile estates: such as beds, tables, and other heavy implements of furniture, which (as an author of their own observes), "*dignitatem istam nacta sunt, ut villis, sylvis, et ædibus, aliisque prædiis, comparentur; quod solidiora mobilia ipsis ædibus ex destinatione patrisfamilias cohærere videantur, et pro parte ipsarum ædium æstimentur* (have obtained this estimation; that they are classed with towns, woods, houses, and other estates; because the more solid movables seem to be fixed to the houses by the will of the ancestor, and are considered as a part of the buildings themselves)."<sup>i</sup>

Other personal chattels there are, which also descend to the heir in the nature of heirlooms, as a monument or tombstone in a church, or the coat-armor of his ancestor there [<sup>429</sup>] hung up, with the pennons and other ensigns of honor, suited to his degree. In this

<sup>f</sup> Co. Litt. 18. 185.

<sup>g</sup> Spelm. Gloss. 277.

<sup>h</sup> 12 Mod. 520.

<sup>i</sup> Stockmans de Jure Devolutionis. c. 3. § 16.

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Pac. 790; Smith v. McGregor, 10 Ohio St. 461; 1 Reeves, Real Prop., 70. In Haven v. Haven, 181 Mass. 573, 64 N. E. 410, the question was waived, the court saying: "This renders it unnecessary to consider whether the direction that the portraits should remain in the mansion so long as it was occupied by any of Ann Haven's lineal descendants could be supported as a disposition of the portraits as heirlooms, as the respondent contends it can. In regard to this contention it may be observed that, assuming that under our law as under the English law (see Hill v. Hill, [1897] 1 Q. B. 483) personal chattels may be disposed of by will so as to pass with the realty as heirlooms or as fixtures in the nature of heirlooms, there is no intention manifested that the title to, or even the possession of, the portraits should pass with or accompany the title to the mansion-house."

case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir.<sup>k</sup> Pews in the church are somewhat of the same nature,<sup>4</sup> which may descend by custom immemorial (without any ecclesiastical concurrence) from the ancestor to the heir.<sup>1</sup> But though the heir has a property in the monuments and escutcheons of his ancestors, yet he has none in their bodies or ashes; nor can he bring any civil action against such as indecently at least, if not impiously, violate and disturb their remains, when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it: and, if anyone in taking up a dead body steals the shroud or other apparel, it will be felony;<sup>m</sup> for the property thereof remains in the executor, or whoever was at the charge of the funeral.<sup>5</sup>

But to return to heirlooms: these, though they be mere chattels, yet cannot be devised away from the heir by will; but such a devise

<sup>k</sup> 12 Rep. 105. Co. Litt. 18.

<sup>1</sup> 3 Inst. 202. 12 Rep. 105.

<sup>m</sup> 3 Inst. 110. 12 Rep. 113. 1 Hal. P. C. 515.

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<sup>4</sup> **Pew rights.**—When, in the United States, pew rights are granted to a person in perpetuity or for life, his ownership thereof may be regarded as real property; when they are leased to him for one or more years, his interest therein is personal property, a chattel real. 1 Reeves, Real Prop., 67. In Massachusetts and New Hampshire pews are personal property by statute. In Pennsylvania they are held personal property as to devolution, although an interest in realty. *Church v. Well's Exr.*, 24 Pa. 249. In any case, the right of the owner to occupy the pew is only for divine service and other recognized occasions. The rights of the parish are paramount. *First Baptist Society v. Grant*, 59 Me. 245.

<sup>5</sup> **Property in dead bodies.**—Nor, as it appears, has the personal representative or the widow of deceased [any property in the body or ashes of the deceased]. As the disposition of the dead was entirely within the jurisdiction of the ecclesiastical courts during the period when the common law was in process of formation, it is not surprising that we find little light on the subject in the latter. But it has been often discussed of late years, and the general opinion seems to be that the *duty* of burial or other proper disposal of the body lies with the personal representative, but terminates with that act, and that so far as property in the remains can be said to exist, it belongs to the next of kin, who in this country are identical with the heirs at common law. (*Wynkoop v. Wynkoop*, 42 Pa. St. 293, 82 Am. Dec. 506,

is void,<sup>n</sup> even by a tenant in fee simple. For, though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since, as the inheritance was his own, he might mangle or dismember it as he pleased; yet, they being at his death instantly vested in the heir, the devise (which is subsequent, and not to take effect till *after* his death) shall be postponed to the custom, whereby they have already descended.

<sup>n</sup> Co. Litt. 185.

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with note, pp. 509-513, citing many cases; *Queen v. Stewart*, 12 Ad. & E. 776, 113 Eng. Reprint, 1007; *In re Betteson*, 4 Ad. & E. 294, 12 Moak, 656; *Bogert v. City of Indianapolis*, 13 Ind. 134; *Lowry v. Plitt*, 16 Am. Law Reg., N. S., 155.) Most cases, however, follow Blackstone in holding the corpse to be *res nullius*.

"In a buried coffin containing a corpse there is no ownership that can be asserted by one person against another in a *civil* action; but an ownership of a character sufficient to support a charge of larceny will be taken to exist somewhere. It is not necessary for the purposes of the *criminal* law, to fix this ownership, and an indictment is sufficient which charges that the coffin is the property of some person to the jurors unknown."

"The property may be said to be in the person who bought the coffin for the purpose of interment. Articles which may have no market value may nevertheless have a value which the law will recognize." (*State v. Doecke*, 5 Mo. App. 590, quoted in 17 Alb. L. J. 296; and on appeal in 68 Mo. 208, 30 Am. Rep. 785; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Weld v. Walker*, 130 Mass. 423, 39 Am. Rep. 465.) The most thorough and discriminating discussion of the subject may be found in *Pierce v. The Proprietors of Swan Point Cemetery*, 10 R. I. 227, 14 Am. Rep. 667, holding that a dead body is not strictly property, but that there may be rights and duties of certain persons in relation to it, arisen out of common humanity, of analogous nature. (See, also, the report of S. B. Ruggles on the Law of Burial, in 4 Bradford's Surrogate Reports, 528.)—HAMMOND.

However, it may be added that the right of the widow, or probably of next of kin, to control the disposition of the body or place of burial is recognized. *O'Donnell v. Slack*, 123 Cal. 285, 43 L. R. A. 388, 55 Pac. 906; *Buchanan v. Buchanan*, 28 Misc. Rep. 261, 59 N. Y. Supp. 810; *Louisville & N. R. Co. v. Wilson*, 123 Ga. 62, 3 Ann. Cas. 128, 51 S. E. 24; *Pettigrew v. Pettigrew*, 207 Pa. 313, 99 Am. St. Rep. 795, 64 L. R. A. 179, 56 Atl. 878. The laws of California, Connecticut, Louisiana and Vermont recognize the interest of relatives in the body of a deceased person. The right to make testamentary direction concerning the disposal of the body is conferred by statute in certain states. After burial, the only right of control that remains is to protect it from unlawful interference. *Peters v. Peters*, 43 N. J. Eq. 140, 10 Atl. 742; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759.

## CHAPTER THE TWENTY-NINTH. [430]

### OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

In the present chapter we shall take into consideration three other species of title to goods and chattels.

§ 575. **V. Title by succession.**—The fifth method, therefore, of gaining a property in chattels, either personal or real, is by *succession*: which is, in strictness of law, only applicable to corporations aggregate of many, as dean and chapter, mayor and commonalty, master and fellows, and the like; in which one set of men may, by succeeding another set, acquire a property in all the goods, movables, and other chattels of the corporation. The true reason whereof is, because in judgment of law a corporation never dies; and therefore the predecessors, who lived a century ago, and their successors now in being, are one and the same body corporate.<sup>a</sup> Which identity is a property so inherent in the nature of a body politic, that, even when it is meant to give anything to be taken in succession by such a body, that succession need not be expressed: but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists.<sup>b</sup> And thus a lease for years, an obligation, [431] a jewel, a flock of sheep, or other chattel interest, will vest in the successors, by succession, as well as in the identical members, to whom it was originally given.

§ 576. **1. Distinction as to sole corporations.**—But with regard to sole corporations, a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of an hospital, who is a corporation for the benefit of the poor brethren; an abbot, or prior, by the old law before the Reformation, who represented the whole convent; or the dean of some ancient cathedral, who stands in the place of, and represents in his corporate capacity, the chapter; such sole corporations as these have in this respect the same powers, as cor-

<sup>a</sup> 4 Rep. 65.

<sup>b</sup> Bro. Abr. t. Estates. 90. Cro. Eliz. 464.



porations aggregate have, to take personal property or chattels in succession. And therefore a bond of such a master, abbot, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society, of which he is in law the representative.<sup>c</sup> Whereas in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession: and therefore, if a lease for years be made to the bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it.<sup>d</sup> For the word "*successors*," when applied to a person in his political capacity, is equivalent to the word "*heirs*" in his natural; and as such a lease for years, if made to John and his heirs, would not vest in his heirs, but his executors; so if it be made to John, Bishop of Oxford, and his successors, who are the heirs of his body politic, it shall still vest in his executors and not in such his successors. The reason of this is obvious: for, besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs, or such successors as are equivalent to heirs; it would also follow, that if any such chattel interest (granted to a sole corporation and his successors) were allowed to descend to such successor, the property thereof must be in abeyance from the [432] death of the present owner until the successor be appointed; and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner;<sup>e</sup> but a man's right therein, when once suspended, is gone forever. This is not the case in corporations aggregate, where the right is never in suspense; nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body, than subsisting merely in their own right: the chattel interest, therefore, in such a case, is really and substantially vested in the hospital, convent, chapter, or other aggregate body; though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said (in point of form) to vest. But the general rule, with regard to corporations merely sole, is this, that no chattel can go or be acquired by right of succession.<sup>f</sup>

<sup>c</sup> Dyer. 48. Cro. Eliz. 464.<sup>e</sup> Brownl. 132.<sup>d</sup> Co. Litt. 46.<sup>f</sup> Co. Litt. 46.

Yet to this rule there are two exceptions. One in the case of the king, in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors.<sup>g</sup> The other exception is, where, by a *particular* custom, some *particular* corporations sole have acquired a power of taking *particular* chattel interests in succession. And this custom, being against the general tenor of the common law, must be strictly interpreted, and not extended to any other chattel interests than such immemorial usage will strictly warrant. Thus the chamberlain of London, who is a corporation sole, may by the custom of London take *bonds* and *recognizances* to himself and his successor, for the benefit of the orphan's fund:<sup>h</sup> but it will not follow from thence, that he has a capacity to take a *lease for years* to himself and his successors for the same purpose; for the custom extends not to that: nor that he may take a *bond* to himself and his successors, for any other purpose than the benefit of the orphan's fund; for that also is not warranted by the custom. Wherefore, upon the whole, we may close this head with laying down this general rule; that such right of succession to chattels is universally [433] inherent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons; and may, by special custom, belong to certain other sole corporations for some particular purposes: although, generally, in sole corporations no such right can exist.

§ 577. VI. Title by marriage.—A sixth method of acquiring property in goods and chattels is by *marriage*;<sup>1</sup> whereby those

<sup>g</sup> *Ibid.* 90.

<sup>h</sup> 4 Rep. 65. Cro. Eliz. 682.

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<sup>1</sup> **Law of property of married women.**—Professor Dicey, in his "Law and Public Opinion in England," discusses the history of the law as to the property of married women by way of illustrating the effect of judge-made law on parliamentary legislation. He considers married women's property rights as determined, first, by the common-law decisions, secondly, by the decisions of the court of chancery, and thirdly, by the Married Women's Property Acts, 1870–1893. The first portion of this critical discussion, the property rights of married women at common law as it prevailed down to 1870, is as follows: "A married woman's position in regard to her property was the natural result, worked out by successive generations of lawyers with logical thoroughness, of the principle that, in the words of Blackstone, 'by marriage, the husband and wife are one person in law: that is, the very being or legal existence of the

chattels, which belonged formerly to the wife, are by act of law vested in the husband, with the same degree of property and with the same powers, as the wife, when sole, had over them.

This depends entirely on the notion of an unity of person between the husband and wife; it being held that they are one person in law,<sup>1</sup> so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows, that whatever per-

<sup>1</sup> See Book I. c. 15.

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woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband.'

"If, for the sake of clearness, we omit all limitations and exceptions, many of which are for the purpose of these lectures unimportant, the result at common law of this merger of a wife's legal status in that of her husband may be thus broadly stated. Marriage was an assignment of a wife's property rights to her husband at any rate during coverture. Much of her property, whether possessed by her at, or coming to her after, her marriage, either became absolutely his own, or during coverture might, if he chose, be made absolutely his own, so that even if his wife survived him it went to his representatives.

"This statement is, from a technical point of view, as every lawyer will perceive, lacking in precision, or even in strict accuracy, but it conveys to a student, more clearly than can otherwise be expressed in a few words, the real effect between 1800 and 1870 of the common law (in so far as it was not controlled by the rules of equity) on the position of a married woman in regard to her property. The statement lacks precision, because at common law the effect of marriage on a woman's property varied with the nature of the property; the interest which a husband acquired in his wife's freeholds differed from the interest which he acquired in her leaseholds; of the goods and chattels again which were at the time of marriage in, or after marriage came into, the possession of his wife, he acquired an interest different from his rights over her *choses in action*, such as debts due to her, *e. g.*, on a bond, or as money deposited at her bankers. The statement, however, is substantially true, because a husband on marriage became for most purposes the almost absolute master of his wife's property. The whole of her income, from whatever source it came (even if it were the earnings of her own work or professional skill), belonged to her husband. Then, too, a married woman, because her personality was merged in that of her husband, had no contractual capacity, *i. e.*, she could not bind herself by a contract. Her testamentary capacity was extremely limited; she could not make a devise of her freehold property, and such testamentary power as she possessed with regard to personal property could be exercised only with the consent of her husband, and this consent, when given, might be at any time revoked. If she died intestate the whole of her personal

sonal property belonged to the wife, before marriage, is by marriage absolutely vested in the husband. In a real estate, he only gains a title to the rents and profits during coverture: for that, depending upon feudal principles, remains entire to the wife after the death of her husband, or to her heirs, if she dies before him; unless by the birth of a child, he becomes tenant for life by the curtesy. But, in chattel interests, the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses

estate either remained her husband's or became his on her death. The way in which the rules of the common law might, occasionally at any rate, deprive a rich woman of the whole of her wealth may be seen by the following illustration. A lady is possessed of a large fortune; it consists of household furniture, pictures, a large sum in money and bank notes, as well as £10,000 deposited at her bankers, of leasehold estates in London, and of freehold estates in the country. She is induced, in 1850, to marry, without having made any settlement whatever, an adventurer, such as the Barry Lyndon of fiction, or the Mr. Bowes of historical reality, who supplied, it is said, the original for Thackeray's picture of Barry Lyndon's married life. He at once becomes the actual owner of all the goods and money in the possession of his wife. He can, by taking the proper steps, with or without her consent, obtain possession for his own use of the money at her bankers, and exact payment to himself of every debt due to her. He can sell her leaseholds and put the proceeds in his own pocket. Her freehold estate, indeed, he cannot sell out and out, but he can charge it to the extent of his own interest therein at any rate during coverture, and if under the curtesy of England he acquires a life interest in the freehold estate after the death of his wife, he can charge the estate for the term of his natural life. In any case he can spend as he pleases the whole of his wife's income. He turns out a confirmed gambler. In the course of a few years he has got rid of the whole of his wife's property, except the freehold estate, but though it has not been sold, he has charged it with the payment of all his debts up to the very utmost of his power. If he outlives his wife she will never receive a penny of rent from the estate. He and his wife are in truth penniless; she earns, however, £1,000 a year as a musician or an actress. This is a piece of rare good luck—for her husband. He is master of the money she earns. Let him allow her enough, say £200 a year, to induce her to exert her talents, and he may live in idleness and modest comfort on the remaining £800. Under this state of things, which up to 1870 was possible, though, of course, not common, it is surely substantially true to say that marriage transferred the property of a wife to her husband. Blackstone, indeed, though he knew the common law well enough, tells us that, 'even the disabilities which the wife lies under, are for the most part intended for her protection and benefit. So great a favorite is the female sex of the laws of England.' But this splendid optimism of 1765 is too much for even the complacent toricism

to take possession of them: for unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife, or to her representatives, after the coverture is determined.

§ 578. 1. Difference between chattels real and personal.— There is therefore a very considerable difference in the acquisition

of 1809, and at that date, Christian, an editor of Blackstone's Commentaries, feels bound to deny that the law of England has shown any special partiality to women, and protests that he is not so much in love with his subject 'as to be inclined to leave it in possession of a glory which it may not justly deserve.'" DICEY, *Law and Opinion in England* (2d ed.), 371 ff.

It may be serviceable to add Professor Dicey's formulation of Blackstone's title by marriage in this "*Outline of effect of marriage at common law as assignment of wife's (W.'s) property to husband (H.)*."

"(A) *W.'s* personal property.

"I. Goods, *e. g.*, money and furniture in actual possession of *W.* became the absolute property of *H.*

"II. *W.'s choses in action* (*e. g.*, debts due to *W.*) became *H.'s* if he recovered them by law, or reduced them into possession during coverture, but not otherwise.

"III. *W.'s* chattels real (leaseholds) did not become *H.'s* property, but he might, during coverture, dispose of them (give them away or sell them) at his pleasure, and, if he sold them, the proceeds of the sale were his property.

"On the death of *W.* before *H.* all her personal property, if it had not already absolutely become his, passed to *H.*

"On the death of *H.* before *W.*, her *choses in action* if not reduced into possession, and her leaseholds, if not disposed of by *H.*, remained *W.'s*.

"(B) *W.'s* freehold estate.

"Any freehold estate of which *W.* was seised vested in *W.* and *H.* during coverture, but was during coverture under his sole management and control.

"On the death of *W.* before *H.* her freehold estate went at once to her heir, unless *H.* was entitled, through the birth of a child of the marriage, to an interest therein for life by the curtesy of England.

"On the death of *H.* before *W.*, *W.'s* freehold estate remained her own.

"N. B.—(1) These rules apply to property coming to *W.* during coverture as well as to property possessed by her at the time of marriage.

"(2) *H.* was entitled during coverture to the whole of *W.'s* income from whatever source it came, *e. g.*, if it were rent from her leasehold or freehold property, or if it were her own earnings. The income, when paid to her or to *H.*, was his, whilst still unpaid it was a *chose in action* which he might reduce into possession. See Blackstone, *Comm.*, II, 433-435; Stephen, *Comm.*, II (14th ed.), 308-314."—DICEY, *Law and Opinion in England* (2d ed.), 372 n.



of this species of property by the husband, according to the subject matter; viz., whether it be a chattel *real*, [434] or a chattel *personal*; and, of chattels personal, whether it be in *possession*, or in *action* only. A *chattel real* vests in the husband, not absolutely, but *sub modo*. As in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture:<sup>k</sup> if he be outlawed or attainted, it shall be forfeited to the king;<sup>l</sup> it is liable to execution for his debts:<sup>m</sup> and, if he survives his wife, it is to all intents and purposes his own.<sup>n</sup> Yet, if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will:<sup>o</sup> for, the husband having made no alteration in the property during his life, it never was transferred from the wife; but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of chattels personal (or *choses*) in *action*; as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And, upon such receipt or recovery, they are absolutely and entirely his own; and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But, if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action*, they shall survive to the wife; for the husband never exerted the power he had of obtaining an exclusive property in them.<sup>p</sup> And so, if an estray comes into the wife's franchise, and the husband seizes it, it is absolutely his property: but, if he dies without seizing it, his executors are not now at liberty to seize it, but the wife or her heirs;<sup>q</sup> for the husband never exerted the right he had, which right determined with the coverture. Thus in both these species of property the law is the same, in case the wife survives the husband; but, in case the husband survives the wife, the law is very different with respect to *chattels real* and *choses in action*: for he shall have [435] the *chattel real* by survivorship, but not the *chose in action*;<sup>r</sup> except

<sup>k</sup> Co. Litt. 46.<sup>l</sup> Plowd. 263.<sup>m</sup> Co. Litt. 351.<sup>n</sup> *Ibid.* 300.<sup>o</sup> Poph. 5. Co. Litt. 351.<sup>p</sup> Co. Litt. 351.<sup>q</sup> *Ibid.*<sup>r</sup> 3 Mod. 186.

in the case of arrears of rent, due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII, c. 37 (Administration of Estates, 1540). And the reason for the general law is this: that the husband is in absolute possession of the *chattel real* during the coverture, by a kind of joint tenancy with his wife; wherefore the law will not wrest it out of his hands, and give it to her representatives; though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all, during the coverture; and the only method he had to gain possession of it, was by suing in his wife's right: but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. But he still will be entitled to be her administrator; and may, in that capacity, recover such things in action as became due to her before or during the coverture.

Thus, and upon these reasons, stands the law between husband and wife, with regard to *chattels real*, and *choses in action*: but, as to *chattels personal* (or *choses*) *in possession*, which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially but in fact, which never can again revest in the wife or her representative.<sup>a</sup>

§ 579. 2. *Paraphernalia*.—And, as the husband may thus generally, acquire a property in all the personal substance of the wife, so in one particular instance the wife may acquire a property in some of her husband's goods; which shall remain to her after his death, and not go to his executors. These are called her *paraphernalia*;<sup>2</sup> [436] which is a term borrowed from the civil law,<sup>t</sup> and

<sup>a</sup> Co. Litt. 351.

<sup>t</sup> Ff. 23. 3. 9. § 3.

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<sup>2</sup> *Paraphernalia*.—By statute in nearly every American state, the widow (alone, or with her minor children) is entitled to a certain part of the husband's property on his death, to be set apart for her immediate use, exempt from appraisement and the claims of creditors, for her immediate support and

is derived from the Greek language, signifying something over and above her dower. Our law uses it to signify the apparel and ornaments of the wife, suitable to her rank and degree: which she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives:<sup>u</sup> and the jewels of a peeress, usually worn by her, have been held to be *paraphernalia*.<sup>w</sup> Neither can the husband devise by his will such ornaments and jewels of his wife; though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away.<sup>x</sup> But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons, except creditors, where there is a deficiency of assets.<sup>y</sup> And her necessary apparel is protected even against the claim of creditors.<sup>z</sup><sup>3</sup>

§ 580. VII. Title by judgment.—A judgment, in consequence of some suit or action in a court of justice, is frequently the means

<sup>u</sup> Cro. Car. 343. 1 Roll. Abr. 911. 2 Leon. 166.

<sup>w</sup> Moor. 213.

<sup>x</sup> Noy's Max. c. 49. Grahme v. Ld. Londonderry. 24 Nov. 1746. Canc.

<sup>y</sup> 1 P. Wms. 730.

<sup>z</sup> Noy's Max. c. 49.

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needs. Usually all the apparel, etc., that would be included in the *paraphernalia* are given her by these statutes; and always the reason of the statutory provision is one that makes the claim of paraphernalia needless. Hence the term and the right are scarcely mentioned in our books.—HAMMOND.

<sup>3</sup> "Community property."—The common law of England with respect to the property rights of married persons was peculiar to that country. That the early lawyers recognized the fact that the English law was in some respect *sui generis* is illustrated by the existence of such a phrase as "tenancy by the curtesy of England." Manifestly those who used this expression were contrasting this right of the husband with his right under some other system, possibly that of Normandy. 2 Poll. & Maitl. Hist. Eng. Law (2d ed.), 414. The convenient formula that husband and wife are one does not accurately represent the wife's position at common law. For example, the wife, even in the early times, was required to be personally summoned as a party in actions affecting her land. Y. B. 4 Edw. II, p. 122 (1311). Moreover, she had certain capacities at common law,—for example, the capacity to act as agent, even for her husband,—which are inconsistent with the theory of "unity of person." If her

of vesting the right and property of chattel interests in the prevailing party. And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action; and property, to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and judgment of the law. Of the former sort are all debts and *choses in action*; as if a man gives bond for 20*l.* or agrees to buy a horse at a stated sum, or takes up goods of a tradesman upon an implied contract to pay as much as they are reasonably worth: in all these cases the right accrues to the creditor, and is completely vested in him, at the time of the bond being sealed, or the contract

position had to be characterized in a single phrase, it would be more proper to substitute for the "unity of person," the statement that the wife was, with relation to her husband, under "an exaggerated guardianship."

The common-law system of property between the spouses, whatever its origin, is fundamentally different from the theory of community of goods, which prevails in most European countries, and in several of the states of our Union. However much particular systems of community may differ in details (as to which see *Garrozi v. Dastas* (1907). 204 U. S. 64, 51 L. Ed. 369, 27 Sup. Ct. Rep. 224), the fundamental idea underlies all of them that husband and wife, with respect to property rights, are regarded as partners. Though in Scotland, for example, the wife's interest is most shadowy, while in France it is a clear, definite interest, both France and Scotland possess the theory that the spouses form a sort of partnership. *De Nicols v. Curlier*, [1900] App. Cas. 21.

For the American student, the Spanish form of the community has the chief interest, for that system has most influenced American law. It is at the basis of the system of property rights between the spouses which exists in Louisiana, Texas, California, Washington, New Mexico, Idaho, Arizona and Nevada. It is true that ideas derived from the common law have much modified the original theory in these jurisdictions, but the fundamental idea of the community remains.

The law of California will serve as an illustration of the relation of the spouses with reference to property under the community system. All property owned by either of the spouses before marriage and that acquired afterwards by gift, devise, bequest or descent, together with the rents, issues and profits of such property, remains the separate property of the spouses. All other property, acquired during the marriage, is community property. Civil Code, California, §§ 162-164. The rule which treats the profits of separate property as separate property is a departure from the Spanish system under which such rents and profits were a part of the community, a rule which remains the law in most of the states where the community system exists. Arizona, Nevada

or agreement made; and the law only gives him a remedy to [437] recover the possession of that right, which already in justice belongs to him. But there is also a species of property to which a man has not any claim or title whatsoever, till after suit commenced and judgment obtained in a court of law: where the right and the remedy do not follow each other, as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. Of this nature are,

§ 581. 1. **Penalties.**—Such penalties as are given by particular statutes, to be recovered on an action *popular*; or, in other words, to be recovered by him or them that will sue for the same. Such

and Washington alone follow the California modification. McKay, Community Property, § 76. The community property is managed and controlled by the husband, subject to the limitation that he cannot give any part of it away without the wife's written consent. Civil Code, § 172. The husband, however, has power to dispose of only one-half of the community property by will; the other half goes to the wife. Upon the death of the wife, the entire community property goes to the husband. Civil Code, § 1401. This rule of succession was not always the law of California,—formerly, the wife's half went to her descendants upon her death, subject to the husband's right of management and control during his lifetime. The older rule in California was nearer the Spanish system than the present one. Loewy, The Spanish Community of Acquests, 1 Cal. Law Rev., 44.

In the Spanish law and in most of the jurisdictions which have followed that law, the right of the wife during the existence of the marriage has been said to be in the nature of an "expectancy, like the interest which an heir may possess in the property of his ancestor." Van Maren v. Johnson (1860), 15 Cal. 308. The husband so long as he lives is the "real and veritable owner of said property." Reade v. De Lea (1908), 14 N. M. 442, 95 Pac. 131. Cf., however, same case, *sub nomine* Arnett v. Reade (1911), 220 U. S. 311, 36 L. R. A. (N. S.) 1040, 55 L. Ed. 477, 31 Sup. Ct. Rep. 425. In both Texas and Washington, particularly in the latter state, the wife's interest is much more extensive, amounting to a vested proprietary interest. McKay, Community Property, § 291.

Those who desire to investigate the origin and history of the community system may examine with profit, Brissaud, History of French Private Law. §§ 552-572; 2 Poll. & Maitl., Hist. Eng. Law, 399-436; Garrozi v. Dastas (1907), 204 U. S. 64, 51 L. Ed. 369, 27 Sup. Ct. Rep. 224; Reade v. De Lea (1908), 14 N. M. 442, 95 Pac. 131, and Arnett v. Reade (1911), 220 U. S. 311, 36 L. R. A. (N. S.) 1040, 55 L. Ed. 477, 31 Sup. Ct. Rep. 425.—McMURRAY.



as the penalty of 500*l.* which those persons are by several acts of parliament made liable to forfeit, that, being in particular offices or situations in life, neglect to take the oaths to the government: which penalty is given to him or them that will sue for the same. Now, here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum, till after action brought;<sup>a</sup> for he that brings his action, and can *bona fide* obtain judgment first, will undoubtedly secure a title to it, in exclusion of everybody else. He obtains an inchoate imperfect degree of property, by commencing his suit: but it is not consummated till judgment; for, if any collusion appears, he loses the priority he had gained.<sup>b</sup> But, otherwise, the right so attaches in the first informer, that the king (who before action brought shall grant a pardon which shall be a bar to all the world) cannot after suit commenced remit anything but his own part of the penalty.<sup>c</sup> For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown, or of anything but parliament to release the informer's interest. This, therefore, is one instance, where a suit and judgment at law are [438] not only the means of recovering, but also of acquiring, property. And what is said of this one penalty is equally true of all others, that are given thus at large to a common informer, or to any person that will sue for the same. They are placed, as it were, in a state of nature, accessible by all the king's subjects, but the acquired right of none of them: open, therefore, to the first occupant, who declares his intention to possess them by bringing his action: and who carries that intention into execution, by obtaining judgment to recover them.

§ 582. 2. Damages.—Another species of property that is acquired and lost by suit and judgment at law, is that of *damages* given to a man by a jury, as a compensation and satisfaction for some injury sustained; as for a battery, for imprisonment, for slander, or for trespass. Here the plaintiff has no certain demand till after verdict; but, when the jury has assessed his damages, and

<sup>a</sup> 2 Lev. 141. Stra. 1169. Combe v. Pitt. B. R. Tr. 3 Geo. III.

<sup>b</sup> Stat. 4 Hen. VII. c. 20.

<sup>c</sup> Cro. Eliz. 138. 11 Rep. 65.

judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true, that this is not an acquisition so perfectly original as in the former instance: for here the injured party has unquestionably a vague and indeterminate right to some damages or other, the instant he receives the injury; and the verdict of the jurors, and judgment of the court thereupon, do not in this case so properly vest a *new* title in him, as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction; yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages, or satisfaction assessed, under the head of property acquired by suit and judgment at law.

§ 583. 3. *Costs*.—[439] 3. Hither also may be referred, upon the same principle, all title to costs and expenses of suit; which are often arbitrary, and rest entirely on the determination of the court, upon weighing all circumstances, both as to the *quantum* (amount), and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.

## CHAPTER THE THIRTIETH.

[440]

### OF TITLE BY GIFT, GRANT AND CONTRACT.

We are now to proceed, according to the order marked out, to the discussion of two of the remaining methods of acquiring a title to property in things personal, which are much connected together; and answer in some measure to the conveyances of real estates; being those by *gift* or *grant*, and by *contract*: whereof the former vests a property in *possession*, the latter a property in *action*.

§ 584. VIII. Title by gift or grant.—1. *Chattels real*.—Gifts, then, or *grants*, which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always gratuitous. *grants* are upon some consideration or equivalent: and they may be divided; with regard to their subject matter, into gifts or grants of chattels *real*, and gifts or grants of chattels *personal*. Under the head of gifts or grants of chattels *real*, may be included all leases for years of land, assignments, and surrenders of those leases; and all the other methods of conveying an estate less than freehold; which were considered in the twentieth chapter of the present book, and therefore need not be here again repeated: though these very seldom carry the outward appearance of a gift, however freely bestowed; being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn: any of which considerations will, in the eye of the law, convert the gift, if executed, into a grant; if not executed, into a contract.

§ 585. 2. *Chattels personal*.—<sup>[441]</sup> Grants or gifts, of chattels *personal*, are the act of transferring the right and the possession of them; whereby one man renounces, and another man immediately acquires, all title and interest therein: which may be done either in writing, or by word of mouth<sup>a</sup> attested by sufficient evidence, of which the delivery of possession is the strongest and

<sup>a</sup> Perk. § 57.

most essential.<sup>1</sup> But this conveyance, when merely voluntary, is somewhat suspicious; and is usually construed to be fraudulent, if creditors or others become sufferers thereby. And, particularly, by statute 3 Hen. VII, c. 4 (Fraudulent Deeds of Gift, 1487), all deeds of gift of goods, made in trust to the use of the donor, shall be void; because otherwise persons might be tempted to commit treason or felony, without danger of forfeiture; and the creditors of the donor might also be defrauded of their rights. And by statute 13 Eliz., c. 5 (Fraudulent Conveyance, 1571), every grant or gift of chattels, as well as lands, with intent to defraud creditors or others,<sup>b</sup> shall be void as against such persons to whom such fraud would be prejudicial; but, as against the grantor himself, shall stand good and effectual: and all persons partakers in, or privy to, such fraudulent grants, shall forfeit the whole value of the goods, one moiety to the king, and another moiety to the party grieved: and also on conviction shall suffer imprisonment for half a year.

§ 586. 3. **Delivery of possession.**—A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately: as if A gives to B 100*l.* or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee; and it is not in the donor's power to retract it, though he did it without any consideration or recompense:<sup>c</sup> unless it be prejudicial to creditors; or the donor were under any legal incapacity, as infancy, coverture, duress, or the like; or if he were

<sup>b</sup> See 3 Rep. 82.

<sup>c</sup> Jenk. 109.

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<sup>1</sup> **Gifts.**—A gift is a voluntary transfer of property by one to another without any consideration or compensation therefor. *Ingram v. Colgan*, 106 Cal. 113, 46 Am. St. Rep. 221, 28 L. R. A. 187, 38 Pac. 315, 39 Pac. 437. A gift must be perfected by delivery and acceptance. It is immaterial whether delivery precedes or follows or is contemporaneous with the acceptance. *Harris v. Harris' Estate*, 82 Vt. 199, 72 Atl. 912. Acceptance is required both under the common and civil law. *De Levillain v. Evans*, 39 Cal. 120. Delivery must be according to the nature of the thing. If the thing be not capable of actual delivery, there must be some act equivalent to it, something sufficient to work an immediate change of dominion. *Gartside v. Pahlman*, 45 Mo. App. 160. The transfer of a claim or chose in action by a written instrument under seal, duly executed, has the effect to divest the title of the donor, and has the same

drawn in, circumvented, or imposed upon, by false pretenses, ebriety, or surprise. But if the gift does not take effect, by delivery of immediate possession, it is then not properly a gift, but a contract: and this a man [442] cannot be compelled to perform, but upon good and sufficient consideration; as we shall see under our next division.

§ 587. IX. Title by contract.—A contract, which usually conveys an interest merely in action, is thus defined: “an agreement, upon sufficient consideration, to do or not to do a particular thing.”<sup>2</sup> From which definition there arise three points to be contemplated

effect as actual delivery. *Matson v. Abbey*, 70 Hun, 475, 24 N. Y. Supp. 284. And a delivery of a chose in action not negotiable and negotiable paper not indorsed which rests in the donee the equitable title is sufficient without a complete transfer of the legal title. *First Nat. Bank v. Holland*, 99 Va. 495, 86 Am. St. Rep. 898, 55 L. R. A. 155, 39 S. E. 126.

2 **Definition of contract.**—The definition by Sir W. R. Anson (*Contracts*, Huffleutt's ed., 10) is: “An agreement enforceable at law, between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others.” Sir Frederick Pollock (*Contracts*, 1) says: “The most popular description of a contract that can be given is also the most exact one, namely, that it is a promise or set of promises which the law will enforce.” Mr. Justice Washington (*Dartmouth College v. Woodward*, 4 Wheat. (U. S.) 518, 656, 4 L. Ed. 629, 664), says of contract: “It may be defined to be a transaction between two or more persons, in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other.” In the Indian Contract Act, which was enacted in 1872 as a serious attempt to codify the English law on the subject, the following analytical definition of a contract is given (*Pollock's Indian Contract Act*, 10):

“(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

“(b) When the person to whom the proposal is made signifies his assent thereto the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

“(c) The person making the proposal is called the ‘promisor,’ and the person accepting the proposal is called the ‘promisee’;

“(d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;



in all contracts; 1. The *agreement*: 2. The *consideration*: and 3. The *thing* to be done or omitted, or the different species of contracts.

§ 588. 1. **Agreement.**—First, then it is an *agreement*, a mutual bargain or convention; and therefore there must at least be two contracting parties, of sufficient ability to make a contract: as where A contracts with B to pay him 100*l.* and thereby transfers a property in such sum to B. Which property is, however, not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law: for no *chose* in action could be assigned or granted over,<sup>d</sup> because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law.<sup>3</sup> But this nicety is now disregarded: though, in compliance with the ancient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of

<sup>d</sup> Co. Litt. 214.

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“(e) Every promise and every set of promises, forming the consideration for each other, is an agreement;

“(f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;

“(g) An agreement not enforceable by law is said to be void;

“(h) An agreement enforceable by law is a contract;

“(i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;

“(j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.”

3 **Assignability of choses in action.**—“In 1 Lilly’s Abr. 125, it is said: ‘A statute merchant or staple, or bond, etc., cannot be assigned over to another so as to vest an interest whereby the assignee may sue in his own name, but they are every day transferred by letter of attorney, etc. Mich. 22 Car. B. R.’ See, also, *Deering v. Carrington*, 1 Lilly, Abr. 124; *Shep. Touchst.*, 6th ed., 240; 2 Blackst. Comm., 442; *Leake, Cont.*, 2d ed., 1183; *Gerard v. Lewis*, L. R. 2 C. P. 308, 309, per Willes, J. These letters of attorney for the attorney’s own use, whether borrowed from the similar *procuratio in rem suam* of the Roman law or not, are of great antiquity. *Riley, Memorials of London* (1309), 68. ‘Know ye that I do assign and attorn in my stead E., my dear partner, to demand and receive the same rent of forty shillings with the arrears and by distress the same to levy in my name . . . and all things to do as to the same matter FOR HER OWN PROFIT as well as ever I myself could have done in

the name of the assignor, in order to recover the possession. And therefore, when in common acceptation a debt or bond is said to be assigned over, it must still be sued in the original creditor's name; the person, to whom it is transferred, being rather an attorney than an assignee. But the king is an exception to this general rule; for he might always either grant or receive a *chose* in action by assignment:<sup>e</sup> and our courts of equity, considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action, as much as the law will that of a *chose* in possession.<sup>f</sup>

<sup>e</sup> Dyer. 30. Bro. Abr. tit. Chose in Action. 1 & 4.

<sup>f</sup> 3 P. Wms. 199.

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my own proper person.' See, also, West, Symbol., § 521."—AMES, Lect. in Leg. Hist., 213 n, also in 3 Sel. Essays in Anglo-Am. Leg. Hist., 584 n.

This note occurs in Professor Ames' learned essay on "The Inalienability of Choses in Action," the opening paragraphs of which are as follows: "The rule that a chose in action is not assignable was a rule of the widest application. A creditor could not assign his debt. A reversioner could not convey his reversion, nor a remainderman his remainder. A bailor was unable to transfer his interest in a chattel. And, as we have seen, the disseisee of land or chattels could not invest another with his right to recover the *res* or its value. In a word, no right of action, whether a right *in rem* or a right *in personam*, whether arising *ex contractu* or *ex delicto*, was assignable either by act of the party or by operation of law.

"A right of action for the recovery of land or chattels, or of a debt which, like land or chattels, was regarded as a specific *res*, did, indeed, descend to one's representative in the case of death. But this was hardly a departure from the rule, since the representative was looked upon as a continuation of the *persona* of the deceased.

"There were, however, a few exceptions to the rule. The king, as might be supposed, could grant or receive the benefit of a chose in action. So, too, a reversion or a remainder was transferable by fine in the king's court, or by a customary devise, which, when recorded in the local court, operated like a fine. Again, certain obligations, by the tenor of which the obligor expressly bound himself to the obligee and his assigns, could be enforced by a transferee. If, for instance, one granted an annuity to A. and his assigns, or covenanted to enfeoff A. and his assigns, or made a charter of warranty to A. and his assigns, the assignee was allowed to bring an action in his own name against the grantor, covenantor, and warrantor, respectively.

"The significance of this exception lies in the fact that it goes far to explain the reason of the rule which prohibits the assignment of rights of action in general. The traditional opinion that this rule had its origin in the aversion

§ 589. a. **Express and implied contracts.**—<sup>[443]</sup> This contract or agreement may be either express or implied. *Express* contracts are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads, of timber, or to pay a stated price for certain goods. *Implied* are such as reason and justice dictate, and which therefore the law presumes that every man undertakes to perform.<sup>4</sup> As, if I employ a

of the 'sages and founders of our law' to the 'multiplying of contentions and suits' shows the power of a great name for the perpetuation of error. The inadequacy of this explanation by Lord Coke was first pointed out by Mr. Spence. The rule is not only older than the doctrine of maintenance in English law, but is believed to be a principle of universal law." See, also, Ames, Lect. on Legal Hist., 258, and the chapter in 3 Street, Foundations of Legal Liability, on "Assignment of Right of Action," 76.

"It may be said that the general tendency has constantly been toward the extension of the right to assign. The ancient argument based on the idea of preventing litigation by discouraging assignments has ceased to appeal to the courts, and consequently that idea is looked upon as a mere legal curiosity and relic of the past.

"As regards particular results, it is pretty generally held in America that the only causes or rights of action which are not transferable or assignable in any sense are those which are founded upon wrongs of a purely personal nature, such as slander (*Renfro v. Prior*, 25 Mo. App. 402; *Miller v. Newell*, 20 S. C. 123, 47 Am. Rep. 833; *Dillard v. Collins*, 25 Gratt. (Va.) 343), assault and battery (*McGlinchy v. Hall*, 58 Me. 152; *Averill v. Longfellow*, 66 Me. 237), negligent personal injuries (*Central R. etc. Co. v. Brunswick etc. R. Co.*, 87 Ga. 386, 13 S. E. 520; *Stone v. Boston etc. R. Co.*, 7 Gray (Mass.), 539), criminal conversation, seduction (*Howard v. Crowther*, 8 Mees. & W. 601, 1 D. & L. 383, 7 Jur. 953; *People v. Tioga Common Pleas*, 19 Wend. (N. Y.) 73), breach of marriage promise, malicious prosecution (*Brewer v. Dew*, 11 Mees. & W. 625; *Lawrence v. Martin*, 22 Cal. 173; *Hunt v. Conrad*, 47 Minn. 557, 14 L. R. A. 512, 50 N. W. 614; *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441), and others of like nature. All other demands, claims and rights of action whatever are generally held to be transferable (*McKee v. Judd*, 12 N. Y. 622, 625, 64 Am. Dec. 515; *Hoyt v. Thompson*, 5 N. Y. 320; *North v. Turner*, 9 Serg. & R. (Pa.) 244, 248, 249)."—STREET, 3 Foundations of Legal Liability, 86.

<sup>4</sup> **Quasi contracts.**—*Obligaciones quasi ex contractu.* Both in Roman and in English law there are certain obligations which are not in truth contractual, but which the law treats as if they were. They are contractual in law, but not in fact, being the subject matter of a fictitious extension of the sphere of contract to cover obligations which do not in reality fall within it. The Romans called them *obligaciones quasi ex contractu*. English lawyers call them *quasi* contracts, or implied contracts, or often enough contracts simply and without qualification. We are told, for example, that a judgment is a contract, and

person to do any business for me, or perform any work; the law implies that I undertook, or contracted to pay him as much as his labor deserves. If I take up wares from a tradesman, without any agreement of price, the law concludes that I contracted to pay their real value. And there is also one species of implied contracts, which runs through and is annexed to all other contracts, conditions and covenants, viz., that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal. In short, almost all the rights of

that a judgment debt is a contractual obligation. "Implied (contracts)," says Blackstone, "are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform." "Thus it is that every person is bound, and hath virtually agreed, to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation, of the law." (3 Bl. 159.) So the same author speaks, somewhat too widely indeed, of the "general implication and intendment of the courts of judicature that every man hath engaged to perform what his duty or justice requires." (*Ibid.* 3, 162.)

From a *quasi* contract, or contract implied *in law*, we must carefully distinguish a contract implied *in fact*. The latter is a true contract, though its existence is only inferred from the conduct of the parties, instead of being expressed. Thus when I enter an omnibus, I impliedly, yet actually agree to pay the usual fare. A contract implied in law, on the contrary, is merely fictitious, for the parties to it have not agreed at all, either expressly or tacitly.

In what cases, then, does the law recognize this fiction of *quasi* contract? What classes of obligations are regarded as contractual in law, though they are not so in fact? To this question it is not possible to give any complete answer here. We can, however, single out two classes of cases, which include most, though not all, of the *quasi*-contractual obligations known to English law.

In the first place, we may say, in general, that in the theory of the common law all *debts* are deemed to be contractual in origin. A debt is an obligation to pay a liquidated sum of money, as opposed to an obligation to pay an unliquidated amount, and as opposed also to all nonpecuniary obligations. Most debts are *obligationes ex contractu* in truth and in fact, but there are many which have a different source. A judgment creates a debt which is noncontractual; so also does the receipt of money paid by mistake or obtained by fraud. Nevertheless in the eye of the common law they all fall within the sphere of contract; for the law conclusively presumes that every person who owes a debt has promised to pay it. "Whatever, therefore," says Blackstone (3, 160), "the laws order anyone to pay, that becomes instantly a debt which he hath beforehand contracted to discharge." \* \* \*

The second class of *quasi* contracts includes all those cases in which a person injured by a tort is allowed by the law to waive the tort and sue in contract

personal property (when not in actual possession) do in great measure depend upon contracts of one kind or other, or at least might be reduced under some of them: which indeed is the method taken by the civil law; it having referred the greatest part of the duties and rights, which it treats of, to the head of obligations *ex contractu* (arising from a contract) and *quasi ex contractu* (from something in the nature of a contract).<sup>5</sup>

§ 590. **b. Executed and executory contracts.**—A contract may also be either *executed*, as if A agrees to change horses with B, and they do it immediately; in which case the possession and the right are transferred together: or it may be *executory*, as if they agree to change next week; here the right only vests, and their reciprocal property in each other's horse is not in possession but in action; for a contract *executed* (which differs nothing from a grant) conveys a *chose in possession*; a contract *executory* conveys only a *chose in action*.

§ 591. **2. Consideration.**—Having thus shown the general nature of a contract, we are, secondly, to proceed to the *consideration* upon which it is founded; or the reason which moves the contracting party to [441] enter into the contract.<sup>5</sup> “It is an agreement,

§ Inst. 3. 14. 2.

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instead. That is to say, there are certain obligations which are in truth delictual, and not contractual, but which may at the option of the plaintiff be treated as contractual, if he so pleases. Thus if one wrongfully takes away my goods and sells them, he is guilty of the tort known as trespass, and his obligation to pay damages for the loss suffered by me is in reality delictual. Nevertheless I may, if I think it to my interest, waive the tort, and sue him on a fictitious contract, demanding from him the payment of the money so received by him as having rightly sold the goods as my agent, and therefore as being indebted to me in respect of the price received by him; and he will not be permitted to plead his own wrongdoing in bar of any such claim. So if a man obtains money from me by fraudulent misrepresentation, I may sue him either in tort for damages for the deceit, or on a fictitious contract for the return of the money.—SALMOND, Jurisprudence, 560.

<sup>5</sup> **Consideration.**—Consideration, according to the traditional definition, is either a detriment incurred by the promisee or a benefit received by the promisor in exchange for the promise. Professor Langdell has pointed out the irrelevancy of the notion of benefit to the promisor, and makes detriment to the



upon *sufficient consideration*." The civilians hold, that in all contracts, either express or implied, there must be something given in exchange, something that is mutual or reciprocal.<sup>b</sup> This thing, which is the price or motive of the contract, we call the consideration: and it must be a thing lawful in itself, or else the contract is void. A *good* consideration, we have before seen,<sup>1</sup> is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another.<sup>1</sup> This consideration may sometimes, however, be set aside, and the contract become void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for *any valuable* consideration, as for marriage, for money, for work done, or for other reciprocal contract, can never be impeached at law; and, if it be of sufficient adequate value, is never set aside in equity: for the person contracted with has been given an equivalent in recompense, and is therefore as much an owner, or a creditor, as any other person.

<sup>b</sup> *In omnibus contractibus, sive nominatis sive innominatis, permutatio continetur.* Gravin. l. 2. § 12.

<sup>1</sup> Pag. 297.

<sup>1</sup> 3 Rep. 83.

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promisee the universal test of consideration. The simplified definition has met with much favor. It is concise, and it preserves the historic connection between the modern simple contract and the ancient *assumpsit* in its primitive form of an action for damage to a promisee by a deceitful promisor. In one respect only does the definition leave anything to desire. What is to be understood by detriment?

The incurring of a detriment by the promisee involves of necessity a change of position on his part; there must be some act or some forbearance by him. But will every act or every forbearance be a detriment, or must the word be restricted to certain acts and forbearances? It is certainly a common opinion that the word is to be interpreted in the restricted sense and cannot properly include an act or forbearance already due from the promisee by reason of some pre-existing legal obligation. The inability of the writer to reconcile this opinion with the decided cases has led him to give to detriment its widest interpretation and to define consideration as any act or forbearance or promise, by one person given in exchange for the promise of another.—AMES, Lect. on Leg. Hist., 323, in the opening paragraphs of his valuable essay on "Two Theories of Consideration."

§ 592. a. **Consideration in the civil law.**—These valuable considerations are divided by the civilians<sup>k</sup> into four species.<sup>6</sup> 1. *Do ut des* (I give that you may give): as when I give money or goods, on a contract that I shall be repaid money or goods for them again. Of this kind are all loans of money upon bond, or promise of repayment; and all sales of goods, in which there is either an express contract to pay so much for them,

<sup>k</sup> Ff. 19. 5. 5.

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6 **Roman law of contracts.**—Blackstone seems to imply that the Romans generalized the principle of consideration, and refused to enforce an agreement which was not founded on a valuable consideration. This is not true, nor is his explanation of the Roman jurist Paul's famous classification of unnamed contracts (*Do tibi ut des; do ut facias; facio ut des; facio ut facias*) correct. In explaining these misconceptions of Blackstone, I shall take occasion to make a brief statement of the Roman law of contracts.

The pervading principle of Roman law was that not every promise which was intended to create an obligation was legally valid and actionable. In addition to the promise there had to be some definite legal ground (*causa civilis*) for the promise. The term "contract" was reserved to such agreements as resulted in an obligation actionable at law. Now, there were four ways in which a promise intended to create an obligation might become actionable or enforceable, leading to the well-known fourfold classification of Roman law. The statement in the Institutes of both Gaius (2d century, A. D.) and Justinian (6th century, A. D.) is in these words: "*Et prius videamus de his [obligationibus] quæ ex contractu nascuntur. Harum quattuor genera sunt: aut enim re contrahitur obligatio, aut verbis, aut literis, aut consensu.*" (And first let us look at those [obligations] that arise from contract. Of these there are four kinds: for contract is concluded (1) by performance, or acts (*re*), (2) by (originally particular) words (*verbis*), (3) by (special) writing, or (4) by (mere) consent (*consensu*). The meaning of this is that: (1) in contracts *re*, the promise becomes actionable because there has been a delivery of property (*res*) by one party, by which he is entitled to claim a redelivery or counter-performance, as the case may be, from the other party; (2) in the contract *verbis*, the promise becomes actionable because the agreement has been orally expressed in a very particular way, in a particular form of question and answer; (3) in the contract *literis*, the promise becomes actionable, because the agreement has been expressed in the form of an entry in the domestic account-book; and (4) in contracts *consensu*, nothing is needed to make the agreement actionable except the consent itself of the parties.

These four classes of contracts constitute the contractual system of the Roman law. They have received the English names (misleading unless the above explanation be held in mind) of (1) Real, (2) Verbal, (3) Literal, and (4) Con-

or else the law implies a contract to pay so much as they are worth. 2. The second species is, *facio ut facias* (I do that you may do): as when I agree with a man to do his work for him, if he will do mine for me; or if two persons agree to marry together: or to do any other positive acts on both sides. Or, it may be to forbear on one side on consideration of something done on the other; as, that in consideration A, the tenant, will repair his house, B, the landlord, will not sue him for waste. Or, it may

sensual. These classes with the recognized contracts falling thereunder may be exhibited in a table as follows:

- I. Real Contracts (*re*—acts, or performance).
  - 1. *Mutuum*, or Loan (for consumption).
  - 2. *Commodatum*, or Loan for use.
  - 3. *Depositum*, or Deposit.
  - 4. *Pignus*, or Pledge.
- II. The Verbal Contract (*verbis*—spoken words).
  - 1. *Stipulatio*, or Stipulation.
- III. The Literal Contract (*litteris*).
  - 1. *Expensilatio* or *nomina trans-scripticia*, Entry in the creditor's ~~note~~ count-book.
- IV. Consensual Contracts (*consensu*—by consent alone).
  - 1. *Emptio Venditio*, or Sale.
  - 2. *Locatio Conductio*, or Hire.
  - 3. *Societas*, or Partnership.
  - 4. *Mandatum*, or Agency.

Of these contracts, *mutuum*, *commodatum*, *depositum*, and *mandatum* were gratuitous contracts. It was only with the progress of time that any pecuniary element, such as payment of interest, was allowed to enter in. Three of the consensual contracts, *emptio venditio*, *locatio conductio*, and *societas*, were founded upon a valuable consideration. The *stipulatio* was an ancient form of making any sort of promise binding. For this purpose, the agreement had to be expressed in due legal form by a question (*spondesne mihi centum dare?*—do you promise to give me one hundred?) on the part of the creditor and a corresponding answer (*spondeo*—I promise) on the part of the debtor. Given these conditions, the contract is valid and actionable on the ground of the form in which the words are put. It was immaterial whether the debtor received any consideration for his promise or not. All that the creditor had to prove was that the stipulation had in fact been made. That is to say, the obligation rested on the *verba* or words. Stipulation was used (1) for originating an obligation, putting it into this solemn form, or converting an informal unenforceable promise into a formal, obligatory one; and (2) for transforming,

be for mutual forbearance on both sides; [445] as, that in consideration that A will not trade to Lisbon, B will not trade to Marseilles: so as to avoid interfering with each other. 3. The third species of consideration is *facio ut des* (I do that you may give): when a man agrees to perform anything for a price, either specifically mentioned, or left to the determination of the law to set a value to it. And when a servant hires himself to his master for

or "novating," an obligation. The latter use was employed in a variety of cases, as for changing the nature of the obligation, or for changing the parties.

The literal contract was based on the business habits of the Romans in keeping domestic account-books. From this arose the practice of utilizing this business habit to create obligations. B. writes in his account-book (*codex*) that a certain sum has been paid him by A. As a matter of fact no money has been paid, but the purpose and effect are to create legal rights and liabilities, a legal relationship. A. usually made a corresponding entry in his account-book; but that was unnecessary. The creditor's entry (*expensilatio*) was all that was necessary. The debtor was then bound *literis*, that is, by the writing as such in the *codex*.

The important real contracts were *mutuum*, *commodatum*, and *depositum*. *Mutuum* was the gratuitous loan of things to be consumed (*res fungibiles*), such as corn, wine, oil, and money, also. The duty of the borrower was to return, not the same things, but things like in kind. *Commodatum* was the gratuitous loan of something to be used according to its purpose and returned, a horse or a book, for instance. *Depositum* was a contract in which A. delivered to B. something for the purpose of gratuitous safekeeping. The ground of liability in these *real* contracts was that there had been an act, or performance (*res*), on one side, and justice demanded that the debtor should perform on his side. There was an agreement (*consensus*), but plus the *consensus* there was a *res*, or performance on one side. These were *real* contracts, *nominate*, or named, *real contracts*. On these the Romans generalized in the formula of Paul: *do ut des, do ut facias, facio ut des, facio ut facias*. And these latter have received with us the designation of *innominate*, or unnamed, *real contracts*. They rest upon the equitable principle that one person having delivered something or performed some act, the law will on that ground enforce a counter-delivery or a counter-performance.

The consensual contracts (except *mandatum*) were in fact, though not in a generalized statement, founded on a valuable consideration. It was part of the definition of sale that a price (*pretium*), and of hire that the rent or wages (*pensio, reditus, merces*), should be paid, and in partnership it was essential that there should be a valuable consideration moving from each of the partners. But the Romans said that these contracts, and also *mandatum*, were actionable upon consent without more, that is to say, the contract was valid the moment the parties were agreed in regard to the terms of the contract.

certain wages or an agreed sum of money: here the servant contracts to do his master's service, in order to earn that specific sum. Otherwise, if he be hired generally; for then he is under an implied contract to perform this service for what it shall be reasonably worth. 4. The fourth species, is, *do ut facias* (I give that you may do): which is the direct counterpart of the other. As when I agree with the servant to give him such wages upon his performing such work: which, we see, is nothing else but the last species inverted; for *servus facit, ut herus det* (the servant performs, that the heir may give), and *herus dat, ut servus faciat* (the heir gives, that the servant may perform).

§ 593. **b. Nude pacts.**—A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a *nudum pactum* (nude pact) or agreement to do or pay anything on one side, without any compensation on the other, is totally void in law: and a man cannot be compelled to perform it.<sup>1</sup> As if one man promises to give another 100*l.*, here there is nothing contracted for or given on the one side, and therefore there is nothing binding on the other. And, however, a man may or may not be bound to perform it, in honor or conscience, which the municipal laws do not take upon them to decide; certainly those municipal laws will not compel the execution of what he had no visible inducement to engage for: and therefore our law has adopted<sup>m</sup> the maxim of the civil law,<sup>n</sup> that *ex nudo pacto non oritur actio* (no action arises from a nude pact).<sup>7</sup> But any degree of reciprocity will

<sup>1</sup> Dr. & St. d. 2. c. 24.

<sup>n</sup> Cod. 2. 3. 10. & 5. 14. 1.

<sup>m</sup> Bro. Abr. tit. Dette. 79. Salk. 129.

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<sup>7</sup> **Nude pacts.**—Although it is true, as Blackstone says, that our law has borrowed this from the Roman, where it is found in various forms, *e. g.*, *ex nudo pacto inter cives Romanos actio non nascitur* (Paulus, R. S. ii. 14, 1), and *nuda pactio obligationem non parit* (Dig. ii. 14, 7, § 4; see, also, Cod. Just. iv. 65, 27, and *Consultatio veteris J. Ci. iv. 9.*), yet it must not be inferred that in that law the phrase meant as in ours the absence of a consideration. The notion of a consideration as necessary or able to make a contract binding was foreign to that law: the statements to the contrary made in books of so much reputation as Story on Promissory Notes, section 183, are misleading. The nude pact of the civilians was any promise or agreement that did *not* constitute an actionable contract, that was not clothed with the established forms requisite



prevent the pact from being nude: nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum*. And as this rule was principally established, to avoid the inconvenience that would arise from setting up mere verbal promises, for which no good reason could [446] be assigned,<sup>o</sup> it therefore does not hold in some cases, where such promise is authentically proved by written documents. For if a man enters into a voluntary bond, or gives a promissory note, he shall not be allowed to aver the want of a consideration in order to evade the payment: for every bond from the solemnity of the instrument,<sup>p</sup> and every note from the subscription of the drawer,<sup>q</sup> carries with it an internal evidence of a good consideration. Courts of justice will therefore support them both, as against the contractor himself;<sup>s</sup> but not to the prejudice of creditors, or strangers to the contract.

<sup>o</sup> Plowd. 308, 309.

<sup>q</sup> Lord Raym. 760.

<sup>p</sup> Hardr. 200. 1 Ch. Rep. 157.

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to make it binding. Besides, to a certain extent, such pacts were more effective in that system than mere promises without consideration are with us. They gave a natural obligation, though not a civil one, and could be used in defense of actions *ope exceptionis*, but not in support of them. . . . The only sense in which the maxim can properly be used of a mere promise in our law is that the lack of consideration prevents it from being a contract in any legal sense of the word, Roman or English. Unfortunately, the promise taken by itself is hardly more of a pact than it is of a contract \* \* \* .—HAMMOND.

<sup>s</sup> Lord Mansfield became chief justice of the king's bench in 1756, a position which he retained till 1788. He was Scotch by extraction and, being better versed than his predecessors in the civil law, showed a decided bias for the legal conceptions of that system. His genuine learning and great ability together with his wonderful personality enabled him to effect, without opposition from the other judges, most radical changes. He left a very deep mark in our law of contract, but he came too late to revolutionize it or put it on a different basis. . . . In *Pillans v. Van Mierop* (1765), 3 Burr. 1663, 97 Eng. Reprint, 1035, his lordship and his associates held that a bill of exchange is good without a consideration. His idea was that this quality was derived from the law merchant. But he further suggested that any contract which by a rule of law is required to be put in writing and which conforms to that requirement is valid without regard to the presence of a consideration. Said he: "I take it that the ancient notion about the want of consideration was for the sake of evidence only, for when it is reduced into writing, as in covenants, specialties, bonds, etc., there was no objection to the want of consideration, and the statute

§ 594. 3. The several species of contract.—We are next to consider, *thirdly*, the thing agreed to be done or omitted. “A contract is an agreement, upon sufficient consideration, *to do or not to do a particular thing*.” The most usual contracts, whereby the right of chattels personal may be acquired in the laws of England, are, 1. That of *sale* or *exchange*. 2. That of *bailment*. 3. That of *hiring* and *borrowing*. 4. That of *debt*.

§ 595. a. Sale or exchange.—Sale or *exchange* is a transmutation of property from one man to another, in consideration of some price or recompense in value: for there is no sale without a recompense; there must be *quid pro quo* (something for some-

of frauds proceeded upon the same principle.” Wilmot, J., agreed with this suggestion and unearthed the old learning of the civil law concerning *nudum pactum*, which was of course more or less irrelevant to the subject of *nudum pactum* in the common law.

If this view had prevailed we should have in English law three classes of contracts: (1) specialties, (2) contracts supported by a consideration, and (3) contracts in writing. Sir Frederick Pollock thinks that if this notion had occurred a century or two earlier to a judge of anything like Mansfield’s ability, the English law of contract might have been shaped along the same lines as those of the law of Scotland. This is doubtful, however.

At any rate, Lord Mansfield’s suggestion came too late and was barren of results. (Mansfield’s opinion that contracts in writing, under the law-merchant, require no consideration, evidently made impression on Blackstone, whose Commentaries were published (1767) a short while after Pillans v. Van Mierop was decided. [The writer here quotes from Blackstone as above.]) It only served to challenge attention to the point in question, and a few years later a judgment was delivered (1778) in the house of lords in which Skynner, L. C. B., used the memorable words: “It is undoubtedly true that every man is by the law of nature bound to fulfill his engagements. It is equally true that the law of this country supplies no means nor affords any remedy to compel the performance of an agreement made without sufficient consideration; such agreement is *nudum pactum ex quo non oritur actio*; and whatsoever may be the sense of this maxim in the civil law, it is in the last-mentioned sense only that it is to be understood in our law.” (Rann v. Hughes, 7 Term. Rep. 346, note a.)

From whatever direction we approach this case of Rann v. Hughes, whether by retracing our steps from the present day or by traveling more tediously over the three preceding centuries, it must appear to mark an epoch in the history of the development of English contract law. The fact that it does mark an epoch is easily lost to the modern reader, because it is in such complete harmony with accepted views.—STREET, 2 Foundations of Legal Liability, 141.

thing).<sup>r9</sup> If it be a commutation of goods for goods, it is more properly an *exchange*; but, if it be a transferring of goods for money, it is called a *sale*: which is a method of exchange introduced for the convenience of mankind, by establishing an universal medium, which may be exchanged for all sorts of other property; whereas if goods were only to be exchanged for goods, by way of barter, it would be difficult to adjust the respective values, and the carriage would be intolerably cumbersome. All civilized nations adopted, therefore, very early the use of money; for we

r Noy's Max. c. 42.

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9 **English Sale of Goods Act of 1893.**—The law relating to sale of personal property in Great Britain was codified by the Sale of Goods Act of 1893. The act deals only with the rules of law that are peculiar to the law of sale; if the whole law of contracts were codified, the act would form merely a chapter in that code. It does not deal, consequently, with questions common to the whole law of contract. For example, if any question arises on a contract of sale as to what constitutes a valid offer or acceptance of the offer, or whether there has been a sufficient *consensus* as to the subject matter or the personality of the parties, or whether the contract has been validly rescinded or performed by substitution, reference must be made to the general law of contract. "Goods" are defined in the act to include all chattels personal other than things in action and money; it includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The definition of sale as given is: "A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

**American Uniform Sales Acts.**—A Uniform Sales Law, drafted by Professor Samuel Williston, has been adopted in a number of the states. It follows, but with important variations, the English Sale of Goods Acts. The definition of sale is: "A sale of goods is an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." The whole law of sale, both at common law and under the uniform act is treated in Williston, Sales. Both the American and English statutes are given in this book.

Barter or exchange differs from sale at common law, in that the consideration, instead of being paid in money, is paid in goods or merchandise susceptible of a valuation. *Mitchell v. Gile*, 12 N. H. 390; *Stevenson v. State*, 65 Ind. 409. Under the American uniform statute, this difference is done away with by the provision that in sale the price may be payable in any personal property.

find Abraham giving "four hundred shekels of silver, current money with the merchant," for the field of Machpelah:<sup>a</sup> though the practice of exchanges still subsists among several of the savage nations. But, with regard to *law* of [447] sales and exchanges, there is no difference. I shall therefore treat of them both under the denomination of sales only; and shall consider their force and effect, in the first place where the vendor *hath* in himself, and secondly where he *hath not*, the property of the thing sold.

§ 596. (1) **Sale after execution.**—Where the vendor *hath* in himself the property of the goods sold, he hath the liberty of disposing of them to whomever he pleases, at any time, and in any manner: unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds,<sup>ss</sup> the sale shall be looked upon as fraudulent, and the property of the goods shall be bound to answer the debt, from the time of delivering the writ. Formerly it was bound from the *teste*, or issuing, of the writ,<sup>t</sup> and any subsequent sale was fraudulent; but the law was thus altered in favor of *purchasers*, though it still remains the same between the *parties*: and therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.<sup>u</sup>

§ 597. (2) **Contract of sale when complete.**—If a man agrees with another for goods at a certain price, he may not carry them away before he hath paid for them; for it is no sale without payment, unless the contrary be expressly agreed. And therefore, if the vendor says, the price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck; and they neither of them are at liberty to be off, provided immediate possession be tendered by the other side. But if neither the money be paid, nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases.<sup>v</sup> But if any part of the price

<sup>a</sup> Gen. c. 23. v. 16.

<sup>u</sup> Comb. 33. 12 Mod. 5. 7 Mod. 95.

<sup>ss</sup> 29 Car. II. c. 3 (1677).

<sup>v</sup> Hob. 41. Noy's Max. c. 42.

<sup>t</sup> 8 Rep. 171. 1 Mod. 188.

is paid down, if it be but a penny, or any portion of the goods delivered by way of *earnest*, which the civil law calls *arrha*, and interprets to be "*emptionis-venditionis* [448] *contractæ argumentum* (a token of a contract for purchase and sale)," <sup>v</sup> the property of the goods is absolutely bound by it: and the vendee may recover the goods by action, as well as the vendor may the price of them.<sup>z</sup>

§ 598. (3) Statute of Frauds, 1677.—And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute 29 Car. II, c. 3, no contract for the sale of goods, to the value of 10*l.* or more, shall be valid, unless the buyer actually receives part of the goods sold, by way of earnest on his part; or unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party, or his agent, who is to be charged with the contract. And, with regard to goods under the value of 10*l.* no contract or agreement for the sale of them shall be valid, unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party who is to be charged therewith. Anciently, among all the northern nations, shaking of hands was held necessary to bind the bargain; a custom which we still retain in many verbal contracts.<sup>10</sup> A

<sup>w</sup> Inst. 3. tit. 24.

<sup>z</sup> Noy, *Ibid.*

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<sup>10</sup> **Shaking hands over a bargain.**—We find among the Franks and Lombards undertakings guaranteed by "making one's faith"—*Fides Facta*. This was symbolized or solemnized by such formal acts as the giving of a rod, the handshake, or the placing of one's hands in those of another. The obligation, for instance, between creditor and surety was made in this way. The debtor, according to the Lombard law, gave the "*festuca*" or "*wadium*" to the creditor, who handed it to the surety. The binding force is derived from the ceremony, and not, as in the case of the real contracts, from the fact that something has passed from the creditor to the debtor. These formal acts will live long in the law as parts of legal ceremonies very distant from one another. Men will long make their faith by the help of rods; and for a still longer period they will convey property by their means. We still, as Blackstone noted, shake hands over a bargain. In the most solemn ceremony of feudal law, the act of homage the tenant placed his hands within his lord's.—HOLDSWORTH, 2 Hist. Eng. Law, 73.



sale thus made was called *hand-sale*, "*venditio per mutuum manuum complexionem* (a sale by the mutual joining of hands);<sup>r</sup> till in process of time the same word was used to signify the price or earnest, which was given immediately after the shaking of hands, or instead thereof.

§ 599. (4) **When title passes.**—As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor; but the vendee cannot take the goods, until he tenders the price agreed on.<sup>a</sup> But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a horse to B for 10*l.* and B pays him earnest, or signs a note in writing of the bargain; and afterwards, before the delivery of the horse or money paid, the horse dies in the vendor's custody; still he is entitled to the money, because by the [449] contract, the property was in the vendee.<sup>a</sup> Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself.

§ 600. (5) **Sale by one not owner.**—But property may also in some cases be transferred by sale, though the vendor *hath none at all* in the goods: for it is expedient that the buyer, by taking proper precautions, may at all events be secure of his purchase; otherwise all commerce between man and man must soon be at an end.

§ 601. (a) **Market overt.**—And therefore the general rule of law is,<sup>b</sup> that all sales and contracts of anything vendible, in fairs or markets *overt* (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein.<sup>11</sup> And for this purpose, the Mirror informs

<sup>r</sup> Stiernhook de Jure Goth. l. 2. c. 5.

<sup>a</sup> Noy. c. 42.

<sup>z</sup> Hob. 41.

<sup>b</sup> 2 Inst. 713.

<sup>11</sup> **Sales in fairs or markets-overt.**—Both these institutions are unknown in this country, and the rule which at common law makes sales in market-overt "binding on all who have any right or property therein," has never been recog-

us,<sup>c</sup> were tolls established in markets, viz., to testify the making of contracts; for every private contract was discountenanced by law: insomuch, that our Saxon ancestors prohibited the sale of anything above the value of twenty pence, unless in open market, and directed every bargain and sale to be contracted in the presence of credible witnesses.<sup>d</sup> Market overt in the country is only held on the special days, provided for particular towns by charter or prescription; but in London every day, except Sunday, is market day.<sup>e</sup> The market place, or spot of ground set apart by custom for the sale of particular goods, is also in the country the only market overt;<sup>f</sup> but in London every shop in which goods are exposed publicly to sale, is market overt, for such things only as the owner professes to trade in.<sup>g</sup>

§ 602. (b) *Stolen goods*.—But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them. And it is expressly provided by statute 1 Jac. I, c. 21 (Broker, 1603), that the sale of any goods wrongfully taken, to any pawnbroker in London, or within two miles thereof, shall not alter the property: for this, being usually a clandestine trade, is therefore made an exception to the general rule. And, even in market overt, if the goods be the property of the king, such sale (though regular in all other respects) [450] will in no case bind him; though it binds infants, feme covert, idiots, or lunatics, and men beyond sea or in prison: or if the goods be stolen from a common person, and then taken by the king's officer from the felon, and sold in open market; still, if the owner has used due diligence in prosecuting the thief to conviction, he loses not his property in the goods.<sup>h</sup>

<sup>c</sup> C. 1. § 3.

<sup>d</sup> LL. Ethel. 10. 12. LL. Eadg. Wilk. 80.

<sup>e</sup> Cro. Jac. 68.

<sup>f</sup> Godb. 131.

<sup>g</sup> 5 Rep. 83. 12 Mod. 521.

<sup>h</sup> Bacon's Use of the Law, 158.

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nized as part of our law. The student, therefore, must be careful not to regard the exceptions and qualifications of this rule in this and the next paragraph, as applicable to the law of sales in general.—HAMMOND.

§ 603. (c) **Knowledge of defective title.**—So, likewise, if the buyer knoweth the property not to be in the seller; or there be any other fraud in the transaction; if he knoweth the seller to be an infant, or feme covert not usually trading for herself; if the sale be not originally and wholly made in the fair or market, or not at the usual hours; the owner's property is not bound thereby.<sup>1</sup> If a man buys his own goods in a fair or market, the contract of sale shall not bind him so as that he shall render the price, unless the property had been previously altered by a former sale.<sup>k</sup> And, notwithstanding any number of intervening sales, if the original vendor, who sold without having the property, comes again into possession of the goods, the original owner may take them, when found in his hands who was guilty of the first breach of justice.<sup>1</sup> By which wise regulations the common law has secured the right of the proprietor in personal chattels from being divested, so far as was consistent with that other necessary policy, that purchasers, *bona fide*, in a fair, open and regular manner, should not be afterwards put to difficulties by reason of the previous knavery of the seller.

§ 604. (d) **Sale of horses.**—But there is one species of personal chattels, in which the property is not easily altered by sale, without the express consent of the owner, and those are horses.<sup>m</sup> For a purchaser gains no property in a horse that has been stolen, unless it be bought in a fair or market overt, according to the directions of the statutes 2 P. & M., c. 7 (Horses, Markets and Fairs, 1555), and 31 Eliz., c. 12 (Horses, Markets and Fairs, 1588). By which it is enacted that the horse shall be openly exposed, in the time of such fair or market, for one whole hour together, between 10 in the morning and sunset, in the public place used for such sales, and not in any private yard or stable; and afterwards brought by both the vendor and vendee to the bookkeeper of such fair or market: that toll be paid, if any <sup>[451]</sup> be due; and if not, one penny to the bookkeeper, who shall enter down the price, color and marks of the horse, with the names, additions, and abode of the vendee and vendor; the latter being properly

<sup>1</sup> 2 Inst. 713, 714.

<sup>k</sup> Perk. § 93.

<sup>1</sup> 2 Inst. 713.

<sup>m</sup> *Ibid.* 719.

attested. Nor shall such sale take away the property of the owner, if within six months after the horse is stolen he puts in his claim before some magistrate, where the horse shall be found; and, within forty days more, proves such his property by the oath of two witnesses, and tenders to the person in possession such price as he *bona fide* paid for him in market overt. But in case any one of the points before mentioned be not observed, such sale is utterly void; and the owner shall not lose his property, but at any distance of time may seize or bring an action for his horse, wherever he happens to find him.\*

§ 605. (6) Warranty.—By the civil law<sup>n</sup> an implied warranty was annexed to every sale, in respect to the title of the vendor: and so, too, in our law, a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose.<sup>o</sup> But, with regard to the goodness of the wares so purchased, the vendor is not bound to answer; unless he expressly warrants them to be sound and good,<sup>p</sup> or unless he knew them to be otherwise and hath used any art to disguise them,<sup>q</sup> or unless they turn out to be different from what he represented to the buyer.

§ 606. b. Bailment.—Bailment, from the French *bailler*, to deliver, is a delivery of goods in trust, upon a contract expressed or implied, that the trust shall be faithfully executed on the part of the bailee.<sup>12</sup> As if cloth be delivered, or (in our legal dialect)

\* Editions prior to the eighth added here, "Wherefore Sir Edward Coke observes,<sup>m</sup> that both by the common law and these two statutes, the property of horses is so well preserved, that if the owner be of capacity to understand them, and be diligent and industrious to pursue the same, it is almost impossible that the property of any horse, either stolen or not stolen, should be altered by any sale in market overt by him that is *malæ fidei possessor*." [<sup>m</sup> 2 Inst. 719.]

<sup>n</sup> Ff. 21. 2. 1.

<sup>p</sup> F. N. B. 94.

<sup>o</sup> Cro. Jac. 474. 1 Roll. Abr. 90.

<sup>q</sup> 2 Roll. Rep. 5.

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<sup>12</sup> Carriers.—Blackstone does not distinguish here between the liability of a common carrier, which by an ancient rule of the common law is much greater than that of an ordinary bailee for carriage, and the latter; nor does he between that of an innkeeper, and that of one who takes boarders and their chat-

bailed, to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanly manner.<sup>r</sup> If money or goods be delivered to a common carrier, to convey from Oxford to London, he is under a contract in law to pay, or carry, them to the person appointed.<sup>s</sup> If a horse, or other goods, be delivered to an innkeeper or his servants, he is bound to keep [<sup>452</sup>] them safely, and restore them when his guest leaves the house.<sup>t 13</sup> If a man takes in a horse, or other cattle,

<sup>r</sup> 1 Vern. 268.

<sup>s</sup> 12 Mod. 482.

<sup>t</sup> Cro. Eliz. 622.

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tels into his house. So, also, on the next page his only example of a pledge is in the case of a public pawnbroker; which is always strictly regulated by statute to a much greater degree than that of an ordinary pledgee.

One who, not being a common carrier, undertakes to carry the goods of another from place to place for a reward, is a bailee, and liable for negligence only to the same extent as other paid bailees. (*Gordon v. Hutchinson*, 1 Watts & S. (Pa.) 285, 37 Am. Dec. 464; *Shelden v. Robinson*, 7 N. H. 157, 26 Am. Dec. 726; *Pennewill v. Cullen*, 5 Harr. (Del.) 238; *Roberts v. Turner*, 12 Johns. (N. Y.) 232, 7 Am. Dec. 311; *Hutchings v. Ladd*, 16 Mich. 493; *Allen v. Sack-rider*, 37 N. Y. 341; *Hooper v. Wells, Fargo & Co.*, 27 Cal. 11, 85 Am. Dec. 211.) But the liability of a *common carrier* is very different. There are not a few *dicta* to the contrary, especially in the older states, nearly all of which will be found collected in *O'Hear v. De Goesbriand*, 33 Vt. 593, 80 Am. Dec. 653; or in the editor's note in the last-named volume. But these are usually based on the repetition of the common-law phraseology without reference to principles, except where the case depends on some statute peculiar to a state, or is consistent with either view of the property in question.—HAMMOND.

13 **The law of public calling.**—At about the beginning of the last quarter of the nineteenth century the principle, which had from the earliest times of the common law governed the relations of the public and the common carrier and innkeeper, was generalized into an active principle regulating the relations of all those engaged in public employment or calling with the community. Under the police powers "the government regulates the conduct of its citizens one toward another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good. In their exercise it has been customary in England from time immemorial, and in this country from its first colonization, to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers, innkeepers, etc., and in so doing to fix a maximum of charges to be made for services rendered, accommodations furnished, and articles sold. To this day, statutes are to be found in many of the states upon some or all of these subjects; and we think it has never yet been successfully



to graze and depasture in his grounds, which the law calls *agistment*, he takes them upon an implied contract to return them on demand to the owner.<sup>u</sup> If a pawnbroker receives plate or jewels as a pledge, or security, for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time:<sup>w</sup> for the due execution of which contract many useful regulations are made by statute 30 Geo. II, c. 24 (Obtaining

<sup>u</sup> Cro. Car. 271.<sup>w</sup> Cro. Jac. 245. Yelv. 178.

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contended that such legislation came within any of the constitutional prohibitions against interference with private property." Waite, C. J., in *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77. Later on in the same opinion the grounds for sustaining such power of regulation were thus set forth: "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what is without its operative effect. Looking, then, to the common law, from whence came the right which the constitution protects, we find that when private property is 'affected with a public interest, it ceases to be *juris privati* only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise *De Portibus Maris*, 1 Harg. Law Tracts, 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control." *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77.

"The difference between public callings and private business is a distinction in the law governing business relations which has always had and will always have most important consequences. Those in a public calling have always been under the extraordinary duty to serve all comers, while those in a private business may always refuse to sell if they please. So great a distinction as this constitutes a difference in kind of legal control rather than merely one of degree. The causes of this division are, of course, rather economic than strictly legal; and the relative importance of these two classes at any given time therefore, depends ultimately upon the industrial conditions which prevail at that period. Thus in the England which we see through the medium of our earliest law reports the mediæval system of established monopolies called for the legal requirement of indiscriminate service from those engaged in almost all employments. There followed in succeeding centuries an expansion of trade which

Money by False Pretenses, 1756). And so if a landlord distrains goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distrainers, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale; or, when sold, to render back the overplus. If a friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand: and it was formerly held that in the meantime he was

gradually did away with the necessity for coercive law. Indeed, in the early part of the nineteenth century, free competition became the very basis of the social organization, with the consequence that the recognition of the public callings as a class almost ceased. It is only in very recent years that it has again come to be recognized that the process of free competition fails in some cases to secure the public good; and it has been reluctantly admitted that state control is again necessary over such lines of industry as are affected with a public interest. Thus with varying importance the distinction between the public callings and the private callings has been present in our law from the earliest times to the present day. The common law requiring public service from those who profess a public calling has been ready to deal with every public employment at the instant of its recognition as such, for the protection of the whole people so far as it was generally felt that such protection was necessary." Wyman, Pub. Service Corporations, § 1.

The early law as to common carriers is thus given in a case of the date of 1683: "Action on the case, for that whereas defendant is a common carrier from London to Lymmington *et abinde retrorsum*, and setting it forth as the custom of England, that he is bound to carry goods, and that the plaintiff brought him such a pack, he refused to carry them, though offered his hire. And held by Jefferies, C. J., that the action is maintainable, as well as it is against an innkeeper for refusing a guest, or a smith on the road who refuses to shoe my horse, being tendered satisfaction for the same. *Note*, That it was alleged and proved that he had convenience to carry the same; and the plaintiff had a verdict." *Jackson v. Rogers*, 2 Show. 327, 89 Eng. Reprint, 968.

It was of the public character of a wharfinger that Lord Hale, in the *De Portibus Maris*, was speaking in his famous statement quoted above in the case of *Munn v. Illinois*. And of the innkeeper, it was said: "The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another, you shall not, as everyone coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travelers, and supplying them with what they want." *Rex v. Ivens*, 7 Car. & P. 213.

These cases describe the nature of public calling, or public service. Traditionally, common carriers, wharfingers, warehouses, and hotels, and such busi-

answerable for any damage or loss it might sustain, whether by accident or otherwise;<sup>x</sup> unless he expressly undertook<sup>y</sup> to keep it only with the same care as his own goods, and then he should not be answerable for theft or other accidents. But now the law seems to be settled,<sup>z</sup> that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud; but, if he undertakes specially to keep the goods

<sup>x</sup> Co. Litt. 89.

<sup>z</sup> Lord Raym. 909. 12 Mod. 487.

<sup>y</sup> 4 Rep. 84.

nesses and enterprises as might be brought under these heads, have been the ones to which this nature has been attached. The economic interests of the present day have demanded the extension of the principle to all businesses that owe their existence either to virtual monopoly, to legal monopoly, or to the favor of the state for an exclusive franchise, for aid or exemption from taxation, for the use of the public highways, or for the exercise of the power of eminent domain. Perhaps it would be more correct to say these are criteria determining the fact that the callings are public in nature. Under one or other of these classes, there have been held as affected with a public interest: Water-works (*Haugen v. Albina Light & Water Co.*, 21 Or. 411; 14 L. R. A. 424, 28 Pac. 244); irrigation systems (*Slosser v. Salt River Valley Canal Co.*, 7 Ariz. 376, 65 Pac. 332); natural gas companies (*State v. Consumers' Gas Trust Co.*, 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 674); grain elevators (*Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77; *Budd v. People*, 143 U. S. 517, 36 L. Ed. 247, 12 Sup. Ct. Rep. 468; *Brass v. State of North Dakota*, 153 U. S. 391, 38 L. Ed. 757, 14 Sup. Ct. Rep. 857); public stockyards (*Ratcliff v. Wichita Union Stockyards Co.*, 74 Kan. 1, 118 Am. St. Rep. 298, 10 Ann. Cas. 1016, 6 L. R. A. (N. S.) 834, 86 Pac. 150; *Cotting v. Godard*, 183 U. S. 79, 46 L. Ed. 92, 22 Sup. Ct. Rep. 30); messenger service (*Haskell v. Boston Dist. Messenger Co.*, 190 Mass. 189, 112 Am. St. Rep. 324, 5 Ann. Cas. 796, 2 L. R. A. (N. S.) 1091, 76 N. E. 215); gasworks (*Gibbs v. Consolidated Gas Co.*, 130 U. S. 396, 32 L. Ed. 979, 9 Sup. Ct. Rep. 553); electric plants (*Snell v. Clinton El. Light, Heat & Power Co.*, 196 Ill. 626, 89 Am. St. Rep. 341, 58 L. R. A. 284, 63 N. E. 1082); telegraph systems (*Green v. Western Union Tel. Co.*, 136 N. C. 489, 103 Am. St. Rep. 955, 1 Ann. Cas. 349, 67 L. R. A. 985, 49 S. E. 165); telephone systems (*Chesapeake & Potomac Tel. Co. v. Manning*, 186 U. S. 238, 46 L. Ed. 1144, 22 Sup. Ct. Rep. 881); sleeping-cars (*Nevin v. Pullman Palace Car Co.*, 106 Ill. 222, 46 Am. Rep. 688); refrigerator-cars (*In re Transportation of Fruit*, 10 Int. Com. Rep. 360).

The duties which public service companies are under are fourfold: (1) to serve all, (2) with adequate facilities, (3) for a reasonable compensation, and (4) without discrimination. In *State v. Nebraska Telephone Co.*, 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237, it was held that the telephone company is a

safely and securely, he is bound to take the same care of them as a prudent man would take of his own.<sup>a</sup>

§ 607. (1) Bailee's qualified property.—In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession.<sup>14</sup> It is not an absolute property, because of his contract [453] for restitution; the bailor

<sup>a</sup> By the laws of Sweden the depositary or bailee of goods is not bound to restitution, in case of accident by fire, or theft: provided his own goods perished in the same manner: "*jura enim nostra*, says Stiernhook, *dolum præsumunt, si una non pereant* (for our laws presume fraud if they do not perish together)." (De Jure Sueon. l. 2. c. 5.)

public servant in the commerce of the country, and that respondent, having undertaken to supply the demand, must supply all alike, without discrimination; and that having undertaken to supply the demand in the city of L. wherein relator resides and being fully able to furnish him a telephone instrument, the same as other subscribers, it was its duty to do so. In *Baily v. Fayette Gas-Fuel Co.*, 193 Pa. St. 175, 44 Atl. 251, it was held that a gas company incorporated for supplying natural gas to customers for heat and light, which is a quasi-public corporation, cannot discriminate by charging more for gas used for lighting than for that used for heating, there being no reason therefor except that it is worth more to the consumer measured by what he would have to pay for substitutes for such purposes.

<sup>14</sup> Interest of the bailee.—The assignee of an equitable chose in action, e. g., a trust, of course sues in his own name without the aid of a statute. But here, too, there is no novation. If the Hibernicism may be pardoned, the assignee of a trust, like an attorney, stands in the place of his assignor, but does not displace him. A release from the assignor to the innocent trustee frees the latter's legal title from the equitable encumbrance. *Newman v. Newman*, 28 Ch. D. 674. So, if a *cestui que trust* should assign his trust first to A. and then to B., and B. should, in good faith, obtain a conveyance of the legal title from the trustee, he could hold it against A. What is true of the equitable trust is equally true of the analogous legal bailment. By judicial legislation the purchaser from a bailor is allowed to proceed in his own name against the bailee. But a bailee who, for value and in ignorance of the bailor's sale of his interest, receives a release from the latter, may keep the chattel. If a bailee, in ignorance of a sale by the bailor, should deliver the goods to the bailor or to some person designated by the bailor, he could not be charged by the bailor's vendee. He would simply have performed his contract according to its tenor. *Saxeby v. Wynne*, 3 Stark. Ev., 3d ed. 1159; *Glyn etc. Co. v. East & West India Dock Co.*, 7 App. Cas. 591; *Jones v. Hodgkins*, 61 Me. 480; *Woods v. McGee*, 7 Ohio, 127, 30 Am. Dec. 220 (as explained in *Newhall v.*

having still left in him the right to a *chose* in action, grounded upon such contract. And, on account of this qualified property of the bailee, he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distrainer, and the general bailee, may all of them vindicate, in their own right, this their possessory interest, against any stranger or third person.<sup>b</sup> For, being responsible to the bailor, if the goods

<sup>b</sup> 13 Rep. 69.

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Langdon, 39 Ohio St. 87, 92, 48 Am. Rep. 426); McGee v. French, 49 S. C. 454, 27 S. E. 487 (*semble*); and if a bailor should sell his interest successively to A. and B., and B. should obtain possession from the bailee, A. could not recover the chattel from B. Upon principle and by the old precedents the bailor's interest is no more transferable than that of a creditor. Y. B. 22 Ed. IV, 10-29; Wood v. Foster, 1 Leon, 42, 43, pl. 54, 74 Eng. Reprint, 39; Marvyn v. Lyds, Dy. 90 b, pl. 6, 73 Eng. Reprint, 195; Rich v. Aldred, 6 Mod. 216, 87 Eng. Reprint, 968; 2 Blackst. Comm. 452. As late as 1844, that great master of the common law, Mr. Baron Parke, ruled that a purchaser from a pledgor could not maintain in action on his own name against the pledgee. The court *in banc* reversed this ruling. Franklin v. Neate, 13 Mees. & W. 481. See, also, Goodman v. Boycott, 2 B. & S. 1, 121 Eng. Reprint, 974; Bristol etc. Bank v. Midland Ry. Co., [1891] 2 Q. B. 653. The innovation has been followed in this country. Carpenter v. Hale, 8 Gray (Mass.), 157; Hubbard v. Bliss, 12 Allen (Mass.), 590; Meyers v. Briggs, 11 R. I. 180; Jack v. Eagles, 2 All. (N. B.) 95.—AMES, Lect. on Leg. Hist. 214 n., also in 3 Sel. Essays in Anglo-Am. Leg. Hist., 585 n.

"In a short discussion of the nature of a bailor's interest, in the sixth volume of the [Harvard Law] Review, p. 43, it was maintained that Blackstone was right in saying (2 Comm. 453) that 'the bailor hath nothing left in him but the right to a *chose* in action.' Consistently with this view, the vendee of a bailor should not be permitted to sue the bailee in his own name. This was formerly the law. As late as 1844 it was urged at *Nisi Prius* that a sale by a bailor was 'merely an assignment of a right of action,' and Parke, B., being of that opinion, directed a verdict for the defendant in an action by the bailor's vendee. The court of exchequer, however, in disregard of the precedents, held this ruling of the learned judge to be a misdirection; and this innovation in procedure must now be regarded as established. (3 Harvard Law Review, 342, n. 1.)

"But Blackstone's statement should still control in settling the substantive rights of the parties, and is believed to be the only ground upon which certain decisions can be supported. For example, in *Saxeby v. Wynne*, 3 Stark, Law of Evidence (3d ed.), 1159, A. deposited goods with B. and then sold them to



are lost or damaged by his willful default or gross negligence, or if he do not deliver up the chattels on lawful demand, it is therefore reasonable that he should have a right of action against all other persons who may have purloined or injured them; that he may always be ready to answer the call of the bailor.

§ 608. **c. Hiring and borrowing.**—Hiring and *borrowing* are also contracts by which a qualified property may be transferred to the hirer or borrower: in which there is only this difference,

C., and afterwards directed B. to deliver them to D. B., it was decided, was not guilty of a conversion in delivering them to D. If C. was simply the assignee of A.'s chose in action against B. the decision was clearly right, for A. could not have recovered against B. If, on the other hand, C. acquired a full title as owner of the goods, the decision must be wrong. *Jones v. Hodgkins*, 61 Me. 480, is a similar case in favor of the bailee.

"It is familiar learning that one who acquires the possession of goods as a fraudulent vendee holds the title so acquired as a constructive trustee for the vendor, and that this fraudulent vendee may, like any trustee, pass the title to a *bona fide* purchaser free from the equitable encumbrance. Suppose, however, that the defrauded vendor simply sells without delivering possession. The fraudulent vendee gets not the *res*, but a conditional right *in rem*, the right to have the *res* on paying the purchase money. His legal right is the same as if he had received possession at the time of the sale, and had immediately given back the possession to the vendor as a security for the purchase money. In other words, he is substantially a pledgor, and has like any bailor only a legal chose in action. And this legal chose in action, which he obtained by fraud, he holds as a constructive trustee for the defrauded vendor. If, therefore, he purports to sell the goods to an innocent purchaser, the latter will acquire only the assignment of this legal chose in action subject to the equitable encumbrance in favor of the defrauded vendor. The *bona fide* purchaser, therefore, and not the original vendor, will be the victim of the rascality of the fraudulent vendee. This was the result of the decisions in *Globe Milling Co. v. Minneapolis E. Co.*, 44 Minn. 153, 46 N. W. 306, and *Dean v. Yates*, 22 Ohio St. 388." 10 Harv. Law Rev., 57.

**Special property of the bailee.**—Having now seen that the bailee undoubtedly has possession at common law, it becomes necessary to inquire whether he has any more extensive interest. Undoubtedly there are frequently found in the old decisions and in the old text-writers' statements to the effect that the bailee has a property in the chattel bailed, or at least a special property. (2 Bl. Comm. 452.) But it is apparent that the possessory right of the bailee sufficiently accounts for all or nearly all of the phenomena presented by the decisions touching his interest. Hence it seems to be unnecessary to attribute to bailees generally any property right at all. The persistence, however, of the

that hiring is always for a price, a stipend, or additional recompense; borrowing is merely gratuitous. But the law in both cases is the same. They are both contracts, whereby the possession and a transient property is transferred for a particular time or use, on condition to restore the goods so hired or borrowed, as soon as the time is expired or use performed; together with the price or stipend (in case of hiring) either expressly agreed on by the parties, or left to be implied by law according to the value of the ser-

expression "special property" as indicative of the bailee's interest makes it necessary to examine into the subject further.

At the outset it is plain that there may well be a distinction between gratuitous bailments, such as deposits, mandates, and loans on the one hand, and bailments for hire on the other. It may be conceded that the bailee for hire, especially the pledgee, has a higher interest than the gratuitous bailee. But if by the term "special property" is meant something in the nature of an estate carved out of the general ownership or property right in a thing, the depositary, mandatary and commodatary certainly did not have such property. The interest commensurate with the legal remedies accorded to these bailees is possession only.

Recent investigation has given to possessory rights much greater recognition than was formerly accorded to them. Thus Sir Frederick Pollock tells us truly, that possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title. Hence it is itself a kind of title, and it is a natural development of the law that a possessor should be able to deal with his apparent interest in the fashion of an owner, and that as regards every one not having a better title those acts should be valid. When possession is understood in this light, it certainly becomes unnecessary to suppose the existence of an actual property right in the gratuitous bailee to account for the consideration given to him by our law.

Some countenance has been given to the idea that gratuitous bailees have a special property in the bailment by the circumstance that trover can be maintained by such bailee against one who interferes with his possession and converts the property. But this is not a conclusive test. Trover, to be sure, is often founded on a property right, but not exclusively so. It is clear that a remedy which is founded exclusively on the right of property, like replevin, will not lie at the instance of the gratuitous bailee. In other words, he has no real property, general or special. (*Waterman v. Robinson*, 5 Mass. 303.)

The nature of the interest acquired by the depositary was discussed in *Hartop v. Hoare* (1736), 3 Atk. 44, 26 Eng. Reprint, 828, where jewels were deposited in a sealed packet with a jeweler for safekeeping. The jeweler broke the seal and then pledged the jewels for an advancement of three hundred pounds. It was held, upon the authority of Coke's interpretation of *Bonion's Case*, that the jeweler had the mere custody, as the owner had not entrusted him with the

vice. By this mutual contract, the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation and not abuse it; and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward. Thus if a man hires or borrows a horse for a month, he has the possession and a qualified property therein during that period; on the expiration of which his qualified property determines, and the owner

goods. From this it necessarily followed that the bailee had no interest which he could transmit, and that the original owner could maintain trover against the pledgee who refused to surrender the jewels without the repayment of his advancement.

As to pledgees, the opinion that they have a special property in the goods pledged is an old one. Coke referred to it in *Southcote's Case*, and the fact that pledgees have such an interest in the bailment was sufficient to relieve the pledgee from any higher degree of diligence in caring for the pledge than he exhibited in keeping his own goods.

Likewise there is little difficulty in ascribing a special property to all bailees to whom things are let for hire and to bailees employed to perform service on things for hire. In an old case where a horse had been let to one for two days, and the bailor, suspecting that the bailee was about to abscond with the horse, forcibly retook the animal, the court, in giving judgment for the plaintiff in a suit for damages arising out of the assault connected with the taking, said the plaintiff had a special property good for the two days against all the world.

This special property of the bailee for hire is not, however, of a definite nature, and the more it is examined the more shadowy it appears. Thus, in *Lilley v. Barnsley* (1844), 2 M. & Rob. 548, it was held that, where goods are bailed for the purpose of having work done upon them, the bailor can countermand the order and have the goods back with the work incomplete, on the payment of the reasonable value of the work done. Of course the bailee can recover damages for the breach of the contract, but he cannot hold the chattels bailed in order to secure this claim. This is a practical denial of any special property in the bailee. It puts the bailee in such cases on a lower plane than that of an agent where the agency is coupled with an interest.—STREET, 2 Foundations of Legal Liability, 311.

The reasoning of Blackstone with reference to the qualified property of the bailee, Professor Holland says, "though found also in Beaumanoir, XXX, 1, and in Y. B. 11 H. IV, seems to be erroneous. See Holmes, Common Law, pp. 167, 170. It is probably derived from a misunderstanding of the remedies given in Roman law to certain bailees for the protection of interests other than those resulting from bare possession. Cf. Inst. iv. 1. 14 and 17; Dig. xlvii. 2. 46. The right of the bailee was held to be irrespective of his liability to the bailor in *The Winkfield*, L. R. [1902] Prob. Div. 42." Holland, Jurisprudence (11th ed.),

becomes (in case of hiring) entitled also to the price, for which the horse was hired.<sup>c</sup>

§ 609. (1) Interest.—[454] There is one species of this price or reward, the most usual of any, but concerning which many good and learned men have in former times very much perplexed themselves and other people, by raising doubts about its legality *in foro conscientiæ* (in the forum of the conscience). That is, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use; which generally is called *interest* by those who think it lawful, and *usury* by those who do not so. For the enemies to interest in general make no distinction between that and usury, holding any increase of money to be indefensibly usurious. And this they ground as well on the prohibition of it by the law of Moses among the Jews, as also upon what is said to be laid down by Aristotle,<sup>d</sup> that money is naturally barren, and to make it breed money is preposterous, and a perversion of the end of its institution, which was only to serve the purposes of exchange, and not of increase. Hence the school divines have branded the practice of taking interest, as being contrary to the divine law both natural and revealed; and the canon law<sup>e</sup> has proscribed the taking any, the least, increase for the loan of money as a mortal sin.

But, in answer to this, it may be observed, that the mosaical precept was clearly a political, and not a moral, precept. It only prohibited the Jews from taking usury from their brethren, the Jews: but in express words permitted them to take it of a stranger:<sup>f</sup> which proves that the taking of moderate usury, or a reward for the use, for so the word signifies, is not *malum in se*, since it was allowed where any but an Israelite was concerned. And as to the reason supposed to be given by Aristotle, and deduced from the natural barrenness of money, the same may with equal force be alleged of houses, which never breed houses; and twenty other things, which nobody doubts it is lawful to make profit of, by

<sup>c</sup> Yelv. 172. Cro. Jac. 236.

<sup>d</sup> Polit. l. 1. c. 10. This passage hath been suspected to be spurious.

<sup>e</sup> Decretal. l. 5. tit. 19.

<sup>f</sup> Deut. xxiii. 20.

letting them to hire. And though money was originally used only for the purposes of exchange, yet the laws of any state [455] may be well justified in permitting it to be turned to the purposes of profit, if the convenience of society (the great end for which money was invented) shall require it. And that the allowance of moderate interest tends greatly to the benefit of the public, especially in a trading country, will appear from that generally acknowledged principle, that commerce cannot subsist without mutual and extensive credit. Unless money, therefore, can be borrowed, trade cannot be carried on: and if no premium were allowed for the hire of money, few persons would care to lend it; or at least the ease of borrowing at a short warning (which is the life of commerce) would be entirely at an end. Thus, in the dark ages of monkish superstition and civil tyranny, when interest was laid under a total interdict, commerce was also at its lowest ebb, and fell entirely into the hands of the Jews and Lombards: but when men's minds began to be more enlarged, when true religion and real liberty revived, commerce grew again into credit; and again introduced with itself its inseparable companion, the doctrine of loans upon interest. And, as to any scruples of conscience, since all other conveniences of life may either be bought or hired, but money can only be hired, there seems to be no greater oppression in taking a recompense or price for the hire of this, than of any other convenience. To demand an exorbitant price is equally contrary to conscience, for the loan of a horse, or the loan of a sum of money: but a reasonable equivalent for the temporary inconvenience, which the owner may feel by the want of it, and for the hazard of his losing it entirely, is not more immoral in one case than it is in the other. Indeed, the absolute prohibition of lending upon any, even moderate interest, introduces the very inconvenience which it seems meant to remedy. The necessity of individuals will make borrowing unavoidable. Without some profit allowed by law, there will be but few lenders: and those principally bad men, who will break through the law, and take a profit; and then will endeavor to indemnify themselves from the danger of the penalty, by making that profit exorbitant. A capital distinction [456] must therefore be made between a moderate and exorbitant profit; to the former of which we usually give the name of inter-



est, to the latter the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated society. For, as the whole of this matter is well summed up by Grotius,<sup>§</sup> "if the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt, by the loan, its allowance is neither repugnant to the revealed nor the natural law; but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they never can make it just."

We see that the exorbitance or moderation of interest, for money lent, depends upon two circumstances; the inconvenience of parting with it for the present, and the hazard of losing it entirely. The inconvenience to individual lenders can never be estimated by laws; the rate, therefore, of general interest must depend upon the usual or general inconvenience. This results entirely from the quantity of specie or current money in the kingdom; for, the more specie there is circulating in any nation, the greater superfluity there will be, beyond what is necessary to carry on the business of exchange and the common concerns of life. In every nation or public community, there is a certain quantity of money thus necessary; which a person well skilled in political arithmetic might perhaps calculate as exactly, as a private banker can the demand for running cash in his own shop: all above this necessary quantity may be spared, or lent, without much inconvenience to the respective lenders; and the greater this national superfluity is, the more numerous will be the lenders, and the lower ought the rate of the national interest to be: but where there is not enough, or barely enough, circulating cash, to answer the ordinary uses of the public, interest will be proportionably high; for lenders will be but few, as few can submit to the inconvenience of lending.

[457] So, also, the hazard of an entire loss has its weight in the regulation of interest: hence, the better the security, the lower will the interest be; the rate of interest being generally in a compound *ratio*, formed out of the inconvenience, and the hazard. And as, if there were no inconvenience, there should be no interest but what is equivalent to the hazard, so if there were no hazard, there ought to be no interest, save only what arises from the mere

§ De j. b. & p. l. 2. c. 12. § 22.

inconvenience of lending. Thus, if the quantity of specie in a nation be such, that the general inconvenience of lending for a year is computed to amount to *three per cent*: a man that has money by him will perhaps lend it upon good personal security at *five per cent*, allowing two for the hazard run; he will lend it upon landed security or mortgage at *four per cent*, the hazard being proportionably less: but he will lend it to the state, on the maintenance of which all his property depends, at *three per cent*, the hazard being none at all.

But sometimes the hazard may be greater than the rate of interest allowed by law will compensate. And this gives rise to the practice of, 1. Bottomry, or *respondentia*. 2. Policies of insurance. 3. Annuities upon lives.

§ 610. (a) Bottomry or respondentia.—And first, *bottomry* (which originally arose from permitting the master of a ship, in a foreign country, to hypothecate the ship in order to raise money to refit) is in the nature of a mortgage of a ship; when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*pars pro toto*—a part for the whole) as a security for the repayment. In which case it is understood, that if the ship be lost, the lender loses also his whole money; but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations, for the benefit of commerce, and by reason of the extraordinary hazard run by the lender.<sup>b</sup> [458] And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower, personally, is bound to answer the contract; who therefore in this case is said to take up money at *respondentia*. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself; when a man

<sup>b</sup> Moll. De Jur. Mar. 361. Malyne. Lex Mercat. b. 1. c. 31. Cro. Jac. 208. Bynkersh. Quæst. Jur. Privat. l. 3. c. 16.

lends a merchant 1,000*l.* to be employed in a beneficial trade, with condition to be repaid with extraordinary interest, in case such a voyage be safely performed:<sup>1</sup> which kind of agreement is sometimes called *fœnus nauticum* (naval usury), and sometimes *usura maritima* (maritime usury).<sup>k</sup> But as this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted by the statute 19 Geo. II, c. 37 (Marine Insurance, 1745), that all moneys lent on bottomry or at *respondentia*, on vessels bound to or from the East Indies, shall be expressly lent only upon the ship or upon the merchandise; that the lender shall have the benefit of salvage; and that if the borrower has not on board effects to the value of the sum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest and all other charges, though the ship and merchandise be totally lost.

§ 611. (b) Insurance.—Secondly, a policy of *insurance* is a contract between A and B, that, upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. This is founded upon one of the same principles as the doctrine of interest upon loans, that of hazard; but not that of inconvenience. For if I insure a ship to the Levant, and back again, at *five per cent*; here I calculate the chance that she performs her voyage to be twenty to one against her being lost; and, if she be lost, I lose 100*l.* and get 5*l.* Now, this is much the same as if I lend the merchant whose whole fortunes are embarked in this vessel, 100*l.* at <sup>[459]</sup> the rate of *eight per cent*. For by a loan I should be immediately out of possession of my money, the inconvenience of which we have computed equal to *three per cent*: if, therefore, I had actually lent him 100*l.* I must have added 3*l.* on the score of inconvenience, to the 5*l.* allowed for the hazard, which together would have made 8*l.* But, as upon an insurance, I am never out of possession of my money till the loss actually happens, nothing is therein allowed upon the principle of inconvenience, but all upon the principle of hazard. Thus too, in a loan, if the chance of repayment depends upon the borrower's life, it is frequent (besides the usual rate of interest) for the borrower

<sup>1</sup> 1 Sid. 27.

<sup>k</sup> Molloy *Ibid.* Malyne *Ibid.*

to have his life insured till the time of repayment; for which he is loaded with an additional premium, suited to his age and constitution.

§ 612. (i) *Life insurance.*—Thus, if Sempronius has only an annuity for his life, and would borrow 100*l.* of Titius for a year; the inconvenience and general hazard of this loan, we have seen, are equivalent to 5*l.*, which is therefore the legal interest: but there is also a special hazard in this case; for if Sempronius dies within the year, Titius must lose the whole of his 100*l.* Suppose this chance to be as one to ten: it will follow that the extraordinary hazard is worth 10*l.* more, and therefore that the reasonable rate of interest in this case would be *fifteen per cent.* But this the law, to avoid abuses, will not permit to be taken; Sempronius therefore gives Titius, the lender, only 5*l.* the legal interest; but applies to Gaius an insurer, and gives him the other 10*l.* to indemnify Titius against the extraordinary hazard. And in this manner may any extraordinary or particular hazard be provided against, which the established rate of interest will not reach; that being calculated by the state to answer only the ordinary and general hazard, together with the lender's inconvenience in parting with his specie for the time. But, in order to prevent these insurances from being turned into a mischievous kind of gaming, it is enacted by statute 14 Geo. III, c. 48 (*Life Insurance, 1774*), that no insurance shall be made on lives, or on any other event, wherein the party insured hath no interest: that in all policies the name of such interested party shall be inserted; [460] and nothing more shall be recovered thereon than the amount of the interest of the insured.

§ 613. (ii) *Marine insurance.*—This doth not, however, extend to marine insurances, which were provided for by a prior law of their own, and the learning relating to which hath of late years been greatly improved by a series of judicial decisions, which have now established the law in such a variety of cases, that (if well and judiciously collected) they would form a very complete title in a code of commercial jurisprudence. But, being founded on equitable principles, which chiefly result from the special circumstances of the case, it is not easy to reduce them to any general

heads in mere elementary institutes. Thus much, however, may be said; that, being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment: and, on the other hand, being much for the benefit and extension of trade, by distributing the loss or gain among a number of adventures, they are greatly encouraged and protected both by common law and acts of parliament. But, as a practice had obtained of insuring large sums without having any property on board, which were called insurances, *interest or no interest*; and also of insuring the same goods several times over; both of which were a species of gaming, without any advantage to commerce, and were denominated *wagering* policies: it is therefore enacted by the statute 19 Geo. II, c. 37 (Marine Insurance, 1745), that all insurances, interest or no interest, or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of salvage to the insurer (all which had the same pernicious tendency), shall be totally null and void, except upon privateers, or ships on the Spanish and Portuguese trade, for reasons sufficiently obvious; and that no reinsurance shall be lawful, except the former insurer shall be insolvent, a bankrupt, or dead; and lastly that, in the East India trade, the lender of money on bottomry, or at *respondentia*, shall alone have a right to be insured for the money lent, and the <sup>[461]</sup> borrower shall (in case of a loss) recover no more upon any insurance than the surplus of his property, above the value of his bottomry or *respondentia* bond.

§ 614. (c) **Annuities.**—Thirdly, the practice of purchasing *annuities for lives* at a certain price or premium, instead of advancing the same sum on an ordinary loan, arises usually from the inability of the borrower to give the lender a permanent security for the return of the money borrowed, at any one period of time. He therefore stipulates to repay annually, during his life, some part of the money borrowed; together with legal interest for so much of the principal as annually remains unpaid, and an additional compensation for the extraordinary hazard run, of losing that principal entirely by the contingency of the borrower's death: all which considerations, being calculated and blended to-



gether, will constitute the just proportion or *quantum* of the annuity granted. The real value of that contingency must depend on the age, constitution, situation, and conduct of the borrower; and therefore the price of such annuities cannot without the utmost difficulty be reduced to any general rules. So that if, by the terms of the contract, the lender's principal is *bona fide* (and not colorably<sup>1</sup>) put in jeopardy, no inequality of price will make it an usurious bargain; though, under some circumstances of imposition, it may be relieved against in equity. To throw, however, some check upon improvident transactions of this kind, which are usually carried on with great privacy, the statute 17 Geo. III, c. 26 (Grants of Life Annuities, 1776), has directed, that upon the sale of any life annuity of more than the value of ten pounds *per annum* (unless on a sufficient pledge of lands in fee simple or stock in the public funds) the true consideration, which shall be in money only, shall be set forth and described in the security itself; and a memorial of the date of the security, of the names of the parties, *cestuy que trusts*, *cestuy que vies*, and witnesses, and of the consideration money, shall within twenty days after its execution be enrolled in the court of chancery; else the security shall be null and void. And, in case of collusive practices respecting the consideration, the [<sup>462</sup>] court, in which any action is brought or judgment obtained upon such collusive security, may order the same to be canceled, and the judgment (if any) to be vacated. And all contracts for the purchase of annuities from infants shall remain utterly void, and incapable of confirmation after such infants arrive to the age of maturity. But, to return to the doctrine of common interest on loans:

§ 615. (2) Rates of interest.—Upon the two principles of inconvenience and hazard, compared together, different nations have at different times established different rates of interest. The Romans at one time allowed *centesimæ*, one per cent monthly or twelve per cent *per annum*, to be taken for common loans; but Justinian<sup>m</sup> reduced it to *trientes*, or one-third of the *as* or *centesima*, that is, four per cent; but allowed higher interest to be taken of merchants,

<sup>1</sup> 1 Carth. 67.

<sup>m</sup> Cod. 4. 32. 26. Nov. 33, 34, 35.

because there the hazard was greater.<sup>a</sup> So, too, Grotius, informs

<sup>a</sup> A short explication of these terms, and of the division of the Roman *as*, will be useful to the student, not only for understanding the civilians, but also the more classical writers, who perpetually refer to this distribution. Thus Horace, *ad Pisones*. 325:

*Romani pueri longis rationibus assem  
Discunt in partes centum diducere. Dicat  
Filius Albini, si de quincunce remota est  
Uncia, quid superet? poterat dixisse, triens: eu,  
Rem poteris servare tuam! redit uncia, quid sit?  
Semis.*——

(“The Roman boys are taught to divide the ‘as’ by long calculations into a hundred parts. Supposing the son of Albinus says: ‘If from five ounces be subtracted one, what is the remainder?’ At once you can answer, ‘A third of an as.’ ‘Good, you will be able to keep your property. If an ounce be added, what does it make?’ ‘The half of an as.’”

—Works of Horace, Trans. by Lonsdale and Lee, 214.)

It is therefore to be observed, that, in calculating the rate of interest the Romans divided the principal sum into an *hundred* parts; one of which they allowed to be taken monthly: and this, which was the highest rate of interest permitted, they called *usuræ centesimæ*, amounting yearly to twelve *per cent*. Now as the *as*, or Roman pound, was commonly used to express any integral sum, and was divisible into twelve parts or *uncie*, therefore these twelve monthly payments or *uncie* were held to amount annually to one pound, or as *usurarius*; and so the *usuræ asses* were synonymous to the *usuræ centesimæ*, and all lower rates of interest were denominated according to the relation they bore to this centesimal usury, or *usuræ asses*: for the several multiples of the *uncie*, or duodecimal parts of the *as*, were known by different names according to their different combinations; *sextans*, *quadrans*, *triens*, *quincunx*, *semis*, *septunx*, *bes*, *dobrans*, *dextans*, *deunx*, containing respectively 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 *uncie* or duodecimal parts of an *as*. (Ff. 28. 5. 50. § 2. Gravin. Orig. Jur. Civ. l. 2. § 47.) This being premised, the following table will clearly exhibit at once the subdivisions of the *as*, and the denominations of the rate of interest.

USURÆ.	PARTES ASSIS.	PER ANNUM.
<i>Asses, sive centesimæ</i> .....	<i>integer</i> .....	12 <i>per cent</i> .
<i>Deunces</i> .....	11-12 .....	11
<i>Dextances, vel decunces</i> .....	5-6 .....	10
<i>Dodrantes</i> .....	3-4 .....	9
<i>Besses</i> .....	2-3 .....	8
<i>Septunces</i> .....	7-12 .....	7
<i>Semisses</i> .....	1-2 .....	6
<i>Quincunces</i> .....	5-12 .....	5
<i>Trientes</i> .....	1-3 .....	4
<i>Quadrantes</i> .....	1-4 .....	3
<i>Sextances</i> .....	1-6 .....	2
<i>Unciæ</i> .....	1-12 .....	1

[463] us,<sup>o</sup> that in Holland the rate of interest was then eight *per cent* in common loans, but twelve to merchants. Our law establishes one standard for all alike, where the pledge or security itself is not put in jeopardy; lest, under the general pretense of vague and indeterminate hazards, a door should be opened to fraud and usury: leaving specific hazards to be provided against by specific insurances, by annuities for lives, or by loans upon *respondentia*, or bottomry. But as to the rate of legal interest, it has varied and decreased for two hundred years past, according as the quantity of specie in the kingdom has increased by accessions of trade, the introduction of paper credit, and other circumstances. The statute 37 Hen. VIII, c. 9 (Usury, 1545), confined interest to ten *per cent* and so did the statute 13 Eliz., c. 8 (Usury, 1571). But as, through the encouragements given in her reign to commerce, the nation grew more wealthy, so under her successor the statute 21 Jac. I, c. 17 (Usury, 1623), reduced it to eight *per cent*; as did the statute 12 Car. II, c. 13 (Usury, 1660), to six; and lastly by the statute 12 Ann., st. 2, c. 16 (Usury, 1713), it was brought down to five *per cent* yearly, which is now the extremity of legal interest that can be taken. But yet, if a contract which carries interest be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made.<sup>p</sup> Thus Irish, American, Turkish, and Indian interest have [464] been allowed in our courts to the amount of even twelve *per cent*. For the moderation or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. And, by statute 14 Geo. III, c. 79 (Legal Rate of Interest, 1774), all mortgages and other securities upon estates or other property in Ireland or the plantations, bearing interest not exceeding six *per cent*, shall be legal; though executed in the kingdom of Great Britain: unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case also, to prevent usurious contracts at home under color of such foreign securities, the borrower shall forfeit treble the sum so borrowed.<sup>15</sup>

<sup>o</sup> De Jur. b. & p. 2. 12. 22.

<sup>p</sup> 1 Equ. Cas. Abr. 289. 1 P. Wms. 395.

<sup>15</sup> Usury laws.—Owing largely, it is thought, to Jeremy Bentham's demonstration of the inefficacy of attempting to protect borrowers against extortion

§ 616. *d. Debt.*—The last general species of contracts, which I have to mention, is that of *debt*; whereby a *chose* in action, or right to a certain sum of money, is mutually acquired and lost.<sup>a</sup> This may be the counterpart of, and arise from, any of the other species of contracts. As, in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on; and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. In bailment, if the bailee loses or detains a sum of money bailed to him for any special purpose, he becomes indebted to the bailor in the same numerical sum, upon his implied contract, that he should execute the trust reposed in him, or repay the money to the bailor. Upon

<sup>a</sup> F. N. B. 119.

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by legislation (Defense of Usury), usury laws were abolished in Great Britain by the Usury Laws Repeal Act of 1854. Since then, subject to the statutory power of the court to set aside or vary a transaction where the interest charged is excessive, there is no restriction on the terms which may be agreed on between a borrower and a lender for the payment of interest, and the ordinary principles of the law of contract govern any such agreement. Where the rate of interest is not fixed by statute, agreement or fixed usage, there is no hard-and-fast rule as to the amount that will be allowed; and the rate may vary according to the practice of the particular court, the value of money for the time being, and the circumstances of the particular case. However, the Money-lenders Acts of 1900 and 1911 are designed to afford relief in certain cases to borrowers. These acts provide that in any transaction, whatever its form may be, which is substantially one of money-lending by a "money-lender," if the interest or charges in respect of the sum actually lent are excessive and the transaction is either harsh and unconscionable, or is otherwise such that a court of equity would give relief, the borrower, or any surety for him, or any other person liable to the money-lender in respect of the loan, will be given relief.—HALSBURY, 21 Laws of England, 42, 53.

In all the states of the American Union there is a legal rate of interest established by statute, which is allowed when no rate is specified in the contract. This legal rate varies from five to twelve per cent. Some of the states have no usury laws, except that interest above the legal rate must be contracted for in writing. But in most states, no person or corporation may take or receive, directly or indirectly, in money, goods, things in action, or in any other way, a greater sum or value than that prescribed by law. The penalties vary in the different states. 1 Stimson, Am. Stat. Law, arts. 481 and 483. *Powell v. Jones*, 44 Barb. (N. Y.) 521; *Carter v. Carusi*, 112 U. S. 478, 28 L. Ed. 820, 5 Sup. Ct. Rep. 281; *Noble & Bros. v. Walker*, 32 Ala. 456.

hiring or borrowing, the hirer or borrower, at the same time that he acquires a property in the thing lent, may also become indebted to the lender, upon his contract to restore the money borrowed, to pay the price or premium of the loan, the hire of the horse, or the like. Any contract, in short, whereby a determinate sum of money becomes due to any person, and is not paid but remains, in action merely, is a contract of debt. And, taken in this light, it comprehends a great variety of acquisition; [465] being usually divided into debts of *record*, debts by *special*, and debts by *simple* contract.

§ 617. (1) **Debts of record.**—A debt of *record* is a sum of money, which appears to be due by the evidence of a court of record. Thus, when any specific sum is adjudged to be due from the defendant to the plaintiff, on an action or suit at law; this is a contract of the highest nature, being established by the sentence of a court of judicature. Debts upon recognizance, are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like: and these, together with statutes merchant and statutes staple, etc., if forfeited by nonperformance of the condition, are also ranked among this first and principal class of debts, viz., debts of record; since the contract, on which they are founded, is witnessed by the highest kind of evidence, viz., by matter of record.

§ 618. (2) **Debts by specialty.**—Debts by *specialty*, or special contract, are such whereby a sum of money becomes, or is acknowledged to be, due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation: which last we took occasion to explain in the twentieth chapter of the present book; and then showed that it is an acknowledgment or creation of a debt from the obligor to the obligee, unless the obligor performs a condition thereunto usually annexed, as the payment of rent or money borrowed, the observance of a covenant, and the like; on failure of which the bond becomes forfeited and the debt becomes due in law. These are looked upon as the next class of debts after those of record, being confirmed by special evidence, under seal.



§ 619. (3) **Debts by simple contract.**—Debts by *simple contract* are such, where the contract upon which the obligation arises is neither ascertained by matter of record, nor yet by deed or special instrument, but by mere oral evidence, the most simple of any; or by notes <sup>[466]</sup> unsealed, which are capable of a more easy proof, and (therefore only) better, than a verbal promise. It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. Some of these we have already occasionally hinted at; and the rest, to avoid repetition, must be referred to those particular heads in the third book of these Commentaries, where the breach of such contracts will be considered. I shall only observe at present, that by the statute 29 Car. II, c. 3 (Statute of Frauds, 1677), no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making; unless the agreement or some memorandum thereof be in writing, and signed by the party himself or by his authority.

But there is one species of debts upon simple contract, which, being a transaction now introduced into all sorts of civil life, under the name of *paper credit*, deserves a more particular regard. These are debts by *bills of exchange*, and *promissory notes*.

§ 620. (a) **Bills of exchange.**—A bill of *exchange* is a security,<sup>16</sup> originally invented among merchants in different countries, for the more easy remittance of money from the one to the other, which has since spread itself into almost all pecuniary transactions. It is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account; by which means a man at the most distant part of the world may have money remitted to him from any trading coun-

<sup>16</sup> For the legal meaning of "security" or "securities," see note in Ann. Cas. 1914D, 623, to the case of *Boston Railroad Holding Co. v. Commonwealth*, 215 Mass. 493, 102 N. E. 650.

try. If A lives in Jamaica, and owes B, who lives in England, 1,000*l.*, now if C be going from England to Jamaica, he may pay B this 1,000*l.* and take a bill of exchange drawn by B in England upon A in Jamaica, and receive it when he comes thither. Thus does B receive his debt, at any distance of place, by transferring it to C; who carries over his money [467] in paper credit, without danger of robbery or loss. This method is said to have been brought into general use by the Jews and Lombards, when banished for their usury and other vices; in order the more easily to draw their effects out of France and England, into those countries in which they had chosen to reside. But the invention of it was a little earlier: for the Jews were banished out of Guienne in 1287, and out of England in 1290;<sup>r</sup> and in 1236 the use of paper credit was introduced into the Mogul empire in China.<sup>s</sup> In common speech such a bill is frequently called a *draft*, but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter, is called in law the *drawer*, and he to whom it is written the *drawee*; and the third person, or negotiator, to whom it is payable (whether specially named, or the *bearer* generally) is called the *payee*.

§ 621. (i) *Foreign and inland bills*.—These bills are either *foreign*, or *inland*; *foreign*, when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa*; and *inland*, when both the drawer and the drawee reside within the kingdom.<sup>17</sup> Formerly foreign bills of exchange were much more

<sup>r</sup> 2 Carte. 203. 206.

<sup>s</sup> Mod. Un. Hist. iv. 499.

<sup>17</sup> "Sir William Blackstone, in his Commentaries (vol. II, p. 467), distinguishes foreign from inland bills, by defining the former as bills drawn by a merchant residing abroad, upon his correspondent in England, or *vice versa*; and the latter, as those drawn by one person on another, when both drawer and drawee reside within the same kingdom. . . . Applying this definition to the political character of the several states of this Union in relation to each other, we are all clearly of opinion, that bills drawn in one of these states, upon persons living in any other of them, partake of the character of foreign bills, and ought so to be treated. For all national purposes, embraced by the federal constitution, the states and the citizens thereof are one, united under the same sovereign authority, and governed by the same laws. In all other re-

regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III, c. 17 (Bill of Exchange, 1697), the other 3 & 4 Ann., c. 9 (Bill of Exchange, 1704), inland bills of exchange are put upon the same footing as foreign ones; what was the law and custom of merchants with regard to the one, and taken notice of merely as such,<sup>t</sup> being by those statutes expressly enacted with regard to the other. So that there is now in law no manner of difference between them.

§ 622. (b) **Promissory notes.**—Promissory notes, or notes of hand, are a plain and direct engagement in writing, to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large. These, also, by the same statute 3 & 4 Ann., c. 9 (Bill of Exchange, 1704), are made assignable and indorseable in like manner as bills of exchange. But, by statute 15 Geo. III., c. 51 (Negotiation of Notes and Bills, 1774), all promissory or other notes, [468] bills of exchange, drafts, and undertakings in writing, being negotiable or transferable, for the payment of less than twenty shillings, are declared to be null and void: and it is made penal to utter or publish any such; they being deemed prejudicial to trade and public credit. And by 17 Geo. III, c. 30 (Bill of Exchange, 1776), all such notes, bills, drafts, and undertakings, to the amount of twenty shillings and less than five pounds, are subjected to many other

<sup>t</sup> 1 Roll. Abr. 6.

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spects, the states are necessarily foreign to, and independent of, each other. Their constitutions and forms of government being, although republican, altogether different, as are their laws and institutions. This sentiment was expressed, with great force, by the president of the court of appeals of Virginia, in the case of *Warder v. Arell*, 2 Wash. (Va.) 282, 298, 1 Am. Dec. 488, where he states, that in cases of contracts, the laws of a foreign country, where the contract was made, must govern; and then adds as follows: 'The same principle applies, though with no greater force, to the different states of America; for though they form a confederated government, yet the several states retain their individual sovereignties, and, with respect to their municipal regulations, are to each other foreign.' " *Washington, J.*, in *Buckner v. Finley*, 2 Pet. (U. S.) 586, 590, ¶ L. Ed. 528.

regulations and formalities; the omission of any one of which vacates the security, and is penal to him that utters it.

§ 623. (i) **Negotiability of bills and notes.**—The payee, we may observe, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied* contract, viz., that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual, in bills of exchange, to express that the *value* thereof hath been *received* by the drawer; <sup>u</sup> in order to show the consideration, upon which the implied contract of repayment arises. And this property, so vested, may be transferred and assigned from the payee to any other man; contrary to the general rule of the common law, that no *chose* in action is assignable: which assignment is the life of paper credit.<sup>18</sup> It

<sup>u</sup> Stra. 1212.

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<sup>18</sup> **English Bills of Exchange Act of 1882.**—The whole law regarding bills and notes was codified in the English Bills of Exchange Act of 1882. In its origin this law was a part of that branch of the common law known as the law-merchant, which is thus described: "The law-merchant is sometimes spoken of as a fixed body of law forming part of the common law and coeval with the rest of it. But this view, as a matter of legal history, is altogether incorrect. The law-merchant is neither more nor less than the usages of merchants and traders in the different departments of trade, ratified by the decisions of courts of law, which, upon such usages being proved before them, have adopted them as settled law with a view to the interest of trade and the public convenience. In thus acting the courts have proceeded on the well-known principle of law that with reference to transactions in the different departments of trade, courts of law, in giving effect to the contracts and dealings of the parties, will assume that the latter have dealt with one another on the footing of some custom or usage prevailing generally in that particular department. By this process what before was usage only, unsanctioned by legal decision, has become engrafted upon or incorporated with the common law. (*Goodwin v. Roberts* (1875), L. R. 10 Exch. 337, per Cockburn, C. J., at p. 346. Compare *Brandao v. Barnett* (1846), 12 Cl. & Fin. 787, per Lord Campbell, at p. 805)." Halsbury, 2 Laws of England, 459.

"The outstanding characteristics common to bills, cheques and notes which found expression in the cases decided before 1882, and are embodied in the codifying statute, are: (1) that in the case of such instruments a valuable

may therefore be of some use to mention a few of the principal incidents attending this transfer or assignment, in order to make it regular, and thereby to charge the drawer with the payment of the debt to other persons than those with whom he originally contracted.

§ 624. (aa) **Indorsement.**—In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by indorsement, or writing his name in *dorso* or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to another, and so on *in infinitum*. And a promissory note, payable to A or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer [469] of it.†

§ 625. (bb) **Presentation and acceptance.**—But, in case of a bill of exchange, the payee, or the indorsee (whether it be a general

† 2 Show. 23. 5.—Grant v. Vaughan. T. 4. Geo. III. B. R.

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consideration is presumed, so that there is no necessity to state it; (2) that such instruments may be transferred from one person to another by indorsement or by delivery, so as to enable the transferee to sue thereon in his own name; (3) that the transferee who takes such an instrument in good faith and for value obtains a good title in spite of any defect of title in the transferrer." *Ibid.*, p 461.

**American Uniform Negotiable Instruments Act.**—A uniform law on the subject of negotiable instruments has been adopted in nearly all the states of the American Union. Under this statute an instrument, in order to be negotiable, must be in writing and signed; must contain an unconditional promise or to pay a certain sum of money on demand at a fixed and determinable future time; must be payable to order or bearer, and where it is addressed to the drawee, he must be named or otherwise indicated with reasonable certainty. Its negotiability is not affected by the fact that it is not dated, or that it bears a seal, or that it does not specify the value given or that any value was given. It may be payable to the order of a specified person, or to him or to his order. A note payable to the maker's order is not negotiable until he indorses it. Brannan's Negotiable Instruments Law contains the uniform act annotated with references to the English Bills of Exchange Act and with the decisions under both acts. It also contains a collection of essays on the subject by James Barr Ames, Lyman D. Brewster and Charles L. McKechnan.



or particular indorsement), is to go to the drawee, and offer his bill for acceptance; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill. If the drawee accepts the bill, either verbally or in writing,<sup>w</sup> he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upward, and expressed to be for value received, the payee or indorsee may protest it for *nonacceptance*: which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses; and notice of such protest must, within fourteen days after, be given to the drawer.

§ 626. (cc) Protest for nonpayment.—But, in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called days of grace), the payee or indorsee is then to get it protested for *nonpayment*, in the same manner, and by the same persons who are to protest it in case of nonacceptance, and such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of nonacceptance or nonpayment, is bound to make good to the payee, or indorsee, not only the amount of the said bills (which he is bound to do within a reasonable time after nonpayment, without any protest, by the rules of the common law<sup>x</sup>), but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill, when refused, must be demanded of the drawer as soon as conveniently may be: for though, when one draws a bill of [470] exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid, when due, the person to whom it is payable shall in convenient time give the drawer

<sup>w</sup> *Stra.* 1000.

<sup>x</sup> *Lord Raym.* 993.

notice thereof; for otherwise the law will imply it paid: since it would be prejudicial to commerce, if a bill might rise up to charge the drawer at any distance of time; when in the meantime all reckonings and accounts may be adjusted between the drawer and the drawee.<sup>7</sup>

§ 627. (dd) **Liability of indorsers.**—If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negotiated through many hands, upon any of the indorsers; for each indorser is a warrantor for the payment of the bill, which is frequently taken in payment as much (or more) upon the credit of the indorser, as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction; and so upward. But the first indorser has nobody to resort to but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes, that are indorsed over, and negotiated from one hand to another: only that, in this case, as there is no drawee, there can be no protest for nonacceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself, and accepted at the time of drawing. And, in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy, as upon bills of exchange, against the prior indorsers.

<sup>7</sup> Salk. 127.

## CHAPTER THE THIRTY-FIRST.

## OF TITLE BY BANKRUPTCY.

The preceding chapter having treated pretty largely of the acquisition of personal property by several commercial methods, we from thence shall be easily led to take into our present consideration a tenth method of transferring property, which is that of

§ 628. **X. Title by bankruptcy.**—Bankruptcy; a title which we before lightly touched upon,<sup>a</sup> so far as it related to the transfer of the real estate of the bankrupt. At present we are to treat of it more minutely, as it principally relates to the disposition of chattels, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us therefore first of all consider, 1. *Who* may become a bankrupt: 2. What *acts* make a bankrupt: 3. The *proceedings* on a commission of bankruptcy: and 4. In what manner an estate in goods and chattels may be *transferred* by bankruptcy.<sup>1</sup>

<sup>a</sup> See pag. 285.

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<sup>1</sup> **Recent English and American bankrupt laws.**—The law of bankruptcy at present in force in England is enacted by the Bankruptcy Acts of 1883 and 1890, which form substantially a complete code of the existing law. All preceding bankruptcy acts have been formally repealed by parliament, but the repeals of successive bankruptcy acts have always been subject to an exception in favor of proceedings which were instituted and pending under the act repealed. See 2 Halsbury, Laws of England, 1 ff; 2 Stephen's Comm. (16th ed.), 257 ff.

In the United States, the federal constitution (art. 1. § 8) authorizes Congress to pass uniform laws on the subject of bankruptcies. At any time when there is no law of Congress in force, state insolvent laws are operative. Congress has passed four bankrupt laws, in 1800, 1841, 1867, and 1898. The first three were repealed after short intervals. The bankruptcy act of 1898 extends to corporations of various kinds, and even to limited or other partnership associations whose capital alone is responsible for their debts. It provides that proceedings may be instituted either by the insolvent or by his creditors. In other words, it establishes voluntary as well as involuntary bankruptcy. The purpose of the statute is to provide a system of bankruptcy, the objects thereof being, "*first*, to ascertain whether the person whose affairs are drawn in question has become a bankrupt; *second*, if so, to take into legal custody all his property

§ 629. 1. Who may become a bankrupt.—Who may become a bankrupt. A bankrupt was before<sup>b</sup> defined to be “a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.” He was formerly considered merely in the light of a criminal or offender;<sup>c</sup> and in this spirit we are told by Sir Edward Coke,<sup>d</sup> that we have fetched as well the name, as the wickedness, [472] of bankrupts from foreign nations.<sup>e</sup> But at present the laws of bankruptcy are considered as laws calculated for the

<sup>b</sup> *Ibid.*

<sup>c</sup> Stat. 1. Jac. I. c. 15. § 17.

<sup>d</sup> 4 Inst. 277.

<sup>e</sup> The word itself is derived from the word *bancus* or *banque*, which signifies the table or counter of a tradesman (Dufresne I. 969) and *ruptus*, broken; denoting thereby one whose shop or place of trade is broken and gone; though others rather choose to adopt the word *route*, which in French signifies a trace or tract, and tell us that a bankrupt is one who hath removed his banque, leaving but a trace behind. (4 Inst. 277.) And it is observable that the title of the first English statute concerning this offense, 34 Hen. VIII. c. 4. “against such persons as do make bankrupt,” is a literal translation of the French idiom, *qui font banque route*.

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and assets of every description for the purpose of making a fair and just distribution among his creditors; *third*, to protect the creditors from frauds and unjust preferences; *fourth*, to ascertain the amount due to the several creditors and their priority; *fifth*, to relieve the bankrupt from his load of debts and to discharge him free to acquire property, which shall not be liable to the payment of ante-bankrupt debts. In short, the acts seek to enable every honest debtor, irrespective of whether he becomes bankrupt upon his own or the petition of his creditors, to have fair treatment and a speedy consideration of his rights; and that the creditors shall have their claims considered, allowed, and the assets of the debtor ratably divided.” Loveland, 1 Bankruptcy, 14. The administration of the law is confided to particular United States courts, designated courts of bankruptcy. These courts are, under the act of 1898, the district courts of the United States in the several states, the supreme court of the District of Columbia, the district courts of the several territories, and the United States courts in the Indian Territory and the District of Alaska. No other courts, federal or state, have any jurisdiction in bankruptcy. The courts of bankruptcy act to a large extent through special officers, called referees and trustees, subject to having their action reviewed by the judge. The decisions of the courts of bankruptcy are subject within limits to review by the appellate courts of the United States.

The bankrupt law, as amended in 1903, enumerates five acts of bankruptcy relating to the disposition of the debtor's property and to his circumstances and

benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some privileges, not only on the creditors, but also on the bankrupt or debtor himself. On the creditors; by compelling the bankrupt to give up all his effects to their use, without any fraudulent concealment: on the debtor; by exempting him from the rigor of the general law, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of

credit. No other acts than those specified will support an adjudication of bankruptcy. In *re Empire Metallic Bedstead Co.*, 98 Fed. 981, 39 C. C. A. 372. The acts of bankruptcy under the statute, which may be committed by a debtor, consist of his having (1) conveyed, transferred, concealed or removed, or permitted to be concealed or removed, any part of his property with intent to hinder, delay or defraud his creditors, or any of them; or (2) transferred, while insolvent, any portion of his property to one or more of his creditors with intent to prefer such creditors over his other creditors; or (3) suffered or permitted, while insolvent, any creditor to obtain a preference through legal proceedings, and not having at least five days before a sale or final disposition of any property affected by such preference vacated or discharged such preference; or (4) made a general assignment for the benefit of his creditors, or, being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state, of a territory, or of the United States; or (5) admitted in writing his inability to pay his debts and his willingness to be adjudged a bankrupt on that ground.

The privileges of voluntary bankruptcy are conferred by the provision of the bankrupt act, as amended in 1910, as follows: "Any person, except a municipal, railroad, insurance, or banking corporation, shall be entitled to the benefits of this act as a voluntary bankrupt."

Those who may be adjudged involuntary bankrupts are set forth in the following provision as amended in 1910: "Any natural person, except a wage-earner or a person engaged chiefly in farming or the tillage of the soil, any unincorporated company, and any moneyed, business or commercial corporation except a municipal, railroad, insurance or banking corporation, owing debts to the amount of one thousand dollars or over, may be adjudged an involuntary bankrupt upon default or an impartial trial, and shall be subject to the provisions and entitled to the benefits of this act. 'The bankruptcy of a corporation shall not release its officers, directors or stockholders, as such, from any liability under the laws of a state or territory or of the United States.'"

A discharge in bankruptcy releases a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the state, county, district or municipality, in which he resides; (2) are liabilities for obtaining property by false pretenses or false representations, or for willful



bankrupts: taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

§ 630. a. Roman law.—In this respect our legislature seems to have attended to the example of the Roman law. I mean not the terrible law of the twelve tables; whereby the creditors might cut the debtor's body into pieces, and each of them take his proportionable share: if indeed that law, *de debitore in partes secando* (of cutting the debtor into pieces), is to be understood in so very butcherly a light; which many learned men have with reason doubted.<sup>f</sup> Nor do I mean those less inhuman laws (if they may be called so, as *their* meaning is indisputably certain) of imprisoning the debtor's person in chains; subjecting him to stripes and hard labor, at the mercy of his rigid creditor; and sometimes selling him, his wife, and children, to perpetual foreign slavery *trans Tiberim* (beyond the Tiber):<sup>g</sup> an oppression, which produced so many [473] popular insurrections, and secessions to the *mons sacer* (the sacred mount). But I mean the law of *cession*, introduced by the Christian emperors; whereby, if a debtor *ceded*, or yielded

<sup>f</sup> Taylor Comment. in L. Decemviral. Bynkersh. Observ. Jur. I. 1. Heineco Antiq. III. 30. 4.

<sup>g</sup> In Pegu, and the adjacent countries in East India, the creditor is entitled to dispose of the debtor himself, and likewise of his wife and children; inso-much that he may even violate with impunity the chastity of the debtor's wife: but then, by so doing, the debt is understood to be discharged. (Mod. Un. Hist. vii. 128.)

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and malicious injuries to the person or property of another, or for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female, or for criminal conversation; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; or (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity. For effect of discharge in bankruptcy, see *Dimock v. Revere Copper Co.*, 117 U. S. 559, 29 L. Ed. 994, 6 Sup. Ct. Rep. 855. For right of jury trial, see *C. Elliott & Co. v. Toepfner*, 187 U. S. 327, 47 L. Ed. 200, 23 Sup. Ct. Rep. 133.

up all his fortune to his creditors, he was secured from being dragged to a jail, "*omni quoque corporali cruciatu semoto* (all bodily torture being also removed)."<sup>b</sup> For, as the emperor justly observes,<sup>1</sup> "*inhumanum erat spoliatum fortunæ suis in solidum damnari* (it was inhuman, being deprived of all his fortune, to be utterly ruined)." Thus far was just and reasonable: but, as the departing from one extreme is apt to produce its opposite, we find it afterwards enacted,<sup>k</sup> that if the debtor by any unforeseen accident was reduced to low circumstances, and would swear that he had not sufficient left to pay his debts, he should not be compelled to cede or give up even that which he had in his possession: a law, which under a false notion of humanity, seems to be fertile of perjury, injustice, and absurdity.

§ 631. b. Only traders within the law in England.—The laws of England, more wisely, have steered in the middle between both extremes; providing at once against the inhumanity of the creditor, who is not suffered to confine an honest bankrupt after his effects are delivered up; and at the same time taking care that all his just debts shall be paid, so far as the effects will extend. But still they are cautious of encouraging prodigality and extravagance by this indulgence to debtors; and therefore they allow the benefit of the laws of bankruptcy to none but actual *traders*; since that set of men are, generally speaking, the only persons liable to accidental losses, and to an inability of paying their debts, without any fault of their own. If persons in other situations of life run in debt without the power of payment, they must take the consequences of their own indiscretion, even though they meet with sudden accidents that may reduce their fortunes: for the law holds it to be an unjustifiable practice, for any person but a trader to encumber himself with debts of any considerable value. If a gentleman, or [474] one in a liberal profession, at the time of contracting his debts, has a sufficient fund to pay them, the delay of payment is a species of dishonesty, and a temporary injustice to his creditor: and if, at such time, he has no sufficient fund, the dishonesty and injustice is the greater. He cannot therefore murmur, if he suffers

<sup>b</sup> Cod. 7. 71. per tot.

<sup>k</sup> Nov. 135. c. 1.

<sup>1</sup> Inst. 4. 6. 40.

the punishment which he has voluntarily drawn upon himself. But in mercantile transactions the case is far otherwise. Trade cannot be carried on without mutual credit on both sides: the contracting of debts is therefore here not only justifiable, but necessary. And if by accidental calamities, as by the loss of a ship in a tempest, the failure of brother traders, or by the nonpayment of persons out of trade, a merchant or trader becomes incapable of discharging his own debts, it is his misfortune and not his fault. To the misfortunes, therefore, of debtors, the law has given a compassionate remedy, but denied it to their faults: since, at the same time that it provides for the security of commerce, by enacting that every considerable trader may be declared a bankrupt, for the benefit of his creditors as well as himself, it has also to discourage extravagance declared, that no one shall be capable of being made a bankrupt, but only a *trader*; nor capable of receiving the full benefit of the statutes, but only an *industrious* trader.

§ 632. c. First bankrupt acts, 1542, 1571, and 1623.—The first statute made concerning any English bankrupts, was 34 Hen. VIII, c. 4 (Bankruptcy, 1542), when trade began first to be properly cultivated in England: which has been almost totally altered by statute 13 Eliz., c. 7 (Bankrupts, 1571), whereby bankruptcy is confined to such persons only as have *used the trade of merchandise*, in gross or by retail, by way of bargaining, exchange, re-change, bartering, chevisance,<sup>1</sup> or otherwise; or have *sought their living by buying and selling*. And by statute 21 Jac. I, c. 19 (Bankrupts, 1623), persons using the trade and profession of a *scrivener*, receiving other men's moneys and estates into their trust and custody, are also made liable to the statutes of bankruptcy: and the benefits, as well as the penal parts of the law, are extended [475] as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives.

§ 633. d. Bankrupt Act of 1731.—By many subsequent statutes, but lastly by statute 5 Geo. II, c. 30 (Bankrupts, 1731),<sup>m</sup> *bank-*

<sup>1</sup> That is, making contracts. (Dufresne. II. 569.)

<sup>m</sup> § 39.

*ers, brokers, and factors*, are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I, viz., for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers: and they are properly to be looked upon as traders, since they make merchandise of money, in the same manner as other merchants do of goods and other movable chattels. But by the same act,<sup>n</sup> no *farmer, grazier, or drover*, shall (as such) be liable to be deemed a bankrupt: for though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. And, besides, the subjecting them to the laws of bankruptcy might be a means of defeating their landlords of the security which the law has given them above all others, for the payment of their reserved rents: wherefore, also, upon a similar reason, a *receiver of the king's taxes* is not capable,<sup>o</sup> as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute,<sup>p</sup> no person shall have a commission of bankrupt awarded against him, unless at the petition of some *one* creditor, to whom he owes 100*l.*; or of *two*, to whom he is indebted 150*l.*; or of *more*, to whom all together he is indebted 200*l.* For the law does not look upon persons, whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statutes, themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.

§ 634. **e. What constitutes trading.**—[476] In the interpretation of these several statutes it hath been held, that buying only, or selling only, will not qualify a man to be a bankrupt; but it must be both buying and selling, and also getting a livelihood by it. As, by exercising the calling of a merchant, a grocer, a mercer, or, in one general word, a *chapman*, who is one that buys and sells anything. But no handicraft occupation (where nothing is bought

<sup>n</sup> § 40.

<sup>p</sup> § 23.

<sup>o</sup> *Ibid.*

and sold, and therefore an extensive credit, for the stock in trade, is not necessary to be had) will make a man a regular bankrupt: as that of a husbandman, a gardener, and the like, who are paid for their work and labor.<sup>a</sup> Also an innkeeper cannot, as such, be a bankrupt:<sup>r</sup> for his gain or livelihood does not arise from buying and selling in the way of merchandise, but greatly from the use of his rooms and furniture, his attendance, and the like: and though he may buy corn and victuals, to sell again at a profit, yet that no more makes him a trader, than a schoolmaster or other person is, that keeps a boarding-house, and makes considerable gains by buying and selling what he spends in the house, and such a one is clearly not within the statutes.<sup>s</sup> But where persons buy goods, and make them up into salable commodities, as shoemakers, smiths, and the like; here, though part of the gain is by bodily labor, and not by buying and selling, yet they are within the statutes of bankrupts;<sup>t</sup> for the labor is only in melioration of the commodity, and rendering it more fit for sale.

One single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandise, within the intent of the statute, by which a profit may be fairly made.<sup>u</sup> Neither will buying and selling under particular restraints, or for particular purposes; as if [477] a commissioner of the navy uses to buy victuals for the fleet, and dispose of the surplus and refuse, he is not thereby made a trader within the statutes.<sup>w</sup> An infant, though a trader, cannot be made a bankrupt: for an infant can owe nothing but for necessities; and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due; and no person can be made a bankrupt for debts, which he is not liable at law to pay.<sup>x</sup> But a feme covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt.<sup>y</sup>

<sup>a</sup> Cro. Car. 31.

<sup>r</sup> Cro. Car. 549. Skinn. 291.

<sup>s</sup> Skinn. 292. 3 Mod. 330.

<sup>t</sup> Cro. Car. 31. Skinn. 292.

<sup>u</sup> 2 P. Wms. 308.

<sup>w</sup> 1 Salk. 110. Skinn. 292.

<sup>x</sup> Lord Raym. 443.

<sup>y</sup> La Vie v. Philips, M. 6 Geo. III. B. R.



§ 635. 2. What are acts of bankruptcy.—Having thus considered, who may, and who may not be made a bankrupt, we are to inquire, secondly, by what *acts* a man may become a bankrupt. A bankrupt is “a trader, who secretes himself, or does certain other acts, tending to defraud his creditors.” We have hitherto been employed in explaining the former part of this description, “a trader”; let us now attend to the latter, “who secretes himself, or does certain other acts, tending to defraud his creditors.” And, in general, whenever such a trader, as is before described, hath endeavored to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is extremely watchful to detect a man, whose circumstances are declining, in the first instance, or at least as early as possible: that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. [478] Among these may therefore be reckoned, 1. Departing from the realm, whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors.<sup>z</sup> 2. Departing from his own house, with intent to secrete himself, and avoid his creditors.<sup>a</sup> 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause; which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law.<sup>b</sup> 4. Procuring or suffering himself willingly to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors.<sup>c</sup> 5. Procuring his money, goods, chattels, and effects to be attached or sequestered by any legal process;

<sup>z</sup> Stat. 13 Eliz. c. 7 (Bankrupts, 1571).

<sup>a</sup> *Ibid.* 1 Jac. I. c. 15 (Bankrupts, 1603).

<sup>b</sup> Stat. 13 Eliz. c. 7.

<sup>c</sup> *Ibid.* 1 Jac. I. c. 15.

which is another plain and direct endeavor to disappoint his creditors of their security.<sup>d</sup> 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels; which is an act of the same suspicious nature with the last.<sup>e</sup> 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavor to elude the justice of the law.<sup>f</sup> 8. Endeavoring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment, originally contracted for; which are an acknowledgment of either his poverty or his knavery.<sup>g</sup> 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail, in order to obtain his liberty.<sup>h</sup> For the inability to procure bail argues a strong deficiency in his credit, owing either to his suspected poverty or ill character; and his neglect to do it, if able, can arise only from a fraudulent intention: in either of which cases it is high time for his creditors to look to themselves, [479] and compel a distribution of his effects. 10. Escaping from prison after an arrest for a just debt of 100*l.* or upwards.<sup>i</sup> For no man would break prison that was able and desirous to procure bail; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after service of legal process, for such debts, upon any trader having privilege of parliament.<sup>k</sup>

§ 636. a. **Construction of statutes.**—These are the several acts of bankruptcy, expressly defined by the statutes relating to this title: which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any

<sup>d</sup> Stat. 1 Jac. I. c. 15.

<sup>e</sup> *Ibid.*

<sup>f</sup> Stat. 21 Jac. I. c. 19 (Bankrupts, 1623).

<sup>g</sup> *Ibid.*

<sup>h</sup> *Ibid.*

<sup>i</sup> Stat. 21 Jac. I. c. 19.

<sup>k</sup> Stat. 4 Geo. III. c. 33 (Bankrupts, 1763).

construction, or implication. And therefore Sir John Holt held,<sup>1</sup> that a man's removing his goods privately to prevent their being seized in execution, was no act of bankruptcy. For the statutes mention only fraudulent gifts to third persons, and procuring them to be seized by sham process, in order to defraud creditors: but this, though a palpable fraud, yet falling within neither of those cases, cannot be adjudged an act of bankruptcy. So, also, it has been determined expressly, that a banker's stopping or refusing payment is no act of bankruptcy; for it is not within the description of any of the statutes, and there may be good reasons for his so doing, as suspicion of forgery, and the like: and if, in consequence of such refusal, he is arrested, and puts in bail, still it is no act of bankruptcy:<sup>m</sup> but if he goes to prison, and lies there two months, then, and not before, is he become a bankrupt.

We have seen who may be a bankrupt, and what *acts* will make him so: let us next consider,

§ 637. 3. *Proceedings in bankruptcy.*—The *proceedings* on a commission of bankrupt; so far as they affect the bankrupt himself. And these depend entirely [480] on the several statutes of bankruptcy;<sup>n</sup> all which I shall endeavor to blend together, and digest into a concise methodical order.

§ 638. a. *Petition by creditor.*—And, first, there must be a *petition* to the lord chancellor by one creditor to the amount of 100*l.*, or by two to the amount of 150*l.*, or by three or more to the amount of 200*l.*; upon which he grants a *commission* to such discreet persons as to him shall seem good, who are then styled commissioners of bankrupt. The petitioners, to prevent malicious applications, must be bound in a security of 200*l.* to make the party amends in case they do not prove him a bankrupt. And if, on the other hand, they receive any money or effects from the bankrupt, as a recompense for suing out the commission, so as to receive more

<sup>1</sup> Lord Raym. 725.

<sup>m</sup> 7 Mod. 139.

<sup>n</sup> 13 Eliz. c. 7 (Bankrupts, 1571). 1 Jac. I. c. 15 (Bankrupts, 1603). 21 Jac. I. c. 19 (Bankrupts, 1623). 7 Geo. I. c. 31 (Bankrupts, 1720). 5 Geo. II. c. 30 (Bankrupts, 1731). 19 Geo. II. c. 32 (Bankrupts, 1745) & 24 Geo. II. c. 57 (1750).

than their ratable dividends of the bankrupt's estate, they forfeit not only what they shall have so received, but their whole debt. These provisions are made, as well to secure persons in good credit from being damnified by malicious petitions, as to prevent knavish combinations between the creditors and bankrupt, in order to obtain the benefit of a commission. When the commission is awarded and issued, the commissioners are to meet, at their own expense, and to take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20*s. per diem* each, at every sitting. And no commission of bankrupt shall abate, or be void, upon any demise of the crown.

§ 639. **b. Proof; finding; notice; surrender.**—When the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the Gazette, and at the same time to appoint three meetings. At one of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be chosen by the major <sup>[481]</sup> part, in value, of the creditors who shall then have proved their debts; but may be originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l.* And at the third meeting, at farthest, which must be on the forty-second day after the advertisement in the Gazette, the bankrupt, upon notice also personally served upon him or left at his usual place of abode, must surrender himself personally to the commissioners, and must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default thereof, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors.

§ 640. **c. Arrest of bankrupt.**—In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge

or justice of the peace be apprehended and committed to the county jail, in order to be forthcoming to the commissioners; who are also empowered immediately to grant a warrant for seizing his goods and papers.

§ 641. d. Examination of bankrupt.—When the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine, the bankrupt's wife and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any jailer, permitting such person to escape, or go out of prison, shall forfeit 500*l.* to the creditors.

[482] The bankrupt, upon this examination, is bound upon pain of death to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto; and is to deliver up all in his own power to the commissioners (except the necessary apparel of himself, his wife, and his children); or, in case he conceals or embezzles any effects to the amount of 20*l.*, or withholds any books or writings with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy.<sup>a</sup>

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent* out of the effects so discovered, and such further reward as the assignees and commissioners shall think proper. And any trustee willfully concealing the estate of any bankrupt, after the

<sup>a</sup> By the laws of Naples all fraudulent bankrupts, particularly such as do not surrender themselves within four days, are punished with death: also all who conceal the effects of a bankrupt, or set up a pretended debt to defraud his creditors. (Mod. Un. Hist. xxviii. 320.)



expiration of the two and forty days, shall forfeit 100*l.* and double the value of the estate concealed, to the creditors.\*

§ 642. e. **Certificate of conformity.**—Hitherto everything is in favor of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but in case he proves honest, it makes him full amends for all this rigor and severity. For if the bankrupt hath made an ingenuous discovery, hath conformed to the directions of the law, and hath acted in all points to the satisfaction of his creditors; and if they or four parts in five of them in number and value (but none of them creditors for less than 20*l.*), will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the lord chancellor: and he, or two judges whom he shall appoint, on oath <sup>[483]</sup> made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it, upon cause shown by any of the creditors of the bankrupt.

§ 643. f. **Allowance to bankrupt.**—If no cause be shown to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behavior, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent*; but if they pay ten shillings in the pound, he is to be allowed *five per cent*; if twelve shillings and six-pence, then *seven and a half per cent*; and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent*: provided, that such

\* Ninth edition adds, “and his goods and estate shall be divided among his creditors. And unless it shall appear, that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off.” [v Stat. 21. Jac. I. c. 19.]

allowance do not in the first case exceed 200*l.*, in the second 250*l.*, and in the third 300*l.*<sup>p</sup>

§ 644. *g. Discharge of debts.*—Besides this allowance, he has also an indemnity granted him, of being free and discharged forever from all debts owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that among other purposes, all proceedings on commission of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate properly allowed shall be sufficient evidence of all previous proceedings. Thus [484] the bankrupt becomes a clear man again; and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth: which is the rather to be expected, as he cannot be entitled to these benefits, but by the testimony of his creditors themselves of his honest and ingenuous disposition; and unless his failures have been owing to misfortunes, rather than to misconduct and extravagance.

§ 645. *h. Conditions of allowance and discharge.*—For no allowance or indemnity shall be given to a bankrupt, unless his certificate be signed and allowed, as before mentioned; and also, if any creditor produces a fictitious debt, and the bankrupt does not make discovery of it, but suffers the fair creditors to be imposed upon, he loses all title to these advantages. Neither can he claim them, if he has given with any of his children above 100*l.* for a marriage portion, unless he had at that time sufficient left

<sup>p</sup> By the Roman law of cession, if the debtor acquired any considerable property subsequent to the giving up of his all, it was liable to the demands of his creditors. (Ff. 42. 3. 4.) But this did not extend to such allowance as was left to him on the score of compassion for the maintenance of himself and family. *Si quid misericordie causa ei fuerit relictum, puta menstruum vel annuum, alimentorum nomine, non oportet propter hoc bona ejus iterato venditari: nec enim fraudandus est alimentis cottidianis.* (If anything shall have been left him through compassion, suppose monthly or yearly, as a maintenance, he is not obliged on this account again to sell his goods; for he is not to be deprived of his daily subsistence.) (*Ibid.* l. 6.)

to pay all his debts; or if he has lost at any one time 5*l.*, or in the whole 100*l.*, within a twelvemonth before he became bankrupt, by any manner of gaming or wagering whatsoever; or, within the same time has lost to the value of 100*l.* by stock-jobbing. Also to prevent the too common practice of frequent and fraudulent or careless breaking, a mark is set upon such as have been once cleared by a commission of bankrupt, or have compounded with their creditors, or have been delivered by an act of insolvency: which is an occasional act, frequently passed<sup>a</sup> by the legislature; whereby all persons whatsoever, who are either in too low a way of dealing to become bankrupts, or not being in a mercantile state of life are not included within the laws of bankruptcy, are discharged from all suits and imprisonment, upon delivering up all their estate and effects to their creditors upon oath, at the sessions or assizes; in which case their perjury or fraud is usually, as in case of bankrupts, punished with death. Persons who have been once cleared by this, or either of the other methods (of composition with their creditors, or bankruptcy), and afterwards become bankrupts again, unless they pay full [485] fifteen shillings in the pound, are only thereby indemnified as to the confinement of their bodies; but any future estate they shall acquire remains liable to their creditors, excepting their necessary apparel, household goods, and the tools and implements of their trades.

Thus much for the proceedings on a commission of bankrupt, so far as they affect the bankrupt himself personally. Let us next consider,

§ 646. 4. Effect of bankruptcy on property.—How such proceedings affect or transfer the *estate* and *property* of the bankrupt. The method whereby a *real* estate, in lands, tenements, and hereditaments, may be transferred by bankruptcy, was shown under its proper head in a former chapter.<sup>f</sup> At present, therefore, we are only to consider the transfer of things *personal* by this operation of law.

<sup>a</sup> Stat. 1 Geo. III. c. 17 (Insolvent Debtor's Relief, 1760). 5 Geo. III. c. 41 (Insolvent Debtor's Relief, 1765). 9 Geo. III. c. 26 (Insolvent Debtor's Relief, 1768). 14 Geo. III. c. 77 (Insolvent Debtor's Relief, 1774).

<sup>f</sup> Pag. 285.

By virtue of the statutes before mentioned all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners, whether they be goods in actual *possession*, or debts, contracts, and other cheses in *action*; and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broken open, in order to enter upon and seize the same. And when the assignees are chosen or approved by the creditors, the commissioners are to assign everything over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it.<sup>a</sup>

§ 647. a. Assignee's title.—The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore, it is usually said, that once a bankrupt, and always a bankrupt: by which is meant, that a plain direct act of bankruptcy once [486] committed cannot be purged, or explained away, by any subsequent conduct, as a dubious equivocal act may be; <sup>t</sup> but that, if a commission is afterwards awarded, the commission and the property of the assignees shall have a relation, or reference, back to the first and original act of bankruptcy.<sup>a</sup> Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And, if an execution be sued out, but not served and executed on the bankrupt's effects till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is within the statutes of bankrupts; <sup>w</sup> for if, after the act of bankruptcy committed and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby.<sup>x</sup> In France this doctrine of relation is

<sup>a</sup> 12 Mod. 324.

<sup>t</sup> Salk. 110.

<sup>u</sup> 4 Burr. 32.

<sup>w</sup> 1 Atk. 262.

<sup>x</sup> Viner. Abr. t. Creditor and Bankr. 104.

carried to a very great length; for there every act of a merchant, for ten days *precedent* to the act of bankruptcy, is presumed to be fraudulent, and is therefore void.<sup>7</sup> But with us the law stands upon a more reasonable footing: for, as these acts of bankruptcy may sometimes be secret to all but a few, and it would be prejudicial to trade to carry this notion to its utmost length, it is provided by statute 19 Geo. II, c. 32 (Bankrupts, 1745), that no money paid by a bankrupt to a *bona fide* or real creditor, in a course of trade, even after an act of bankruptcy done, shall be liable to be refunded. Nor, by statute 1 Jac. I, c. 15 (Bankrupts, 1603), shall any debtor of a bankrupt, that pays him his debt, without knowing of his bankruptcy, be liable to account for it again. The intention of this relative power being only to reach fraudulent transactions, and not to distress the fair trader.

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority; but <sup>[487]</sup> cannot commence a suit in *equity*, nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the Gazette.

§ 648. *b. Distribution of assets.*—When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, within twelve months after the commission issued, give one and twenty days' notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a ratable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption.<sup>8</sup> So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the

<sup>7</sup> Sp. L. b. 29. c. 16.

<sup>8</sup> Finch. Rep. 466.



debtor's lands or goods in execution. And upon the equity of the statute 8 Ann., c. 14 (Distress; Execution; Landlord and Tenant, 1709), (which directs that, upon all executions of goods being on any premises demised to a tenant, one year's rent and no more shall, if due, be paid to the landlord), it hath also been held, that under a commission of bankrupt, which is in the nature of a statute execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors, even though he hath neglected to distrain, while the goods remained on the premises: which he is otherwise entitled to do for his entire rent, be the *quantum* what it may.<sup>a</sup> But, otherwise, judgments and recognizances (both which are debts of record, and therefore at other times have a priority) and also bonds and obligations by deed or special instrument (which are called debts by specialty, and are usually the next [488] in order), these are all put on a level with debts by mere simple contract, and all paid *pari passu* (in an equal degree). Nay, so far is this matter carried, that, by the express provision of the statutes, debts not due at the time of the dividend made, as bonds or notes of hand payable at a future day certain, shall be proved and paid equally with the rest,<sup>b</sup> allowing a discount or drawback in proportion. And insurances, and obligations upon bottomry or *respondentia*, *bona fide* made by the bankrupt, though forfeited after the commission is awarded, shall be looked upon in the same light as debts contracted before any act of bankruptcy.\*

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects were exhausted by the first.\*\* And if any surplus remains, after paying every creditor his full debt, it shall be restored to the bankrupt.† This is a case which sometimes happens to men in trade, who involuntarily, or at least unwarily, commit acts of bankruptcy, by absconding and the like, while their effects are more than sufficient to pay their creditors. And, if any suspicious or malevolent creditor will take the advantage of such acts, and sue out a commission,

\* Ninth edition inserts note, "r Stat. 19 Geo. II. c. 32."

\*\* Ninth edition inserts note, "s Stat. 5 Geo. II. c. 30."

† Ninth edition inserts note, "t Stat. 13 Eliz. c. 7."

• 1 Atk. 103, 104.

• Lord Raym. 1549. Stra. 1211.

the bankrupt has no remedy, but must quietly submit to the effects of his own imprudence; except that, upon satisfaction made to all the creditors, the commission may be *superseded*.<sup>c</sup> This case may also happen, when a knave is desirous of defrauding his creditors, and is compelled by a commission to do them that justice which otherwise he wanted to evade. And therefore, though the usual rule is, that all interest on debts carrying interest shall cease from the time of issuing the commission, yet, in case of a surplus left after payment of every debt, such interest shall again revive, and be chargeable on the bankrupt,<sup>d</sup> or his representatives.

<sup>c</sup> 2 Ch. Cas. 144.

<sup>d</sup> 1 Atk. 244.

## [489] CHAPTER THE THIRTY-SECOND.

### OF TITLE BY TESTAMENT, AND ADMINISTRATION.

§ 649. **XI, XII. Wills and administration.**—There yet remain to be examined, in the present chapter, two other methods of acquiring personal estates, viz., by *testament* and *administration*. And these I propose to consider in one and the same view; they being in their nature so connected and blended together, as makes it impossible to treat of them distinctly, without manifest tautology and repetition.

In the pursuit, then, of this joint subject, I shall, first, inquire into the original and antiquity of testaments and administrations; shall, secondly, show who is capable of making a last will and testament; shall, thirdly, consider the nature of a testament and its incidents: shall, fourthly, show what an executor and administrator are, and how they are to be appointed; and lastly, shall select some few of the general heads of the office and duty of executors and administrators.

§ 650. **1. Origin and history of wills and administrations.**—First, as to the *original* of testaments and administrations. We have more than once observed, that when property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society, that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it; which introduced the doctrine and practice of alienations, [490] gifts, and contracts. But these precautions would be very short and imperfect, if they were confined to the life only of the occupier; for then upon his death all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and, in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons.<sup>a</sup> The former method of acquiring personal property, accord-

<sup>a</sup> Puff. L. of N. b. 4. c. 10.

ing to the express directions of the deceased, we call a *testament*: the latter, which is also according to the will of the deceased, not expressed, indeed, but presumed by the law,<sup>b</sup> we call in England an *administration*; being the same which the civil lawyers term a succession *ab intestato* (from an intestate), and which answers to the descent or inheritance of real estates.

§ 651. a. *Antiquity of wills.*—Testaments are of very high antiquity.<sup>1</sup> We find them in use among the ancient Hebrews; though I hardly think the example usually given,<sup>c</sup> of Abraham's complaining<sup>d</sup> that, unless he had some children of his body, his steward Eliezer of Damascus would be his heir, is quite conclusive to show that he had made him so by *will*. And indeed a learned writer<sup>e</sup> has adduced this very passage to prove, that in the patriarchal age, on failure of children or kindred, the servants born under their master's roof succeeded to the inheritance as heirs at law.<sup>f</sup> But (to omit what Eusebius and others have related of Noah's testament, made in *writing* and witnessed under his *seal*, whereby he disposed of the whole world<sup>g</sup>), I apprehend that a much more authentic instance of the early use of testaments may be found in the sacred writings,<sup>h</sup> wherein Jacob bequeaths to his son Joseph a portion of his inheritance [491] double to that of his brethren: which will we find carried into execution many hundred years afterwards, when the posterity of Joseph were divided into two distinct tribes, those of Ephraim and Manasseh, and had two several inheritances assigned them; whereas the descendants of each of the other patriarchs formed only one single tribe, and had only one lot of inheritance. Solon was the first legislator that

<sup>b</sup> *Ibid.* b. 4. c. 11.

<sup>c</sup> Barbeyr. Puff. 4. 10. 4. Godolph. Orph. Lag. 1. 1.

<sup>d</sup> Gen. c. 15.

<sup>e</sup> Taylor's Elem. Civ. Law. 517.

<sup>f</sup> See pag. 12.

<sup>g</sup> Selden. de Succ. Ebr. c. 24.

<sup>h</sup> Gen. c. 48.

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<sup>1</sup> Very informing are the chapters in Maine's *Ancient Law*, chaps. VI and VII, on "The Early History of Testamentary Succession" and "Ancient and Modern Ideas Respecting Wills and Successions."

introduced wills into Athens;<sup>1</sup> but in many other parts of Greece they were totally discountenanced.<sup>k</sup> In Rome they were unknown, till the laws of the twelve tables were compiled, which first gave the right of bequeathing;<sup>1</sup> and, among the northern nations, particularly among the Germans,<sup>m</sup> testaments were not received into use. And this variety may serve to evince, that the right of making wills, and disposing of property after death, is merely a creature of the civil state;<sup>n</sup> which has permitted it in some countries, and denied it in others: and, even where it is permitted by law, it is subjected to different formalities and restrictions in almost every nation under Heaven.\*

§ 652. **b. Testamentary power in England.**—With us in England this power of bequeathing is coeval with the first rudiments of the law: for we have no traces or memorials of any time when it did not exist. Mention is made of intestacy, in the old law before the Conquest, as being merely accidental; and the distribution of the intestate's estate, after payment of the lord's heriot, is then directed to go according to the established law. "*Sive quis incuria, sive morte repentina, fuerit intestatus mortuus, dominus tamen nullum rerum suarum partem (præter eam quæ jure debetur hereditati nomine) sibi assumito. Verum possessionis uxori, liberis, et cognatione proximis, pro suo cuique jure, distribuuntur* (If anyone through negligence or sudden death die intestate, let not the lord take any part of his effects, except what is due to him of right as a heriot. But let his possessions be distributed among his wife, children, and next of kin, to everyone according to their right)."<sup>p</sup> But we are not to imagine that the power of bequeathing extended originally to *all* a man's personal estate.<sup>2</sup> On the contrary, Glan-

<sup>1</sup> Plutarch. in Vita Solon.

<sup>k</sup> Pott. Antiq. l. 4. c. 15.

<sup>1</sup> Inst. 2. 22. 1.

<sup>m</sup> Tacit. de Mor. Germ. 21.

<sup>n</sup> See pag. 13.

<sup>o</sup> Sp. L. b. 27. c. 1. Vinnius in Inst. l. 2. tit. 10.

<sup>p</sup> LL. Canut. c. 68.

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<sup>2</sup> For the early history of wills in England, see 2 Pollock & Maitland, Hist. Eng. Law (2d ed.), 314-363.



vill will inform us,<sup>a</sup> that by the common law, [492] as it stood in the reign of Henry the Second, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and the third was at his own disposal: or, if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other: but, if he died without either wife or issue, the whole was at his own disposal.<sup>r 3</sup> The shares of the wife

<sup>a</sup> 12. c. 5.

<sup>r</sup> Bracton. l. 2. c. 26. Flet. l. 2. c. 57.

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3 "While the laws of all civilized states recognize in every citizen the absolute right to his own earnings, and to the enjoyment of his own property, and the increase thereof, during his life, except so far as the state may require him to contribute his share for public expenses, the right to dispose of his property by will has always been considered purely a creature of statute and within legislative control. 'By the common law, as it stood in the reign of Henry II, a man's goods were to be divided into three equal parts; of which one went to his heirs or lineal descendants, another to his wife, and a third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children; and so, *e converso*, if he had no children, the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal.' 2 Bl. Comm. 492. Prior to the Statute of Wills, enacted in the reign of Henry VIII, the right to a testamentary disposition of property did not extend to real estate at all, and as to personal estate was limited as above stated. Although these restrictions have long since been abolished in England, and never existed in this country, except in Louisiana, the right of a widow to her dower and to a share in the personal estate is ordinarily secured to her by statute. By the Code Napoleon, gifts of property, whether by acts *inter vivos* or by will, must not exceed one-half the estate if the testator leave but one child; one-third, if he leaves two children; one-fourth, if he leaves three or more. If he have no children, but leaves ancestors, both in the paternal and maternal line, he may give away but one-half of his property, and but three-fourths if he have ancestors in but one line. By the law of Italy, one-half a testator's property must be distributed equally among all his children; the other half he may leave to his eldest son or to whomsoever he pleases. Similar restrictions upon the power of disposition by will are found in the codes of other continental countries, as well as in the state of Louisiana. Though the general consent of the most enlightened nations has, from the earliest historical period, recognized a natural right in children to inherit the property of their parents, we know of no legal principle to prevent the legislature from taking

and children were called their *reasonable* parts; and the writ *de rationabili parte bonorum* (of the reasonable part, or share, of the goods) was given to recover it.\*

§ 653. c. Development of the law of wills.—This continued to be the law of the land at the time of *magna carta*, which provides, that the king's debts shall first of all be levied, and then the residue of the goods shall go to the executor to perform the will of the deceased: and, if nothing be owing to the crown, "*omnia catalla cedant defuncto; salvis uxori ipsius et pueris suis rationabilibus partibus suis* (let them resign all the chattels to the will of the deceased; reserving to his wife and children their reasonable shares)."† In the reign of King Edward the Third this right of the wife and children was still held to be the universal or common law;‡ though frequently pleaded as the local custom of Berks, Devon, and other counties:§ and Sir Henry Finch lays it down

\* F. N. B. 122.

† 9 Hen. III. c. 18 (1225).

‡ A widow brought an action *of detinue* against her husband's executors, *quod cum per consuetudinem totius regni Angliæ hæcenus usitatam et approbatam, uxores debent et solent a tempore, etc., habere suam rationabilem partem bonorum maritorum suorum: ita videlicet, quod si nullos habuerint liberos, tunc medietatem; et, si habuerint, tunc tertiam partem, etc.* (that as by the universal custom of England, hitherto used and approved, wives have a right and are accustomed from time, etc., to have a reasonable share of their husbands' goods, in the following proportion; that if they have no children, they shall take the half; and if they have children, then the third part, etc.): and that her husband died worth 200,000 marks, without issue had between them; and thereupon she claimed the moiety. Some exceptions were taken to the pleadings, and the fact of the husband's dying without issue was denied; but the rule of law, as stated in the writ, seems to have been universally allowed. (M. 30 Edw. III. 25.) And a similar case occurs in H. 17 Edw. III. 9.

§ Reg. Brev. 142. Co. Litt. 176.

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away or limiting the right of testamentary disposition or imposing such conditions upon its exercise as it may deem conducive to public good."—United States v. Perkins, 163 U. S. 625, 627, 41 L. Ed. 287, 16 Sup. Ct. Rep. 1073.

There are many American *dicta* to the effect that the right to transmit or succeed to property at death is but a statutory right that might be wholly abrogated by the legislature. These are collected in a note in 9 L. R. A. (N. S.) 121–123. For a vigorous argument to the contrary, see *Nunnemacher v. State*, 129 Wis. 190, 9 Ann. Cas. 711, 9 L. R. A. (N. S.) 121, 108 N. W. 627.

expressly,<sup>x</sup> in the reign of Charles the First, to be the general law of the land. But this law is at present altered by imperceptible degrees, and the deceased may now by will bequeath the whole of his goods and chattels; though we cannot trace out when first this alteration began. Indeed, Sir Edward Coke<sup>y</sup> is of opinion, that this never was [493] the general law, but only obtained in particular places by special custom: and to establish that doctrine. he relies on a passage in Bracton, which in truth, when compared with the context, makes directly against his opinion. For Bracton<sup>z</sup> lays down the doctrine of the reasonable part to be the common law; but mentions that as a particular exception, which Sir Edward Coke has hastily cited for the general rule. And Glanvill, *magna carta*, Fleta, the Year-Books, Fitzherbert, and Finch, do all agree with Bracton, that this right to the *pars rationabilis* (reasonable part, or share) was by the common law: which also continues to this day to be the general law of our sister kingdom of Scotland.<sup>a</sup> To which we may add, that, whatever may have been the custom of later years in many parts of the kingdom, or however it was introduced in derogation of the old common law, the ancient method continued in use in the province of York, the principality of Wales, and in the city of London, till very modern times: when, in order to favor the power of bequeathing, and to reduce the whole kingdom to the same standard, three statutes have been provided; the one 4 & 5 W. & M., c. 2 (Wills, 1691), explained by 2 and 3 Ann., c. 5 (Wills, 1703), for the province of York; another 7 & 8 W. III, c. 38 (Wills, 1695), for Wales; and a third, 2 Geo. I, c. 18 (1715), for London; whereby it is enacted, that persons within those districts, and liable to those customs, may (if they think proper) dispose of *all* their personal estates by will; and the claims of the widow, children, and other relations, to the contrary, are totally barred. Thus is the old common law now utterly abolished throughout all the kingdom of England, and a man may devise the whole of his chattels as freely, as he formerly could his third part or moiety. In disposing of which, he was bound by the custom of many places (as was stated in a former chapter)<sup>b</sup> to remember

<sup>x</sup> Law. 175.

<sup>y</sup> 2 Inst. 33.

<sup>z</sup> 1. 2. c. 26. § 2.

<sup>a</sup> Dalrymp. of Feud. Property. 145.

<sup>b</sup> Pag. 426.

his lord and the church, by leaving them his two best chattels, which was the original of heriots and mortuaries; and afterwards he was left at his own liberty, to bequeath the remainder as he pleased.

§ 654. d. Intestate estates.—<sup>[494]</sup> In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was, and is, said to die intestate; and in such cases it is said that by the old law the king was entitled to seize upon his goods, as the *parens patriæ* (parent of the country), and general trustee of the kingdom.<sup>c 4</sup> This prerogative the king continued to exercise for some time by his own ministers of justice: and probably in the county court, where matters of all kinds were determined: and it was granted as a franchise to many lords of manors, and others, who have to this day a prescriptive right to grant administration to their intestate tenants and suitors, in their own courts-baron and other courts, or to have their wills there proved, in case they made any disposition.<sup>d</sup> Afterwards the crown, in favor of the church, invested the prelates with this

c 9 Rep. 38.

d *Ibid.* 37.

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4 What is more peculiar to England is that the prelates firmly established, as against the king and the lay lords, their right to distribute the goods of the intestate for the weal of his soul. It was otherwise in some parts of France, notably in Normandy. The man who had fair warning that death was approaching, the man who lay in bed for several days, and yet made no will and confession, was deemed to die "desperate," and the goods of the desperate, like the goods of the suicide, were forfeited to the duke. The church was entitled to nothing, as it had done nothing for his soul. The bishop of Llandaff complained to Edward I that the magnates in his diocese would not permit him to administer the goods of intestates, and the king replied that he would not interfere with the custom of the country. (Memor. de Parl. 33 Edw. I (ed. Maitland), p. 73. Selden [The Disposition of Intestates' Goods (Collected Works, vol. iii)], p. 1681, resists, and as we think rightly, the opinion that the king of England was at one time entitled to the goods of intestates; but the clauses in the charters of 1100 and 1215, to say nothing of Cnut's law and the texts of Glanvill and Bracton, seem to show that there had (to say the least) been a grave danger of "desperate" death being treated as a cause of forfeiture. Prynne, Records, vol. iii, *passim*, regards the action of the prelates as a shameless usurpation.)—POLLOCK & MAITLAND, 2 Hist. Eng. Law (2d ed.), 359.

branch of the prerogative; which was done, saith Perkins,\* because it was intended by the law, that spiritual men are of better conscience than laymen, and that they had more knowledge what things would conduce to the benefit of the soul of the deceased. The goods, therefore, of intestates were given to the ordinary by the crown; and he might seize them, and keep them without wasting, and also might give, alien, or sell them at his will, and dispose of the money *in pios usus* (to pious uses): and, if he did otherwise, he broke the confidence which the law reposed in him.† So that properly the whole interest and power, which were granted to the ordinary, were only those of being the king's almoner within his diocese; in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious.‡ And, as he had thus the disposition of intestate's effects, the probate of wills of course followed: for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby.

§ 655. e. **Origin and history of administrations.**—[495] The goods of the intestate being thus vested in the ordinary upon the most solemn and conscientious trust, the reverend prelates were therefore not accountable to any, but to God and themselves, for their conduct.‡ But even in Fleta's time it was complained,† “*quod ordinarii, hujusmodi bona nomine ecclesie occupantes, nullam vel saltem indebitam faciunt distributionem* (that the ordinaries, who take possession of goods of this kind in the name of the church, make no distribution of them, or at least no due distribution).” And to what a length of iniquity this abuse was carried, most evidently appears from a gloss of Pope Innocent IV,‡ written about the year 1250; wherein he lays it down for established canon law, that “*in Britannia tertia pars bonorum decedentium ab intestato in opus ecclesie et pauperum dispensanda est* (in Britain a third part of the goods left by an intestate is to be distributed for the

\* § 486.

† Finch. Law 173, 174.

‡ Plowd. 277.

h Plowd. 277.

i 1. 2. c. 57. § 10.

k In Decretal. l. 5. t. 3. c. 42.



benefit of the church and the poor).” Thus the popish clergy took to themselves<sup>1</sup> (under the name of the church and poor) the whole residue of the deceased’s estate, after the *partes rationabiles* (reasonable portions), or two-thirds, of the wife and children were deducted; without paying even his lawful debts, or other charges thereon. For which reason it was enacted by the statute of Westm. 2<sup>m</sup> that the ordinary shall be bound to pay the debts of the intestate so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will: a use more truly pious, than any *requiem*, or mass for his soul. This was the first check given to that exorbitant power, which the law had entrusted with ordinaries. But though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the *residuum*, after payment of debts, remained still in their hands, to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands, or those of their immediate dependents: [496] and therefore the statute 31 Edw. III, c. 11 (Administration of Estates, 1357), provides, that, in case of intestacy, the ordinary shall depute the nearest and most lawful friends of the deceased to administer his goods; which administrators are put upon the same footing, with regard to suits and to accounting, as executors appointed by will. This is the original of administrators, as they at present stand; who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful friend* of the intestate; who is interpreted<sup>2</sup> to be the *next of blood* that is under no legal disabilities. The statute 21 Hen. VIII, c. 5 (Administration of Estates, 1529), enlarges a little more the power of the ecclesiastical judge; and permits him to grant administration *either* to the widow, *or* the next of kin, *or* to both

<sup>1</sup> The proportion given to the priest, and to other pious uses, was different in different countries. In the archdeaconry of Richmond in Yorkshire, this proportion was settled by a papal bull A. D. 1254 (Regist. Honoris de Richm. 101.) and was observed till abolished by the statute 26 Hen. VIII. c. 15 (1534).

<sup>2</sup> 13 Edw. I. c. 19.

<sup>3</sup> 9 Rep. 39.

of them, **at his own discretion**; and, where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.

Upon this footing stands the general law of administrations at this day.<sup>5</sup> I shall, in the further progress of this chapter, mention a few more particulars, with regard to who may, and who may not, be administrator; and what he is bound to do when he has taken this charge upon him: what has been hitherto remarked only serving to show the original and gradual progress of testaments and administrations: in what manner the latter was first of all vested in the bishops by the royal indulgence; and how it was afterwards, by authority of parliament, taken from them in effect, by obliging them to commit all their power to particular persons nominated expressly by the law.

§ 656. 2. Capacity to make a will.—I proceed now, *secondly*, to inquire who may, or may not make a testament; or what persons are absolutely obliged by law to die intestate. And this law<sup>o</sup> is entirely prohibitory; for, regularly, every person hath full power and liberty to make a will, that is not under special prohibition by law or custom: which prohibitions are principally upon three [497] accounts; for want of sufficient discretion; for want of sufficient liberty and free will; and on account of their criminal conduct.

o Godolph. Orph. Leg. p. 1. c. 7.

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<sup>5</sup> Upon this footing stood the law of wills and of administrations, down to the year 1857; although, in almost all other countries, these matters had come to be under the jurisdiction of the civil magistrates. And, in our own times, the opinion gradually obtained, that the subjects in question were not handled by the ecclesiastical courts as effectively, expeditiously and cheaply as the interests of justice required; which opinion at length led to the introduction, by act of parliament, of a new system, whereby the jurisdiction which these courts had during some centuries enjoyed over wills and intestacies was wholly taken away. We are referring, of course, to the Court of Probate Act, 1857, whereby the jurisdiction in the matter of wills and intestacies, so far as concerned personal estate, was directed to be thenceforth exercised by the court of probate, a new tribunal then created, of a secular character. And this jurisdiction was afterwards assigned to the Probate Division of the High Court of Justice by the Judicature Act, 1873.—STEPHEN, 2 Comm. (16th ed.), 310.

§ 657. a. **Infants and non compotes mentis.**—In the first species are to be reckoned infants, under the age of fourteen if males, and twelve if females; which is the rule of the civil law.<sup>p</sup> For, though some of our common lawyers have held that an infant of any age (even four years old) <sup>q</sup> might make a testament,<sup>q</sup> and others have denied that under eighteen he is capable,<sup>r</sup> yet as the ecclesiastical court is the judge of every testator's capacity, this case must be governed by the rules of the ecclesiastical law. So that no objection can be admitted to the will of an infant of fourteen, merely for want of age: but, if the testator was not of sufficient discretion, whether at the age of fourteen or four and twenty, that will overthrow his testament. Madmen, or otherwise *non compotes* (not in their right senses), idiots or natural fools, persons grown childish by reason of old age or distemper, such as have their senses besotted with drunkenness,—all these are incapable, by reason of mental disability, to make any will so long as such disability lasts. To this class also may be referred such persons as are *born* deaf, blind, and dumb; who, as they have always wanted the common inlets of understanding, are incapable of having *animus testandi* (testamentary discretion), and their testaments are therefore void.

§ 658. b. **Persons under duress.**—Such persons, as are intestable for want of liberty or freedom of will, are by the civil law of various kinds; as prisoners, captives, and the like.<sup>s</sup> But the law of England does not make such persons absolutely intestable; but only leaves it to the discretion of the court to judge, upon the consideration of their particular circumstances of duress, whether or no such persons could be supposed to have *liberum animus testandi* (free testamentary discretion).

<sup>p</sup> Godolph. p. 1. c. 8. Wentw. 212. 2 Vern. 104. 469. Gilb Rep. 74.

<sup>q</sup> Perkins. § 503.

<sup>r</sup> Co. Litt. 89.

<sup>s</sup> Godolph. p. 1. c. 9.

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<sup>6</sup> "Blackstone cites Perkins, Profitable Book, § 503, as saying that a child of four may make a will; but this is clearly a misprint for fourteen."—HOLDSWORTH, 3 Hist. Eng. Law, 428 n. But it was not until 1837 that the common-law rule as to the age of majority was applied to testamentary capacity.

§ 659. (1) **Married women.**—And, with regard to feme coverts, our laws differ still more materially from the civil. Among the Romans there was no distinction; a married woman was as capable of bequeathing as a feme sole.<sup>t</sup> But with us a [498] married woman is not only utterly incapable of devising *lands*, being excepted out of the statute of wills, 34 & 35 Hen. VIII, c. 5 (1542), but also she is incapable of making a testament of *chattels*, without the license of her husband. For all her personal chattels are absolutely his own; and he may dispose of her chattels real, or shall have them to himself if he survives her: it would be therefore extremely inconsistent, to give her a power of defeating that provision of the law, by bequeathing those chattels to another.<sup>u</sup> Yet by her husband's license she may make a testament;<sup>v</sup> and the husband, upon marriage, frequently covenants with her friends to allow her that license: but such license is more properly his assent; for, unless it be given to the particular will in question, it will not be a complete testament, even though the husband beforehand hath given her permission to make a will.<sup>w</sup> Yet it shall be sufficient to repel the husband from his general right of administering his wife's effects; and administration shall be granted to her appointee, with such testamentary paper annexed.<sup>x</sup> So that in reality the woman makes no will at all, but only something like a will;<sup>y</sup> operating in the nature of an appointment, the execution of which the husband by his bond, agreement, or covenant, is bound to allow. A distinction similar to which we meet with in the civil law. For, though a son who was *in potestate parentis* (in the power of the parent) could not by any means make a formal and legal testament, even though his father permitted it,<sup>z</sup> yet he might, with the like permission of his father, make what was called a *donatio mortis causa* (a donation depending on the event of the death of the donor).<sup>a</sup>

<sup>t</sup> Ff. 31. 1. 77.

<sup>u</sup> 4 Rep. 51.

<sup>v</sup> Dr. & St. d. 1. c. 7.

<sup>w</sup> Bro. Abr. tit. Devise. 34. Stra. 891.

<sup>x</sup> The King v. Bettesworth. T. 13 Geo. II. B. B.

<sup>y</sup> Cro. Car. 376. 1 Mod. 211.

<sup>z</sup> Ff. 28. 1. 6.

<sup>a</sup> Ff. 39. 6. 25.

§ 660. (2) **Queen consort.**—The queen consort is an exception to this general rule, for she may dispose of her chattels by will, without the consent of her lord:<sup>b</sup> and any feme covert may make her will of goods, which are in her possession *in auter droit* (in the right of another), as executrix or administratrix; for these can never be the property of the husband:<sup>c</sup> and, if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by [499] testament, without the control of her husband.<sup>d</sup> But, if a feme sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will.<sup>e 7</sup>

<sup>b</sup> Co. Litt. 133.

<sup>d</sup> Prec. Chan. 44.

<sup>c</sup> Godolph. 1. 10.

<sup>e</sup> 4 Rep. 60. 2 P. Wms. 624.

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<sup>7</sup> **Will revoked by marriage.**—That the will of a woman should be revoked by her marriage, after which the common law left her no freedom to change it or make any disposition of her property whatever, is based on a solid reason: which reason ceases, when she is allowed to give, devise or dispose of her property in any way during coverture, as she now is in nearly all the states, by the married women's acts. But whether the rule ceases with the reason of it is a question upon which American courts have formed contrary opinions. Some hold the common-law rule still in force, and the will revoked by her marriage. (*Swan v. Hammond*, 135 Mass. 45, 52 Am. Rep. 255; *Blodgett v. Moore*, 141 Mass. 75, 5 N. E. 470; *Brown v. Clark*, 77 N. Y. 369.)

Yet even in such states that rule is held not applicable to a case where an antenuptial agreement preserved to her the ability to make a will during coverture (*Osgood v. Bliss*, 141 Mass. 474, 55 Am. Rep. 488, 6 N. E. 527), while other courts hold that no such distinction is of any weight. (*Young's Appeal*, 39 Pa. St. 115, 80 Am. Dec. 513.)

In others the common-law rule is regarded as no longer in force, since the reason of it has ceased. (*Will of Ward*, 70 Wis. 251, 5 Am. St. Rep. 174, 35 N. W. 731; *In re Tuller's Will*, 79 Ill. 99, 22 Am. Rep. 164; *Noyes v. Southworth*, 55 Mich. 174, 54 Am. Rep. 359, 20 N. W. 891; *Webb v. Jones*, 36 N. J. Eq. 163; *Fellows v. Allen*, 60 N. H. 439, 49 Am. Rep. 328.) See cases cited in note to *Young's Appeal*, 39 Pa. St. 115, 80 Am. Dec. 513, where the statutory provisions of various states on this point are given. They may be found also in *Stimson's Ann. Stat. Law*, §§ 2676, 6460, and in *Boone on Wills*, §§ 64, 94.—HAMMOND.

These exceptional provisions are, however, now chiefly of historical interest only; for at the present day a married woman has practically the same power of making a will as a man or a single woman. For the Married Women's Property Act, 1882, has made the whole of a married woman's property her



§ 661. **c. Traitors and felons.**—Persons incapable of making testaments, on account of their criminal conduct, are in the first place all traitors and felons, from the time of conviction; for then their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a *felo de se* (suicide) make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture.<sup>f</sup> Outlaws also, though it be but for debt, are incapable of making a will, so long as the outlawry subsists, for their goods and chattels are forfeited during that time.<sup>g</sup> As for persons guilty of other crimes, short of felony, who are by the civil law precluded from making testaments (as usurers, libelers, and others of a worse stamp), by the common law their testaments may be good.<sup>h</sup> And in general the rule is, and has been so at least ever since Glanvill's time,<sup>i</sup> *quod libera sit cujuscunque ultima voluntas* (that the last will of everyone be free).

§ 662. **3. Nature and incidents of wills.**—Let us next, *thirdly*, consider what this last will and testament is, which almost everyone is thus at liberty to make; or, what are the nature and incidents of a testament. Testaments both Justinian<sup>j</sup> and Sir Edward Coke<sup>k</sup> agree to be so called, because they are *testatio mentis* (a testifying of the mind): an etymon, which seems to savor too much of the conceit; it being plainly a substantive derived from the

<sup>f</sup> Plowd. 261.

<sup>g</sup> Fitzh. Abr. t. Descent. 16.

<sup>h</sup> Godolph. p. 1. c. 12.

<sup>i</sup> l. 7. c. 5.

<sup>j</sup> Inst. 2. 10.

<sup>k</sup> 1 Inst. 111. 322.

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separate property; except only the property acquired before 1883 of a woman married before that year. And the Married Women's Property Act, 1893, has provided, that the will of a married woman dying after the passing of that act shall take effect as if executed immediately before her death, whether she was or was not possessed of separate property at the time of making it; and that such will shall not require to be re-executed or republished after the death of her husband. Her will is therefore now effectual to dispose of all property acquired by her at any time, whether before, or during the continuance of, the marriage, or after its termination; with the sole exception of property acquired by her before 1883, in case she was married before that year.—STEPHEN, 2 Comm. (16th ed.), 312.

verb *testari* (to testify), in like manner as *juramentum* (an oath), *incrementum* (an increase), and others, from other verbs. The definition of the old Roman lawyers is much better than their etymology; "*voluntatis nostræ justa sententia de eo, quod quis post mortem suam fieri velit*":<sup>1</sup> which may be thus rendered into English, "the legal declaration of a man's intentions, [500] which he wills to be performed after his death." It is called *sententia* to denote the circumspection and prudence with which it is supposed to be made: it is *voluntatis nostræ sententia*, because its efficacy depends on its declaring the testator's intention, whence in England it is emphatically styled his *will*: it is *justa sententia*; that is, drawn, attested, and published with all due solemnities and forms of law: it is *de eo, quod quis post mortem suam fieri velit*, because a testament is of no force till after the death of the testator.

§ 663. a. Kinds of wills.—These testaments are divided into two sorts; *written*, and *verbal* or *nuncupative*; of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* (in his last moments) before a sufficient number of witnesses, and afterwards reduced to writing. A *codicil*, *codicillus*, a little book or writing is a supplement to a will; or an addition made by the testator, and annexed to, and to be taken as part of, a testament: being for its explanation, or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator.<sup>m</sup> This may also be either written or nuncupative.

§ 664. (1) Nuncupative wills.—But, as *nuncupative* wills and codicils<sup>8</sup> (which were formerly more in use than at present, when

<sup>1</sup> Ff. 28. 1. 1.

<sup>m</sup> Godolph. p. 1. c. 1. § 3.

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<sup>8</sup> Nuncupative wills.—Oral or nuncupative wills are restricted by statutes in the United States even more narrowly than is here stated. In few states, if in any, will they pass real estate; and the amount of personalty that may be bequeathed is usually limited, except in the case of soldiers or sailors in actual employment. The most important additional requisite not mentioned by Blackstone is that the substance of the nuncupative will shall be reduced to writing, and signed by the witnesses who heard it, within a brief time—three to six days—after the testator's decease. (See the various statutory rules collected in Stimson's Am. Stat. Law, §§ 2702–2705; Boone's Law of Wills, §§ 5–14.) HAMMOND.

the art of writing is become more universal), are liable to great impositions and may occasion many perjuries, the statute of frauds, 29 Car. II, c. 3 (1677), enacts: 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing, and read over to him, and approved; and unless the same be proved to have been so done by the oaths of three witnesses at the least; who, by statute 4 & 5 Ann., c. 16 (Wills, 1705), must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in anywise be good, where the estate bequeathed exceeds 30*l.*; unless proved by three such witnesses, present at the making thereof (the Roman law requiring seven<sup>a</sup>) and unless they or some of them were specially required to bear <sup>[501]</sup> witness thereto by the testator himself; and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself is fallen into disuse; and hardly ever heard of, but in the only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness; for he must require the bystanders to bear witness of such his intention: the will must be made at home, or among his family or friends, unless by unavoidable accident; to prevent impositions from strangers: it must be in his *last* sickness; for, if he recovers, he may alter his dispositions, and has time to make a written will: it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses; nor yet too hastily

<sup>a</sup> Inst. 2. 10. 14.

and without notice, lest the family of the testator should be put to inconvenience, or surprised.

§ 665. (2) **Written wills.**—As to *written* wills, they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature; being conveyances by statute, unknown to the feudal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication is good; provided sufficient proof can be had that it is his handwriting.<sup>9</sup> And though written in another [502] man's hand, and never signed by the testator, yet if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate.<sup>9</sup> Yet it is the safer and more prudent way, and leaves less in the breast of the ecclesiastical judge, if it be signed or sealed by the testator, and published in the presence of witnesses: which last was always required in the time of Bracton;<sup>9</sup> or, rather, he in this respect has implicitly copied the rule of the civil law.<sup>10</sup>

<sup>9</sup> Godolph. p. 1. c. 21. Gilb. Rep. 260.    <sup>a</sup> 1. 2. c. 26.

<sup>p</sup> Comyns. 452, 3, 4.

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<sup>9</sup> **Holographic wills.**—Holographic wills, "written by the testator's own hand" and *signed* by him, are valid by law in a number of states (Stimson's Am. Stat. Law, § 2645; Boone on Wills, § 16), both as to real and personal estate. But the further informalities allowed by the text would not be admitted to probate as to either in the United States.

It seems to be the better opinion, and that of the majority of decisions, that a written paper drawn up by the testator or under his direction, but inadmissible as a holographic will, cannot be proved as a nuncupative will. (Stamper v. Hooks, 22 Ga. 603, 68 Am. Dec. 511; Hebden's Will, 20 N. J. Eq. 473, 478.) As to all wills but holographic, and in states where holographic wills are not allowed, the requirement that a will be duly witnessed is now as applicable to those of personalty as to those devising land.—HAMMOND.

<sup>10</sup> The Wills Act, 1837, requires (1) that every will and codicil shall be a written instrument, signed at the foot or end thereof by the testator (or by some other person in his presence and by his direction), (2) that such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and (3) that such witnesses shall attest

§ 666. **b. Wills inoperative before death.**—No testament is of any effect till after the death of the testator. "*Nam omne testamentum morte consummatum est: et voluntas testatoris est ambulatoria usque ad mortem* (For every testament is established by death, and the will of the testator is revocable until his death.)"<sup>r</sup> And therefore, if there be many testaments, the last overthrows all the former:<sup>s</sup> but the republication of a former will revokes one of a later date, and establishes the first again.<sup>t</sup>

§ 667. **c. Wills how avoided.**—Hence it follows, that testaments may be avoided three ways: 1. If made by a person laboring under any of the incapacities before mentioned: 2. By making another testament of a later date; and, 3. By canceling or revoking it. For, though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it: because my own act or words, cannot alter the disposition of law, so as to make that irrevocable which is in its own nature revocable.<sup>u</sup> For this, saith Lord Bacon,<sup>w</sup> would be for a man to deprive himself of that, which of all other things is most incident to human condition; and that is, alteration or repentance. It hath also been held, that, without an express revocation, if a man, who hath made his will, afterwards marries and hath a child, this is a presumptive or implied revocation of his former will, which he made in his state of celibacy.<sup>x</sup> The Romans were also wont to set aside testaments as being *inofficiosa*, deficient in natural duty, if they disinherited or totally passed by (without assigning a true and [503] sufficient reason<sup>y</sup>) any of the children of the testator.<sup>z</sup> But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed; but was then supposed to have acted thus for some

<sup>r</sup> Co. Litt. 112.

<sup>s</sup> Litt. § 168. Perk. 478.

<sup>t</sup> Perk. 479.

<sup>u</sup> 8 Rep. 82.

<sup>w</sup> Elem. c. 19.

<sup>x</sup> Lord Raym. 441. 1 P. Wms. 304.

<sup>y</sup> See book I. ch. 16.

<sup>z</sup> Inst. 2. 18. 1.

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and shall subscribe the will in the presence of the testator. But soldiers and sailors on active service may still validly make nuncupative wills of personalty.—STEPHEN, 2 Comm. (16th ed.) 314.



substantial cause: and in such case no *querela inofficiosi testamenti* (complaint of an undutiful will) was allowed. Hence probably has arisen that groundless vulgar error, of the necessity of leaving the heir a shilling or some other express legacy, in order to disinherit him effectually: whereas the law of England makes no such constrained suppositions of forgetfulness or insanity; and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi*, to set aside such a testament.

§ 668. 4. **Executors and administrators.**—We are next to consider, fourthly, what is an executor, and what an administrator; and how they are both to be appointed.

§ 669. a. **Executors.**—An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors, that are capable of making wills, and many others besides; as feme coverts, and infants: nay, even infants unborn, or *in ventre sa mere*, may be made executors.<sup>a</sup> But no infant can act as such till the age of seventeen years; till which time administration must be granted to some other, *durante minore ætate* (during minority).<sup>b</sup> In like manner as it may be granted *durante absentia* (during absence), or *pendente lite* (pending a suit); when the executor is out of the realm,<sup>c</sup> or when a suit is commenced in the ecclesiastical court touching the validity of the will.<sup>d</sup> This appointment of an executor is essential to the making of a will:<sup>e</sup> and it may be performed either by express words, or such as strongly imply the same. But if the testator makes his will, without naming any executors, or if he names incapable persons, or if the executors named refuse to act; in any of these cases, the ordinary must [<sup>504</sup>] grant administration *cum testamento annexo* (with the will annexed)<sup>f</sup> to some other person; and then the duty of the administrator, as also when he is constituted only *durante minore ætate*, etc., of another, is very little different from that of an executor. And this was law

<sup>a</sup> West. Symb. p. 1. § 635.

<sup>b</sup> Went. Off. Ex. c. 18.

<sup>c</sup> 1 Lutw. 342.

<sup>d</sup> 2 P. Wms. 589, 590.

<sup>e</sup> Went. c. 1. Plowd. 281.

<sup>f</sup> 1 Roll. Abr. 907. Comb. 20.

so early as the reign of Henry II, when Glanvill<sup>s</sup> informs us, that "*testamenti executores esse debent ii, quos testator ad hoc elegerit, et quibus curam ipse commiserit: si vero testator nullos ad hoc nominaverit, possunt propinqui et consanguinei ipsius defuncti ad id faciendum se ingerere* (those should be executors of a will whom the testator shall have chosen, and to whom he himself shall have committed the trust; but if the testator shall not have named any, the relations of the deceased may take this duty upon themselves)."

§ 670. **b. Administrators.**—But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward the Third, and Henry the Eighth, before mentioned, direct.<sup>11</sup> In consequence of which

§ 1. 7. c. 6.

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<sup>11</sup> **Modern English administration of estates.**—Letters of administration are now granted in England under the provisions of the Court of Probate Act of 1857, but, as to the person to whom the office of administrator is to be granted, the court follows, except under special circumstances, the rules which used to be obligatory on the ordinary. The modern English law of title by will and by administration is explained briefly but adequately in Stephen, 2 Comm. (16th ed.), 305 ff.

**Development of probate powers in the United States.**—In America circumstances have been peculiarly favorable to the rational development of this principle. Ecclesiastical courts with secular powers did not exist. Prerogatives and prescriptive rights were swept away by the republican spirit of the people. The legislatures were unhampered by the traditions and customs of the mother country, armed with full authority to carry out the views and convictions of the people, who thus exerted a controlling influence in shaping the law and regulating the practice of managing and settling estates of deceased persons and minors; for no branch of the law concerns the general public so universally, and affects their interests so directly, as this. The consequence has been a rapid development of the law of administration, particularly in those states which early cut loose from the common-law doctrines in this respect. The American courts of probate, with their extensive powers, their simple and efficient procedure, their happy adaptation to the wants of the people in the safe, speedy and inexpensive settlement of the estates of deceased persons attest the marvelously clear insight of the people of the colonies and young states into the principles involved, and the genuine instinct which guided them in their realization. Necessarily diverse in their details, as the systems of the several states cannot but be, since each state enacts its own code, there is a

we may observe; 1. That the ordinary is compellable to grant administration of the goods and chattels of the wife, to the husband, or his representatives:<sup>h</sup> and of the husband's effects, to the widow, or next of kin; but he may grant it to either, or both, at his discretion.<sup>i</sup> 2. That, among the kindred, those are to be preferred that are the nearest in degree to the intestate; but, of persons in equal degree, the ordinary may take which he pleases.<sup>k</sup> 3. That this *nearness* or propinquity of degree shall be reckoned according to the computation of the civilians;<sup>l</sup> and not of the canonists, which the law of England adopts in the descent of real estates:<sup>m</sup> because in the civil computation the intestate himself is the *terminus, a quo* (the limit from which) several degrees are numbered; and not the common ancestor, according to the rule of the canonists. And therefore in the first place the children, or (on failure of children), the parents of the deceased, are entitled to the administration; both which are indeed in the first degree; but with us<sup>n</sup> the children are allowed the preference.<sup>o</sup> Then [505] follow brothers,<sup>p</sup> grand-

<sup>h</sup> Cro. Car. 106. Stat. 29. Car. II. c. 3 (Statute of Frauds, 1677). 1 P. Wms. 381.

<sup>i</sup> Salk. 36. Stra. 532.

<sup>k</sup> Stat. 28 Hen. VIII. c. 5 (1536). See pag. 496.

<sup>l</sup> Prec. Chanc. 593.

<sup>m</sup> See pag. 203. 207. 224.

<sup>n</sup> Godolph. p. 2. c. 34. § 1. 2 Vern. 125.

<sup>o</sup> In Germany there was long a dispute whether a man's children should inherit his effects during the life of their grandfather; which depends (as we shall see hereafter) on the same principles as the granting of administrations. At last it was agreed at the diet of Arensburg, about the middle of the tenth century, that the point should be decided by combat. Accordingly, an equal number of champions being chosen on both sides, those of the children obtained the victory; and so the law was established in their favor, that the issue of a person deceased shall be entitled to his goods and chattels in preference to his parents. (Mod. Un. Hist. xxix. 28.)

<sup>p</sup> Harris in Nov. 118. c. 2.

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common intendment of them all in the direction of recognizing the law of administration as a distinct, independent branch of jurisdiction, based upon and determined by its own inherent principles. The rich and manifold experiences of a century of unexampled national growth and development have tended to mould these systems in the national spirit common to all the states; as each is the reflex of the nation, so their institutions are rapidly assimilating into a national system, in which the incongruities incidental to the experimental enact-

fathers,<sup>q</sup> uncles or nephews<sup>r</sup> (and the females of each class respectively), and lastly cousins. 4. The half blood is admitted to the administration as well as the whole: for they are of the kindred of the intestate, and only excluded from inheritances of land upon feudal reasons. Therefore the brother of the half blood shall exclude the uncle of the whole blood;<sup>s</sup> and the ordinary may grant administration to the sister of the half, or the brother of the whole blood, at his own discretion.<sup>t</sup> 5. If none of the kindred will take out administration, a creditor may, by custom, do it.<sup>u</sup> 6. If the executor refuses, or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin.<sup>w</sup> And, lastly, the ordinary may, in defect of all these, commit administration (as he might have done<sup>x</sup> before the statute Edward III) to such discreet person as he approves of: or may grant him letters *ad colligendum bona defuncti* (for collecting the goods of the deceased), which neither makes him executor nor administrator; his only business being to keep the goods in his safe custody,<sup>y</sup> and to do other acts for the benefit of such as are entitled to the property of the deceased.<sup>z</sup> If a bastard, who has no kindred, being *nullius filius*, or anyone else that has no kindred, dies intestate and without wife or child, it hath formerly been held<sup>a</sup> that the ordinary might seize his goods, and dispose of them *in pios usus* (to pious uses). But the usual course now is for someone to procure letters [<sup>506</sup>] patent, or other authority from the king; and then the ordinary of course grants administration to such appointee of the crown.<sup>b</sup>

<sup>q</sup> Prec. Chanc. 527. 1 P. Wms. 41.

<sup>r</sup> Atk. 455.

<sup>s</sup> 1 Vent. 425.

<sup>t</sup> Aleyn. 36. Styl. 74.

<sup>u</sup> Salk. 38.

<sup>w</sup> 1 Sid. 281. 1 Vent. 219.

<sup>x</sup> Plowd. 278.

<sup>y</sup> Went. ch. 14.

<sup>z</sup> 2 Inst. 398.

<sup>a</sup> Salk. 37.

<sup>b</sup> 3 P. Wms. 33.

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ments of the several and independent legislatures are gradually disappearing before the light of common experience and intelligent discussion.—WOERNER, 1 Am. Law of Administration (2d ed.), p. 322.

§ 671. c. Respective interests of executors and administrators.—The interest, vested in the executor by the will of the deceased, may be continued and kept alive by the will of the same executor; so that the executor of A's executor is to all intents and purposes the executor and representative of A himself;<sup>c</sup> but the executor of A's administrator, or the administrator of A's executor, is not the representative of A.<sup>d</sup> For the power of an executor is founded upon the special confidence and actual appointment of the deceased; and such executor is therefore allowed to transmit that power to another, in whom he has equal confidence: but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all; and therefore, on the death of that officer, it results back to the ordinary to appoint another. And, with regard to the administrator of A's executor, he has clearly no privity or relation to A; being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh, *of the goods* of the deceased *not* administered by the former executor or administrator. And this administrator, *de bonis non* (of the goods not administered), is the only legal representative of the deceased in matters of personal property.<sup>e</sup> But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, viz., of certain specific effects, such as a term of years and the like; the rest being committed to others.<sup>f</sup>

§ 672. 5. Office and duties of executors and administrators.—[507] Having thus shown what is, and who may be, an executor or administrator, I proceed now, *fifthly* and lastly, to inquire into some few of the principal points of their office and duty. These, in general, are very much the same in both executors and adminis-

<sup>c</sup> Stat. 25 Edw. III. st. 5. c. 5 (Administration of Estates, 1351). 1 Leon. 275.

<sup>d</sup> Bro. Abr. tit. Administrator. 7.

<sup>e</sup> Styl. 225.

<sup>f</sup> 1 Roll. Abr. 908. Godolph. p. 2. c. 30. Salk. 36.



trators; excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor: and, secondly, that an executor may do many acts before he proves the will,<sup>g</sup> but an administrator may do nothing till letters of administration are issued; for the former derives his power from the will and not from the probate,<sup>h</sup> the latter owes his entirely to the appointment of the ordinary.

§ 673. a. **Executor de son tort.**—If a stranger takes upon him to act as executor, without any just authority (as by intermeddling with the goods of the deceased,<sup>i</sup> and many other transactions<sup>k</sup>) he is called in law an executor of his own wrong, *de son tort*, and is liable to all the trouble of an executorship, without any of the profits or advantages: but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling, as will charge a man as executor of his own wrong.<sup>l</sup> Such a one cannot bring an action himself in right of the deceased,<sup>m</sup> but actions may be brought against him. And, in all actions by creditors, against such an officious intruder, he shall be named an executor, generally;<sup>n</sup> for the most obvious conclusion, which strangers can form from his conduct, is that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof.<sup>o</sup> He is chargeable with the debts of the deceased, so far as assets come to his hands;<sup>p</sup> and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree,<sup>q</sup> [508] himself only excepted.<sup>r</sup> And though, as against the

<sup>g</sup> Wentw. ch. 3.

<sup>h</sup> Comyns. 151.

<sup>i</sup> 5 Rep. 33, 34.

<sup>k</sup> Wentw. ch. 14. Stat. 43 Eliz. c. 8 (Administration of Estates, 1601).

<sup>l</sup> Dyer. 166.

<sup>m</sup> Bro. Abr. t. Administrator. 8.

<sup>n</sup> 5 Rep. 31.

<sup>o</sup> 12 Mod. 471.

<sup>p</sup> Dyer. 166.

<sup>q</sup> 1 Chan. Cas. 22

<sup>r</sup> 5 Rep. 30. Moor. 527.

rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages;<sup>a</sup> unless perhaps upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt.<sup>t 12</sup> But let us now see what are the power and duty of a rightful executor or administrator.

<sup>a</sup> 12 Mod. 441. 471.

<sup>t</sup> Wentw. ch. 14.

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12 Doctrine of executor *de son tort* in the United States.—Distinguished American writers on this subject have expressed their disapprobation of the doctrine of liability as executor *de son tort* in strong terms, and intimate that it meets with little favor in American courts. (3 Redf. on Wills, 21, note (6); Schoul. Ex., §§ 184, 187; Horner, Pr. L., § 115.) There can be no doubt that in many of the American states, in which the common-law system of the administration of the estates of deceased persons has been entirely done away with, this doctrine should disappear with the conditions which called it into being. There is neither occasion nor room for it in those states which have vested complete jurisdiction in probate courts to control the settlement of estates of deceased persons: where the title to the personal property remains in abeyance until an executor or administrator is appointed by the court, and any other person undertaking to interfere with it is known to be without lawful authority to do so; where creditors of the deceased cannot be lawfully satisfied out of the property of the estate until they have proved their claims in the manner pointed out by the law; and where an executor or an administrator can neither prefer a creditor nor retain for his own debt. It is quite apparent that in such states it would be irrational to apply the doctrine of executor *de son tort* to one who unlawfully appropriates the property left by a deceased person, and thereby renders himself liable as a wrongdoer to the one upon whom the law casts the title: which, by relation, attaches to him from the time of the decedent's death. No one's interest would be subserved: neither that of the creditor—for he has a safer, simpler and less expensive remedy against a lawful administrator, and cannot pretend that he looked upon the intermeddler as rightfully in possession; nor that of the heir or distributee—whose safety is better secured by the appointment of a competent officer of the court, whose duty it will be to recover all the property belonging to the estate and dispose of it according to law; nor yet that of the intermeddler himself, whose wrongful act, instead of subjecting him to intricate complications, the result of which it is impossible to foresee, will simply lead to the punishment or reparation demanded by the law.

The office of executor *de son tort* is accordingly abolished in New York (Rev. Stats., p. 449, § 17. Alluded to in *Field v. Gibson*, 20 Hun (N. Y.), 274, 276), and declared by the courts of Arkansas (*Barasien v. Odum*, 17 Ark. 122, 127; *Rust v. Witherington*, 17 Ark. 129), California (*Bowden v. Pierce*, 73 Cal. 459,

§ 674. **b. Burial of deceased.**—He must *bury* the deceased in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed, previous to other debts and charges; but if the executor or administrator be extravagant, it is a species of *devastation* or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.<sup>u</sup>

§ 675. **c. Probate of will.**—The executor, or the administrator *durante minore ætate*, or *durante absentia*, or *cum testamento annexo*, must *prove the will* of the deceased: which is done either in *common form*, which is only upon his own oath before the ordinary, or his surrogate; or *per testes* (by witnesses), in more solemn form of law, in case the validity of the will be disputed.<sup>w</sup> When the will is so proved, the original must be deposited in the registry of the ordinary; and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with the certificate of its having been proved before him: all which together is usually styled the *probate*. In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under

<sup>u</sup> Salk. 196. Godolph. p. 2. c. 26. § 2.

<sup>w</sup> Godolph. p. 1. c. 20. § 4.

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463, 14 Pac. 302, affirmed in 15 Pac. 64. The authorities relied on seem, however, to contain mere *dicta*. See *Valencia v. Vernal*, 26 Cal. 328, 335; *Estate of Hamilton*, 34 Cal. 464, 468; *Pryor v. Downey*, 50 Cal. 388, 400, 19 Am. Rep. 656, Kansas (*Fox v. Van Norman*, 11 Kan. 214, 217), Missouri (*Rozelle v. Harmon*, 29 Mo. App. 569, 578, affirmed in 103 Mo. 339, 12 L. R. A. 187, 15 S. W. 432. See, also, *Richardson v. Dreyfus*, 64 Mo. App. 600), Ohio (*Benjamin v. Le Baron*, 15 Ohio, 517; *Dixon v. Cassell*, 5 Ohio, 533), Oregon (*Rutherford v. Thompson*, 14 Or. 236, 239, 12 Pac. 382), and Texas (*Ansley v. Baker*, 14 Tex. 607, 610, 65 Am. Dec. 136; *Green v. Rugely*, 23 Tex. 539), to be repugnant to the letter and spirit of the law of these states. In other states, whose administration laws present the same or similar features as those above mentioned, neither the legislature nor courts have abolished the doctrine, at least not in express terms; but it is gradually passing out of notice, for the reason that it meets no practical want. (See remarks of Philips, J., in *Rozelle v. Harmon*, 29 Mo. App. 569, 578.)—WOERNER, 1 *Am. Law of Administration* (2d ed.), § 198.

the seal of the ordinary; whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him: and he must, by statute 22 & 23 Car. II, c. 10 (Statute of Distribution, 1670), enter into a bond with sureties, faithfully to execute his trust. If all the goods of the deceased lie within the same jurisdiction, a probate before the [509] ordinary, or an administration granted by him, are the only proper ones: but if the deceased had *bona notabilia* (goods of sufficient value to be accounted for); or chattels to the value of a *hundred shillings*, in two distinct dioceses or jurisdictions, then the will must be proved, or administration taken out, before the metropolitan of the province, by way of special prerogative;<sup>x</sup> whence the court where the validity of such wills is tried, and the office where they are registered, are called the prerogative court, and the prerogative office, of the provinces of Canterbury and York. Lyndewode, who flourished in the beginning of the fifteenth century, and was official to Archbishop Chichele, interprets these hundred shillings to signify *solidos legales* (lawful shillings); of which he tells us seventy-two amounted to a pound of gold, which in his time was valued at fifty nobles or 16*l.* 13*s.* 4*d.* He therefore computes<sup>y</sup> that the hundred shillings, which constituted *bona notabilia*, were then equal in current money to 23*l.* 3*s.* 0<sup>1</sup>/<sub>4</sub>*d.* This will account for what is said in our ancient books, that *bona notabilia* in the diocese of London,<sup>z</sup> and indeed everywhere else,<sup>a</sup> were of the value of ten pounds by *composition*: for, if we pursue the calculations of Lyndewode to their full extent, and consider that a pound of gold is now almost equal in value to an hundred and fifty nobles, we shall extend the present amount of *bona notabilia* to nearly 70*l.* But the makers of the canons of 1603 understood this ancient rule to be meant of the shillings current in the reign of James I, and have therefore directed<sup>b</sup> that *five pounds* shall for the future be the standard of *bona notabilia*, so as to make the probate fall

<sup>x</sup> 4 Inst. 335.

<sup>y</sup> Provine. l. 3. t. 13. c. item. v. centum. etc. statutum. v. laicis.

<sup>z</sup> 4 Inst. 335. Godolph. p. 2. c. 22.

<sup>a</sup> Plowd. 281.

<sup>b</sup> Can. 92.

within the archiepiscopal prerogative.<sup>13</sup> Which prerogative (properly understood) is grounded upon this reasonable foundation: that, as the bishops were themselves originally the administrators to all intestates in their own diocese, and as the present administrators are in effect no other than their officers or substitutes, it was impossible for the bishops, or those who acted under them, to collect any goods of the deceased, other than such as lay within their [510] own dioceses, beyond which their episcopal authority extends not. But it would be extremely troublesome, if as many administrations were to be granted, as there are dioceses within which the deceased had *bona notabilia*; besides the uncertainty which creditors and legatees would be at, in case different administrators were appointed, to ascertain the fund out of which their demands are to be paid. A prerogative is therefore very prudently vested in the metropolitan of each province, to make in such cases one administration serve for all. This accounts very satis-

13 *Bona notabilia*.—Under the present system of the English law, it is said that the law as to *bona notabilia* is disused; the effect of the Court of Probate Act, 1857 (by which the jurisdiction of the ecclesiastical courts in these matters was taken away), being, that the whole jurisdiction and authority in relation to granting probates and the depositing and preserving wills, is now exercised without reference to the locality in which the property of the deceased may lie. 2 Stephen's Comm. (16th ed.), 318.

"The common-law term *bona notabilia*, as meaning the property of a nonresident sufficient to authorize a grant of administration, is not technically applicable in the United States, but writers and judges find it convenient to use it in speaking of the jurisdiction conferred by the several kinds of property for the purposes of administration. 'Personal property,' says Judge Cooper of the supreme court of Mississippi, 'whether of a tangible or an intangible character, is considered as located, for the purposes of administration, in the territory of that state whose laws must furnish the remedies for its reduction to possession.' (Speed v. Kelly, 59 Miss. 47, 51.) At common law, says Phelps, J. (in Vaughn v. Barret, 5 Vt. 333, 337, 26 Am. Dec. 306. To same effect, Bell, J., in Taylor v. Barron, 35 N. H. 484, 494; Thompson v. Wilson, 2 N. H. 291; Emery v. Hildreth, 2 Gray (Mass.), 228, 230), the site of administration in respect of debts due a deceased person never followed the residence of the creditor. 'They are always *bona notabilia*, unless they happen to fall within the jurisdiction where he resided. Judgments are *bona notabilia* where the record is; specialties where they are at the time of the creditor's decease; and simple contract debts where the debtor resides.'"—WOERNER, 1 Am. Law of Administration (2d ed.), p. 440.



factorily for the reason of taking out administration to intestates, that have large and diffusive property, in the prerogative court: and the probate of wills naturally follows, as was before observed, the power of granting administrations; in order to satisfy the ordinary that the deceased has, in a legal manner, by appointing his own executor, excluded him and his officers from the privilege of administering the effects.

§ 676. d. Inventory.—The executor or administrator is to make an *inventory*<sup>c</sup> of all the goods and chattels, whether in possession or action, of the deceased; which he is to deliver in to the ordinary upon oath, if thereunto lawfully required.

§ 677. e. Collecting assets.—He is to *collect* all the goods and chattels so inventoried; and to that end he has very large powers and interests conferred on him by law; being the representative of the deceased,<sup>d</sup> and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest;<sup>e</sup> but in case of administrators it is otherwise.<sup>f</sup> Whatever is so recovered, that is of a salable nature and may be converted into ready money, is called *assets* in the hands of the executor or administrator;<sup>g</sup> that is sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee, so far as such goods and chattels extend. [511] Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him: which is the next thing to be considered; for,

§ 678. f. Paying debts.—The executor or administrator must *pay* the *debts* of the deceased. In payment of debts he must observe the rules of priority; otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral

<sup>c</sup> Stat. 21 Hen. VIII. c. 5 (Administration of Estates, 1529).

<sup>d</sup> Co. Litt. 209.

<sup>e</sup> Dyer. 23.

<sup>f</sup> 1 Atk. 460.

<sup>g</sup> See pag. 244.

charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty.<sup>h</sup> Thirdly, such debts as are by particular statutes to be preferred to all others; as the forfeitures for not burying in woolen,<sup>i</sup> money due upon poor rates,<sup>k</sup> for letters to the postoffice,<sup>l</sup> and some others. Fourthly, debts of record; as judgments (docketed according to the statutes 4 & 5 W. & M., c. 20—1692), statutes, and recognizances.<sup>m</sup> Fifthly, debts due on special contracts; as for rent (for which the lessor has often a better remedy in his own hands, by distraining), or upon bonds, covenants, and the like, under seal.<sup>n</sup> Lastly, debts on simple contracts, viz., upon notes unsealed, and verbal promises. Among these simple contracts, servants' wages are by some<sup>o</sup> with reason preferred to any other: and so stood the ancient law, according to Bracton<sup>p</sup> and Fleta,<sup>q</sup> who reckon, among the first debts to be paid, *servitia servientium et stipendia famulorum* (the services of attendants and the wages of servants). Among debts of equal degree, the executor or administrator is allowed to pay himself first; by retaining in his hands so much as his debt amounts to.<sup>r</sup> But an executor of his own wrong is not allowed to retain: for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased; and would besides be taking advantage of their own wrong, which is contrary to the rule of law.<sup>s</sup> If a [512] creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no;<sup>t</sup> provided there be assets sufficient to pay the testator's debts: for, though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors

<sup>h</sup> 1 And. 129.

<sup>i</sup> Stat. 30 Car. II. c. 3 (Burying in Woolen, 1678).

<sup>k</sup> Stat. 17 Geo. II. c. 38 (Poor Relief, 1743).

<sup>l</sup> Stat. 9 Ann. c. 10 (1710).

<sup>m</sup> 4 Rep. 60. Cro. Car. 363.

<sup>n</sup> Wentw. ch. 12.

<sup>o</sup> 1 Roll. Abr. 927.

<sup>p</sup> 1. 2. c. 26.

<sup>q</sup> 1. 2. c. 56. § 10.

<sup>r</sup> 10 Mod. 496.

<sup>s</sup> 5 Rep. 30.

<sup>t</sup> Plowd. 184. Salk. 299.

of their just debts by a release which is absolutely voluntary.<sup>u</sup> Also, if no suit is commenced against him, the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest: for, without a suit commenced, the executor has no legal notice of the debt.<sup>w</sup>

§ 679. g. Legacies.—When the debts are all discharged, the legacies claim the next regard; which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts.<sup>x</sup>

A legacy is a bequest, or gift, of goods and chattels by testament; and the person to whom it was given is styled the legatee: which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee: but the legacy is not perfect without the assent of the executor: for if I have a *general* or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor.<sup>y</sup> For in him all the chattels are vested; and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator: the rule of equity being, that a man must be just, before he is permitted to be generous; or, as Bracton expresses the sense of our ancient law,<sup>z</sup> “*de bonis defuncti primo deducenda sunt ea quæ sunt necessitatis et postea quæ sunt utilitatis, et ultimo quæ sunt voluntatis*” (from the effects of the deceased are to be answered, first, the demands of necessity; afterwards, what expediency requires; and lastly, the requisitions of bequest).” And in case of a deficiency of assets, all the *general* legacies must abate proportionably, in order to pay the debts; [513] but a *specific* legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow anything by way of abatement, unless there be not sufficient without it.<sup>a</sup> Upon the same principle, if the legatees have been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in, more than sufficient to exhaust the *residuum* after the legacies paid.<sup>b</sup> And this law is

<sup>u</sup> Salk. 303. 1 Roll. Abr. 921.

<sup>z</sup> 1. 2. c. 26.

<sup>w</sup> Dyer. 32. 2 Leon. 60.

<sup>a</sup> 2 Vern. 111.

<sup>x</sup> 2 Vern. 434. 2 P. Wms. 25.

<sup>b</sup> *Ibid.* 205.

<sup>y</sup> Co. Litt. 111. Aleyn. 39.

as old as Bracton and Fleta, who tells us,<sup>c</sup> “*si plura sint debita, vel plus legatum fuerit, ad quæ catalla defuncti non sufficient, fiat ubique defalcatio, excepto regis privilegio* (if there should be more due, or more legacies bequeathed, than the chattels of the deceased are sufficient to satisfy, let an equal abatement be made on all the legacies, the privilege of the king being excepted).”

If the legatee dies before the testator, the legacy is a lost or lapsed legacy, and shall sink into the *residuum*. And if a *contingent* legacy be left to anyone; as *when* he attains, or *if* he attains, the age of twenty-one; and he dies before that time; it is a lapsed legacy.<sup>d</sup> But a legacy to one *to be paid* when he attains the age of twenty-one years, is a *vested* legacy; an interest which commences *in præsentī* (in the present), although it be *solvendum in futuro* (to be paid at a future period): and, if the legatee dies before that age, his representatives shall receive it out of the testator's personal estate, at the same time that it would have become payable, in case the legatee had lived. This distinction is borrowed from the civil law;<sup>e</sup> and its adoption in our courts is not so much owing to its intrinsic equity, as to its having been before adopted by the ecclesiastical courts. For, since the chancery has a concurrent jurisdiction with them, in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations; and that the subject should have the same measure of justice in whatever court he sued.<sup>f</sup> But if such legacies be charged upon a real estate, in both cases they should lapse for the benefit of the heir:<sup>g</sup> for, with regard to devises affecting lands, the ecclesiastical court hath no concurrent jurisdiction. And, in case of a vested legacy, due immediately, and charged on land or money in the funds, which yield an immediate profit, [514] interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator.<sup>h</sup>

<sup>c</sup> Bract. l. 2. c. 26. Flet. l. 2. c. 57. § 11.

<sup>d</sup> Dyer. 59. 1 Equ. Cas. Abr. 295.

<sup>e</sup> Ff. 35. 1. 1. & 2.

<sup>f</sup> 1 Equ. Cas. Abr. 295.

<sup>g</sup> 2 P. Wms. 601.

<sup>h</sup> 2 P. Wms. 26, 27.

§ 680. (1) *Gifts causa mortis*.—Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property; which is called a *donation causa mortis*. And that is, when a person in his last sickness, apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods (under which have been included bonds, and bills drawn by the deceased upon his banker), to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor: yet it shall not prevail against creditors; and is accompanied with this implied trust, that, if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa*.<sup>i</sup> This method of donation might have subsisted in a state of nature, being always accompanied with delivery of actual possession;<sup>k</sup> and so far differs from a testamentary disposition: but seems to have been handed to us from the civil lawyers,<sup>l</sup> who themselves borrowed it from the Greeks.<sup>m</sup>

§ 681. h. *The surplus or residue*.—When all the debts and particular legacies are discharged, the surplus or *residuum* must be paid to the residuary legatee, if any be appointed by the will; and if there be none, it was long a settled notion that it devolved to the executor's own use, by virtue of his executorship.<sup>n</sup> But whatever ground there might have been formerly for this opinion, it seems now to be understood<sup>o</sup> with this restriction; that, although where the executor has no legacy at all the *residuum* shall in general be his own, yet wherever there is sufficient [515] on the face of a will (by means of a competent legacy or otherwise), to imply that the testator intended his executor should *not* have the residue, the undevised surplus of the estate shall go to the next of kin, the

<sup>i</sup> Prec. Chanc. 269. 1 P. Wms. 406. 441. 3 P. Wms. 357.

<sup>k</sup> Law. of Forfeiture. 16.

<sup>l</sup> Inst. 2. 7. 1. Ff. l. 39. t. 6.

<sup>m</sup> There is a very complete *donatio mortis causa* in the *Odyssey*, b. 17, v. 78, made by Telemachus to his friend Piræus; and another by Hercules, in the *Alcestitis* of Euripides, v. 1020.

<sup>n</sup> Perkins. 525.

<sup>o</sup> Prec. Chanc. 323. 1 P. Wms. 7. 544. 2 P. Wms. 338. 3 P. Wms. 43. 194. Stra. 559. *Lawson v. Lawson*, *Dom. Proc.* 28 Apr. 1777.



executor then standing upon exactly the same footing as an administrator: concerning whom indeed there formerly was much debate,<sup>p</sup> whether or no he could be compelled to make any distribution of the intestate's estate. For, though (after the administration was taken in effect from the ordinary, and transferred to the relations of the deceased) the spiritual court endeavored to compel a distribution, and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law.<sup>q</sup> And the right of the husband not only to administer, but also to enjoy exclusively, the effects of his deceased wife, depends still on this doctrine of the common law: the statute 29 Car. II (Frauds, 1677), declaring only, that the statute of distributions does not extend to this case.

§ 682. *i. Statute of Distributions, 1670.*—But now these controversies are quite at an end; for by the statute 22 & 23 Car. II, c. 10 (Statute of Distribution, 1670), it is enacted, that the surplusage of intestates' estates, except of *femes covert*,<sup>r</sup> shall (after the expiration of one full year from the death of the intestate) be distributed in the following manner. One-third shall go to the widow of the intestate, and the residue in equal proportions to his children, or if dead, to their representatives; that is, their lineal descendants: if there are no children or legal representative subsisting, then a moiety shall go to the widow, and a moiety to the next of kindred in equal degree and their representatives: if no widow, the whole shall go to the children: if neither widow nor children, the whole shall be distributed among the next of kin in equal degree, and their representatives: but no representatives are admitted, among collaterals, further than the children of the intestate's brothers and sisters.<sup>s</sup> The next of kindred, here referred to, are to be investigated by the same rules of consanguinity, as those who are entitled to letters of administration; of whom we have sufficiently spoken.<sup>t</sup> And therefore by this statute the mother, [516] as well as the father, succeeded to all the personal

<sup>p</sup> Godolph. p. 2. c. 32.

<sup>q</sup> 1 Lev. 233. Cart. 135. 2 P. Wms. 447.

<sup>r</sup> Stat. 29 Car. II. c. 3. § 25 (1677).

<sup>s</sup> Raym. 496. Lord Raym. 571.

<sup>t</sup> Pag. 504.

effects of their children, who died intestate and without wife or issue: in exclusion of the other sons and daughters, the brothers and sisters of the deceased. And so the law still remains with respect to the father; but by statute 1 Jac. II, c. 17 (Administration of Estates, 1685), if the father be dead, and any of the children die intestate without wife or issue, in the lifetime of the mother, she and each of the remaining children, or their representatives, shall divide his effects in equal portions.

§ 683. (1) Analogies of the statute.—It is obvious to observe how near a resemblance this Statute of Distributions bears to our ancient English law, *de rationabili parte bonorum* (concerning the reasonable share of the goods), spoken of at the beginning of this chapter;<sup>u</sup> and which Sir Edward Coke<sup>w</sup> himself, though he doubted the generality of its restraint on the power of devising by will, held to be universally binding (in point of conscience at least) upon the administrator or executor, in the case of either a total or partial intestacy. It also bears some resemblance to the Roman law of succession *ab intestato* (from an intestate):<sup>x</sup> which, and because the act was also penned by an eminent civilian,<sup>y</sup> has occasioned a notion that the parliament of England copied it from the Roman prætor: though indeed it is little more than a restoration, with some refinements and regulations, of our old constitutional law; which prevailed as an established right and custom from the time of King Canute downwards, many centuries before Justinian's laws were known or heard of in the western parts of Europe. So likewise there is another part of the Statute of Distributions, where directions are given that no child of the intestate (except his heir at law), on whom he settled in his lifetime

<sup>u</sup> Pag. 492.

<sup>w</sup> 2 Inst. 33. See 1 P. Wms. 8.

<sup>x</sup> The general rule of such successions was this: 1. The children or lineal descendants in equal portions. 2. On failure of these, the parents or lineal ascendants, and with them the brethren or sisters of the whole blood; or, if the parents were dead, all the brethren and sisters, together with the representatives of a brother or sister deceased. 3. The next collateral relations in equal degree. 4. The husband or wife of the deceased. (Ff. 38. 15. 1. Nov. 118. c. 1, 2, 3. 127. c. 1.)

<sup>y</sup> Sir Walter Walker. Lord Raym. 574.

any estate in lands, or pecuniary portion, equal to the distributive shares of the other children, shall have any part of the surplusage with their [517] brothers and sisters; but if the estates so given them, by way of advancement, are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal. This just and equitable provision hath been also said to be derived from the *collatio bonorum* (commingling of property for the purpose of equal division) of the imperial law: <sup>a</sup> which it certainly resembles in some points, though it differs widely in others. But it may not be amiss to observe that, with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland: and, with regard to lands descending in coparcenary, that it hath always been, and still is, the common law of England, under the name of *hotchpot*.<sup>a</sup>

§ 684. (2) Representation by the statute.—Before I quit this subject, I must, however, acknowledge, that the doctrine and limits of representation, laid down in the Statute of Distributions, seem to have been principally borrowed from the civil law: whereby it will sometimes happen, that personal estates are divided *per capita* (share and share alike), and sometimes *per stirpes* (by representation); whereas the common law knows no other rule of succession but that *per stirpes* only.<sup>b</sup> They are divided *per capita*, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not *jure representationis* (by right of representation), in the right of another person. As if the next of kin be the intestate's three brothers, A, B, and C; here his effects are divided into three equal portions, and distributed *per capita*, one to each: but if one of these brothers, A, had been dead leaving three children, and another, B, leaving two; then the distribution must have been *per stirpes*; viz., one-third to A's three children, another third to B's two children; and the remaining third to C the surviving brother: yet if C had also been dead, without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights *per capita*; viz., each of them one-fifth part.<sup>c</sup>

<sup>a</sup> Ff. 37. 6. 1.

<sup>a</sup> See ch. 12. pag. 191.

<sup>b</sup> See ch. 14. pag. 217.

<sup>c</sup> Prec. Chanc. 54.

§ 685. (3) **Local exceptions in the statute.**—The Statute of Distributions expressly excepts and reserves the customs of the city of London, of the province of York, <sup>[518]</sup> and of all other places having peculiar customs of distributing intestates' effects. So that, though in those places the restraint of devising is removed by the statutes formerly mentioned,<sup>d</sup> their ancient customs remain in full force, with respect to the estates of intestates. I shall therefore conclude this chapter, and with it the present book, with a few remarks on those customs.

In the first place, we may observe that in the city of London,<sup>e</sup> and province of York,<sup>f</sup> as well as in the kingdom of Scotland,<sup>g</sup> and therefore probably also in Wales (concerning which there is little to be gathered, but from the statute 7 & 8 W. III, c. 38—Wills, 1695), the effects of the intestate, after payment of his debts, are in general divided according to the ancient universal doctrine of the *pars rationabilis* (a reasonable part). If the deceased leaves a widow and children, his substance (deducting the widow's apparel and furniture of her bedchamber, which in London is called the *widow's chamber*), is divided into three parts; one of which belongs to the widow, another to the children, and the third to the administrator: if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other;<sup>h</sup> if neither widow nor child, the administrator shall have the whole.<sup>i</sup> And this portion, or *dead man's part*, the administrator was wont to apply to his own use,<sup>k</sup> till the statute 1 Jac. II, c. 17 (Administration of Estates, 1685), declared that the same should be subject to the Statute of Distributions. So that if a man dies worth 1800*l.* personal estate, leaving a widow and two children, this estate shall be divided into eighteen parts; whereof the widow shall have eight, six by the custom and two by the statute; and each of the children five, three by the custom and two by the statute: if he leaves a widow and one child, she shall still have eight parts, as before; and the child shall have ten, six by the custom, and four by the statute: if he leaves a widow and no child, the

<sup>d</sup> Pag. 493.

<sup>e</sup> Lord Raym. 1329.

<sup>f</sup> 2 Burn. Eccl. Law. 746.

<sup>g</sup> *Ibid.* 782.

<sup>h</sup> 1 P. Wms. 341. Salk. 246.

<sup>i</sup> 2 Show. 175.

<sup>k</sup> 2 Freem. 85. 1 Vern. 133.

widow shall have three-fourths of the whole, two by the custom and one by [519] the statute; and the remaining fourth shall go by the statute to the next of kin. It is also to be observed, that if the wife be provided for by a jointure before marriage, in bar of her customary part, it puts her in a state of nonentity, with regard to the custom only;<sup>1</sup> but she shall be entitled to her share of the dead man's part under the Statute of Distributions, unless barred by special agreement.<sup>m</sup> And if any of the children are advanced by the father in his lifetime with any sum of money (not amounting to their full proportionable part), they shall bring that portion into hotchpot with the rest of the brothers and sisters, but not with the widow, before they are entitled to any benefit under the custom:<sup>n</sup> but if they are fully advanced, the custom entitles them to no further dividend.<sup>o</sup>

Thus far in the main the customs of London and of York agree: but, besides certain other less material variations, there are two principal points in which they considerably differ. One is, that in London the share of the children (or orphanage part) is not fully vested in them till the age of twenty-one, before which they cannot dispose of it by testament:<sup>p</sup> and, if they die under that age, whether sole or married, their share shall survive to the other children; but after the age of twenty-one, it is free from any orphanage custom, and in case of intestacy, shall fall under the Statute of Distributions.<sup>q</sup> The other, that in the province of York, the heir at common law, who inherits any land either in fee or in tail, is excluded from any filial portion or reasonable part.<sup>r</sup> But, notwithstanding these provincial variations, the customs appear to be substantially one and the same. And, as a similar policy formerly prevailed in every part of the island, we may fairly conclude the whole to be of British original; or, if derived from the Roman law of successions, to have been drawn from that fountain much earlier than the time of Justinian, from whose constitutions in many

1 2 Vern. 665. 3 P. Wms. 16.

m 1 Vern. 15. 2 Chan. Rep. 252.

n 2 Freem. 279. 1 Equ. Cas. Abr. 155. 2 P. Wms. 526.

o 2 P. Wms. 527.

p 2 Vern. 558.

q Prec. Chanc. 537.

r 2 Burn. 754.



points [520] (particularly in the advantages given to the widow) it very considerably differs: though it is not improbable that the resemblances which yet remain may be owing to the Roman usages; introduced in the time of Claudius Caesar (who established a colony in Britain to instruct the natives in legal knowledge\*), inculcated and diffused by Papinian (who presided at York as *præfectus prætorio* (judge of the court) under the Emperors Severus and Caracalla†) and continued by his successors till the final departure of the Romans in the beginning of the fifth century after Christ.

\* Tacit. Annal. l. 12. c. 32.

† Selden in Fletam. cap. 4. § 3.



# APPENDIX.

(1415)



# APPENDIX.

No. I.

No. I.

## VETUS CARTA FEOFFAMENTI.

**Sci**ant presentes et futuri, quod ego Willielmus, filius **Premises.**  
Willielmi de Segenho, dedi, concessi, et hac presenti carta  
mea confirmavi, Johanni quondam filio Johannis de Sale-  
ford, pro quadam summa pecunie quam michi dedit pre  
manibus, unam acram terre mee arabilis, jacentem in  
campo de Saleford, juxta terram quondam Richardi de  
la Mere: **Habendum et tenendum** totam predictam acram **Habendum,**  
terre, cum omnibus ejus pertinentiis, prefato Johanni, **and**  
et heredibus suis, et suis assignatis, de capitalibus dominis **Tenendum.**  
feodi: **Reddendo** et faciendo annuatim eisdem dominis **Reddendum.**  
capitalibus servitia inde debita et consueta: **Et** ego pre- **Warranty.**  
dictus Willielmus, et heredes mei, et mei assignati, totam  
predictam acram terre, cum omnibus suis pertinentiis,  
predicto Johanni de Saleford, et heredibus suis, et suis  
assignatis, contra omnes gentes warrantizabimus in per-  
petuum. **In** cujus rei testimonium huic presenti carte **Conclusion.**  
sigillum meum apposui: **Hii**s testibus, Nigello de Saleford,  
Johanne de Seybroke, Radulpho clerico de Saleford,  
Johanne molendario de eadem villa, et aliis. **Data** apud  
Saleford die Veneris proximo ante festum sancte Mar-  
garete virginis, anno regni regis Edwardi filii regis  
Edwardi sexto.

(L. S.)

Livery of  
seisin in-  
dorsed.

**Memorandum**, quod die et anno infrascriptis plena et  
pacifica seisin acre infrascriptate, cum pertinentiis, data  
et deliberata fuit per infranominatum Willielmum de  
Segenho infranominato Johanni de Saleford, in propriis  
personis suis, secundum tenorem et effectum carte in-  
frascripte, in presentia Nigelli de Saleford, Johannis de  
Seybroke, et aliorum.



## [TRANSLATION]

## AN OLD DEED OF FEOFFMENT.

Premises.

**Know** all men present and to come, That **I**, William, son of William de Segenho, have given and granted, and by this my present deed have confirmed, to John, son of John of Saleford, for a certain sum of money which he has paid into my hands, one acre of my arable land, lying in the plain of Saleford, adjoining to the land of Richard de la Mere; **to have and to hold** all of the aforesaid acre of land,

Habendum  
and Tenendum

with all its appurtenances, to the aforesaid John, and his

Reddendum,

heirs and assigns, of the chief lords of the fee: **Rendering** and performing yearly to the same chief lords the services

Warranty.

therefor due and accustomed: **and I**, the aforesaid William, and my heirs and assigns, warrant all the aforesaid acre of land with all its appurtenances, to the aforesaid John of Saleford and to his heirs and assigns, against all the world forever. **In witness** whereof, I have put my seal

Conclusion.

to this present deed. **Witness**, Nigell of Saleford, John of Seybrooke Radulphus, clerk of Saleford, on the Friday next before the feast of St. Margaret the Virgin, in the sixth year of the reign of King Edward, the son of King Edward.

(L. S.)

Livery of  
seisin in-  
dorsed.

**Memorandum**, That on the day and year within written full and quiet seisin of the within specified acre, with its appurtenances, was given and delivered by the within named William de Segenho to the within named John of Saleford, in their own proper persons, according to the tenor and effect of the within written deed, in the presence of Nigell of Saleford, John of Seybrooke, and others.

## A MODERN CONVEYANCE BY LEASE AND RELEASE.

§ 1. *Lease, or bargain and sale, for a year.*

This indenture, made the third day of September, in the twenty-first year of the reign of our sovereign lord, George the Second, by the grace of God King of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven, between Abraham Barker, of Dale Hall, in the county of Norfolk, Esquire, and Cecilia, his wife, of the one part, and David Edwards, of Lincoln's Inn, in the county of Middlesex, Esquire, and Francis Golding, of the city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia, his wife, in consideration of five shillings of lawful money of Great Britain to them in hand paid by the said David Edwards and Francis Golding at or before the ensembling and delivery of these presents (the receipt whereof is hereby acknowledged), and for other good causes and considerations them, the said Abraham Barker and Cecilia, his wife, hereunto specially moving, have bargained and sold, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, all that the capital messuage, called Dale Hall, in the Parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia, his wife, now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage

Premises.

Parties.

Nominal consideration.

Bargain and sale.

Parcels.

General words.

**No. II.** and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof or as belonging to the same or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and

**Habendum.** parcel thereof: **To have and to hold** the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises, herein before mentioned or intended to be bargained and sold, and every part and parcel thereof, with their and every of their rights, members, and appurtenances, <sup>[iii]</sup> unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing and fully to be complete and ended: **Yield-**

**Reddendum.** **ing** and paying therefor unto the said Abraham Barker, and Cecilia, his wife, and their heirs and assigns, the yearly rent of one pepper-corn at the expiration of the said term, if the same shall be lawfully demanded: **To**

**Intent.** **the intent** and purpose, that by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold, reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs, and assigns; to the uses and upon the trusts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. **In**

**Conclusion.** **witness** whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed, and delivered,	}	ABRAHAM BARKER.	(L. S.)
being first duly stamped,		CECILIA BARKER.	(L. S.)
in the presence of		DAVID EDWARDS.	(L. S.)
GEORGE CARTER,		FRANCIS GOLDING.	(L. S.)
WILLIAM BROWNE.			

§ 2. *Deed of Release.*

No. II.

This indenture of five parts, made the fourth day of <sup>Premises.</sup> September, in the twenty-first year of the reign of our sovereign lord, George the Second, by the grace of God King of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven, between Abra- <sup>Parties.</sup>ham Barker, of Dale Hall, in the county of Norfolk, Esquire, and Cecilia, his wife, of the first part; David Edwards, of Lincoln's Inn, in the county of Middlesex, Esquire, executor of the last will and testament of Lewis Edwards, of Cowbridge, in the county of Glamorgan, gentleman, his late father, deceased, and Francis Golding, of the city of Norwich, clerk, of the second part; Charles Browne, of Enstone, in the county of Oxford, gentleman, and Richard More, of the city of Bristol, merchant of the third part; John Barker, Esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part. **Whereas** a marriage is intended, by the permission of <sup>Recital.</sup> God, to <sup>[iv]</sup> be shortly had and solemnized between the said John Barker and Katherine Edwards: **Now this indenture witnesseth**, that in consideration of the said <sup>Considera-  
tion.</sup> intended marriage, and of the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker (by and with the consent and agreement of the said John Barker, and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents), by the said David Edwards in hand paid at or before the enscaling and delivery hereof, being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker doth hereby acknowledge, and thereof, and of every part and parcel thereof, they, the said Abraham Barker, John Barker, and Katherine Edwards, do,

<b>No. II.</b>	and each of them doth, release, acquit, and discharge the said David Edwards, his executors and administrators, forever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker, her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments, hereinafter mentioned, unto such uses, and upon such trusts, as are hereinafter expressed and declared:
Nominal consideration.	and for and in consideration of the sum of five shillings, of lawful money of Great Britain, to the said Abraham Barker and Cecilia, his wife, in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the ensealing and delivering hereof (the several receipts whereof are hereby respectively acknowledged), they, the said Abraham Barker and Cecilia, his wife, <b>have</b> , and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their heirs and assigns, <b>all</b> that the capital messuage called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia, his wife, now dwell, and all those their lands in the said parish of Dale called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part,
Release.	
Parcels.	
General words.	



parcel, or member thereof, [v] or as belonging to the same or any part thereof (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of a bargain and sale to them thereof made to the said Abraham Barker and Cecilia, his wife, for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession); and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them, the said Abraham Barker and Cecilia, his wife, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises: **to have and to hold** the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia, his wife, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent

No. II.

Mention of  
bargain and  
sale.

Habendum.

To the use of  
the grantors  
till marriage.Then of the  
husband for  
life, sans  
waste:Remainder to  
trustees to  
preserve con-  
tingent re-  
mainders.

No. II.

Remainder to  
the wife for  
life, for her  
jointure, in  
bar of dower:

Remainder to  
other trustees  
for a term,  
upon trusts  
after men-  
tioned:

Remainder to  
the first and  
other sons of  
the marriage  
in tail.

uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but nevertheless to permit and suffer the said John Barker, and his assigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit: and from and after the decease of the said John Barker, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can or may have or claim, of, in, to, or out of, all and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance: [vi] and from and after the decease of the said Katherine Edwards or other sooner determination of the said estate, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during, and unto the full end and term of, five hundred years from thence next ensuing and fully to be complete and ended, without impeachment of waste: upon such trusts, nevertheless, and to and for such intents and purposes, and under and subject to such provisos and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards, his intended wife, to be begotten, and of the heirs of the body of such first son lawfully issuing; and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards,

his intended wife, to be begotten, severally, successively, and in remainder, one after another, as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards, his intended wife, to be begotten, to be equally divided between them (if more than one), share and share alike, as tenants in common and not as joint tenants, and of the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing: and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: and for default of such heirs, then to the use and behoof of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns forever. **And** as to, for, and concerning the term of five hundred years hereinbefore limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisos and agreements, hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, in case there shall be an eldest or only son and one or more other child or children of the said John Barker, <sup>[vii]</sup> on the body of the said Katherine, his intended wife, to be begotten, then upon trust that they, the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means

Remainder to  
the daugh-  
ters,

as tenants in  
common, in  
tail;

Remainder to  
the husband  
in tail;

Remainder to  
the husband's  
mother in fee.

The trust of  
the term de-  
clared;

to raise por-  
tions for  
younger chil-  
dren.

No. II. as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child and children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one), share and share alike; the portion or portions of such of them as shall be a son or sons to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the meantime and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid, raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respective portions after the rate of four pounds in the hundred yearly. **Provided, always,** that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid, then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. **Provided also,** that in case there shall be no such child or children of the said John Barker on the body of the said Katherine, his intended wife, begotten, besides an eldest or only son; or in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or in case the said portions, and also such maintenance as

payable at  
certain times.

with mainte-  
nance at the  
rate of 4 per  
cent.

and benefit of  
survivorship.

If no such  
child.

or if all die,

aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf aforementioned; or in case of the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisposed of for the purposes aforesaid, shall cease, determine, and be utterly void to all intents [viii] and purposes, anything herein contained to the contrary thereof in anywise notwithstanding. **Provided also,** and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia, his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor, shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee simple, in possession, in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments, and premises; hereby granted and released, and in lieu, and recompense thereof unto and for such and the like uses, intents, and purposes, and upon such and the like trusts, as the said capital messuage, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates hereinbefore limited, expressed, and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from

No. II.

or if the portions be raised,

or paid,

or secured by the person next in remainder,

the residue of the term to cease.

Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense.



No. II.  
  
Covenant to  
levy a fine;

thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia, his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns forever: and to and for no other use, intent, or purpose whatsoever; anything herein contained to the contrary thereof in anywise notwithstanding. **And**, for the considerations aforesaid, and for barring all estates-tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia, his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they, the said Abraham Barker and Cecilia, his wife, and John Barker, shall and will, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowledge and levy, before his majesty's justices of the court of common pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, etc.*, with proclamations according to <sup>[ix]</sup> the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres, and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines, so as aforesaid or in any other manner levied and acknowledged, or to be levied and acknowledged, shall be and inure, and shall be adjudged,

No. II.

deemed, construed, and taken, and so are and were meant and intended, to be and inure, and are hereby declared by all the said parties to these presents to be and inure, to the use and behoof of the said David Edwards, and his heirs and assigns; to the intent and purpose that the said David Edwards may, by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of chancery one more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of common pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualitics, number of acres and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he, the said David Edwards, shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker, and Cecilia, his wife, and John Barker; who shall also *gratis* appear in their proper persons, or by their attorney, or attorneys, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default: so as judgment shall and may be thereupon had and given for the said Francis Golding, to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said

in order to  
make a ten-  
ant to the  
præcipe, that  
a recovery  
may be suf-  
fered;

No. II.

to inure.

to the pre-  
viously de-  
clared uses in  
this deed.  
Other cove-  
nants;

Abraham Barker, and Cecilia, his wife, and John Barker, and for them to recover in value against the said common vouchee, and that executions shall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful <sup>[x]</sup> and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. **And** it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine and fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and inure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and inure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisos, limitations, and agreements, herein before mentioned, expressed, and declared, of and concerning the same. **And** the said Abraham Barker, party hereunto, doth hereby for himself, his heirs, executors, and administrators, further covenant, promise, grant, and agree, to and with the said David Edwards and Francis Golding, their heirs,

executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisos, limitations, and agreements, herein before mentioned, expressed, and declared, of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia, his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for him, her, them, or any of them; or from, by, or under his or her ancestors, or any of them; and shall so remain, continue and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise, by the said Abraham Barker, or Cecilia, his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, [xi] and indemnified of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and encumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker, or Cecilia, his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their act, means, assent, consent, or procurement. **And moreover** that he, the said Abraham Barker, and Cecilia, his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, shall and will from time to time, and at all times hereafter, upon every reasonable re-

No. II.

for quiet enjoyment,

free from encumbrances;

and for further assurance.

No. II.

quest, and at the costs and charges, of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying; settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisos, limitations, and agreements herein before mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law shall be reasonably advised, devised, or required: so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties, who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. **Provided lastly**, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia, his wife, John Barker and Katherine, his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals and attested by two or more credible witnesses, to revoke, make void, alter, or change all and every or any the use and uses, estate and estates, herein and hereby [xii] before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel

Power of rev-  
ocation.



thereof, and to declare new and other uses of the same, No. II.  
or of any part or parcel thereof, anything herein contained to the contrary thereof in anywise notwithstanding. In witness whereof the parties to these presents Conclusion.  
their hands and seals have subscribed and set, the day and year first above written.

Sealed, and delivered, being first duly stamped, in the presence of	{	ABRAHAM BARKER.	(L. S.)
GEORGE CARTER.		CECILIA BARKER.	(L. S.)
WILLIAM BROWNE.		DAVID EDWARDS.	(L. S.)
		FRANCIS GOLDING.	(L. S.)
		CHARLES BROWNE.	(L. S.)
		RICHARD MORE.	(L. S.)
		JOHN BARKER.	(L. S.)
		KATHERINE EDWARDS.	(L. S.)

[xiii] No. III.

AN OBLIGATION OR BOND, WITH CONDITION FOR THE PAYMENT OF MONEY.

Know all men by these presents, that I, David Edwards, No. III.  
of Lincoln's Inn, in the county of Middlesex, Esquire, am held and firmly bound to Abraham Barker of Dale Hall, in the county of Norfolk, Esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord, George the Second, by the grace of God King of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand, seven hundred, and forty-seven.

The condition of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his

No. III.

executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above-written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed, and delivered, be-      DAVID EDWARDS.      (L. S.)  
ing first duly stamped, in  
the presence of

GEORGE CARTER.  
WILLIAM BROWNE.

No. IV.

[xiv] No. IV.

A FINE OF LANDS, SUR COGNIZANCE DE DROIT, COME CEO, ETC.

§ 1. *Writ of covenant; or præcipe.*

George the Second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. **Command** Abraham Barker, Esquire, and Cecilia, his wife, and John Barker, Esquire, that justly and without delay they perform to David Edwards, Esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John, that they appear before our justices, at Westminster, from the day of Saint Michael in one month, to show wherefore they have not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster, the ninth day of October, in the twenty-first year of our reign.

Sheriff's re-  
turn.

		Summoners	
Pledges	{ JOHN DOE. RICHARD ROE.	of the within	{ JOHN DEN. RICHARD FEN.
of prose- cution.		named Abra- ham, Cecilia, and John.	

§ 2. *The license to agree.*

Norfolk, } **David Edwards**, Esquire, gives to the lord  
to wit. { the king ten marks, for license to agree with  
**Abraham Barker**, Esquire, of a plea of covenant of two  
messuages, two gardens, three hundred acres of land, one  
hundred acres of meadow, two hundred acres of pasture,  
and fifty acres of wood, with the appurtenances, in Dale.

§ 3. *The concord.*

**And the agreement is such**, to wit, that the aforesaid  
**Abraham**, **Cecilia**, and **John**, have acknowledged the  
aforesaid tenements, <sup>[xv]</sup> with the appurtenances, to be  
the right of him, the said **David**, as those which the said  
**David** hath of the gift of the aforesaid **Abraham**, **Cecilia**,  
and **John**; and those they have remised and quitted claim,  
from them and their heirs, to the aforesaid **David** and his  
heirs forever. And further, the same **Abraham**, **Cecilia**,  
and **John**, have granted, for themselves and their heirs,  
that they will warrant to the aforesaid **David**, and his  
heirs, the aforesaid tenements, with the appurtenances,  
against all men forever. And for this recognition, re-  
mise, quitclaim, warranty, fine, and agreement, the said  
**David** hath given to the said **Abraham**, **Cecilia**, and **John**,  
two hundred pounds sterling.

§ 4. *The note, or abstract.*

Norfolk, } **Between David Edwards**, Esquire, complain-  
to wit. { ant, and **Abraham Barker**, Esquire, and  
**Cecilia**, his wife, and **John Barker**, Esquire, deforciant  
of two messuages, two gardens, three hundred acres of  
land, one hundred acres of meadow, two hundred acres  
of pasture, and fifty acres of wood, with the appur-  
tenances, in Dale, whereupon a plea of covenant was sum-  
moned between them; to wit, that the said **Abraham**,  
**Cecilia**, and **John**, have acknowledged the aforesaid tene-  
ments, with the appurtenances, to be the right of him, the  
said **David**, as those which the said **David** hath of the gift  
of the aforesaid **Abraham**, **Cecilia** and **John**; and those  
they have remised and quitted claim, from them and their

No. IV. heirs, to the aforesaid David and his heirs forever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men forever. And for the recognition, remise, quitclaim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

§ 5. *The foot, chirograph, or indentures, of the fine.*

Norfolk, } This is the final agreement, made in the court  
to wit. { of the lord the king at Westminster, from  
the day of Saint Michael in one month, in the twenty-first year of the reign of the lord, George the Second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, Esquire, complainant, and Abraham Barker, Esquire, and Cecilia, <sup>[xvi]</sup> his wife, and John Barker, Esquire, deforciant, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him, the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs forever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men forever. And for this recognition, remise, quitclaim, warranty, fine, and agreement,

the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling. No. IV.

§ 6. *Proclamations, indorsed upon the fine, according to the statutes.*

The first proclamation was made the sixteenth day of November, in the term of Saint Michael, in the twenty-first year of the king within written.

The second proclamation was made the fourth day of February, in the term of Saint Hilary, in the twenty-first year of the king within written.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the twenty-first year of the king within written.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king within written.

[xvii] No. V.

No. V.

A COMMON RECOVERY OF LANDS WITH\* DOUBLE VOUCHER.

§ 1. *Writ of entry sur disseisin in the post; or præcipe.*

George the Second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, and so forth; to the sheriff of Norfolk, greeting. **Command** David Edwards, Esquire, that justly and without delay he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And un-

\* Note, that if the recovery be had with single voucher, the parts marked "thus" in § 2 are omitted.



**No. V.** less he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to show wherefore he hath not done it: and have you there the summoners, and this writ. **Witness** ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Sheriff's return.

Pledges of prosecution.	}	JOHN DOE. RICHARD ROE.	Summoners of the within named David.	}	JOHN DEN. RICHARD FEN.
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§ 2. *Exemplification of the recovery roll.*

**George** the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth; to all to whom these our present letters shall come, greeting. **Know ye**, that among the pleas of land enrolled at Westminster, before Sir John Willes, Knight, and his fellows, our justices of the bench, of the term of Saint Michael, in the twenty-first year of our reign, upon the fifty-second roll it is thus contained. **Entry** returnable on the octave of Saint Martin. [xviii]

Return.  
Demand  
against the  
tenant.

**Norfolk**, to wit: Francis Golding, clerk, in his proper person demandeth against David Edwards, Esquire, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. And whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value [\*of six shillings and eight

Count.

Esples.

\* The clauses between books, are no otherwise expressed in the record than by an etc.

pence, and more, in rents, corn, and grass]: and into which [the said David hath not entry, unless as aforesaid]: and thereupon he bringeth suit [and good proof].

No. V.

**And** the said David in his proper person comes and defendeth his right, when [and where it shall behoove him], and thereupon voucheth to warranty "John Barker, Es-

Defense of  
the tenant.

Voucher.

quire; who is present here in court in his proper person, and the tenements aforesaid with the appurtenances to him freely warranteth [and prays that the said Francis may count against him]. **And** hereupon the said

"Warranty.  
"Demand  
"against the  
"vouchee.  
"Count.

Francis demandeth against the said John, tenant by his own warranty, the tenements aforesaid with the appurtenances, in form aforesaid, etc. **And** whereupon he saith, that he himself was seised of the tenements aforesaid with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, etc. **And** into which, etc. **And** thereupon he bringeth suit, etc.

**And** the aforesaid John, tenant by his own warranty, defends his right, when, etc., and thereupon he further voucheth to warranty "Jacob Morland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, etc.

"Defense of  
"the vouchee"Second  
voucher.

**And** hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances in form aforesaid, etc. **And** whereupon he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, etc. **And** into which etc. **And** there-

"Warranty."

Demand  
against the  
common  
vouchee.  
Count.

upon he bringeth suit, etc. **And** the aforesaid Jacob, tenant by his own warranty, defends his right, when, etc. **And** saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: [ix] and of this he puts himself upon the country. **And** the aforesaid Francis thereupon craveth leave to imparl; and he hath it. **And** afterwards the aforesaid

Defense of  
the common  
vouchee.  
Plea, nul dis-  
seisin.

Imparlance.

No. V.

Default of the  
common  
vouchee.  
Judgment for  
the demand-  
ant.

Recovery in  
value.  
Amercement.  
Award of the  
writ of seisin,  
and return.

Exemplifica-  
tion con-  
tinued.

Teste.

Francis cometh again here into court in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. **Therefore it is considered**, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances; and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid]; and further, that the said John, have of the land of the said" Jacob to the value [of the tenements aforesaid]. And the said Jacob in mercy. **And** hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the tenements aforesaid with the appurtenances; and it is granted unto him, returnable here without delay. Afterwards, that is to say, the twenty-eighth day of November in this same term, here cometh the said Francis in his proper person; and the sheriff, namely Sir Charles Thompson, Knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded. **All and singular** which premises, at the request of the said Francis, by the tenor of these presents we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the bench aforesaid, to be affixed to these presents. **Witness** Sir John Willes, Knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

COOKE.

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(1441)





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